



PLACER COUNTY BAR ASSOCIATION

31st ANNUAL

FALL MCLE

SEPTEMBER 9-10, 2022

TIMBERCREEK BALLROOM

ROSEVILLE, CALIFORNIA

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PLACER COUNTY BAR ASSOCIATION'S 28th ANNUAL
 2022 FALL MCLE CONFERENCE
 TIMBERCREEK BALLROOM
 ROSEVILLE, CALIFORNIA
 SEPTEMBER 9-10, 2022

Friday, September 9

7:30am—8:45am:	Registration and Buffet Breakfast	
8:45am—9:00am:	Opening Welcome	
9:00am—10:30am:	Breakout Session 1: Keeping It Civil During Opening Statements <i>Speaker: Hon. Michael Jones</i>	7
	Breakout Session 2: Navigating the DCSS <i>Speaker: Jonathan Rotondo, Esq.</i>	29
	Breakout Session 3: Medi-Cal Planning Update <i>Speaker: Randy Rosa, Esq.</i>	43
10:30am—10:45am:	Break with refreshments	
10:45am—11:45am:	Breakout Session 1: Jury Selection: Essential Strategies and Tactics <i>Speaker: Stephen Duffy</i>	87
	Breakout Session 2: Income Available for Support/New Case Re: Reliability of Self-Employed Tax Returns <i>Speaker: Tom Collins, CPA.</i>	111
	Breakout Session 3: Important Updates to Conservatorship Laws <i>Speaker: Alexandria Goff, Esq.</i>	117
12:45pm—12:30pm:	Hosted Lunch: Social Networking Time with Colleagues	
12:30pm—12:45pm:	Placer County Judicial Mentor Program – <i>Speakers: Hon. Alan Pineschi and Hon. Suzanne Gazzaniga</i>	
12:45pm—1:45pm:	Ethics Lessons Learned From Fictional Attorneys <i>Speakers: Carl Chamberlin, Esq. & Joanna Storey, Esq.</i>	157
1:45pm—2:00pm:	Break with refreshments	
2:00pm—3:00pm:	Breakout Session 1: Cross-Examination of an Expert Witness <i>Speaker: Frank Noey, Esq.</i>	191
	Breakout Session 2: Criminal and Civil DV: Crossover Issues <i>Speakers: Hon. Suzanne Gazzaniga & Jessica Hopper, Esq.</i>	207
	Breakout Session 3: Assessing and Avoiding Estate Planner Liability <i>Speaker: Tyson Hubbard, Esq. & Sean McKissick, Esq.</i>	213
3:00pm—3:10pm:	Break with refreshments	
3:15pm—4:45pm:	Did Adolph Weber Receive a Fair Trial? Lessons Learned from Placer's Most Infamous Trial <i>Speaker: Hon. Garen Horst</i>	227

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Saturday, September 10

7:45am—8:30am:	Registration and Buffet Breakfast	
8:30am—9:30am:	Implicit Bias: Disrupting Implicit Bias and Building an Inclusive Mind Set <i>Speakers: Alana Mathews Arcurio, Esq.</i>	273
9:30am—9:45am:	Break with refreshments	
9:45am—11:15am:	Breakout Session 1: Civil Law – Negotiating Medical Liens <i>Speaker: Daniel Wilcoxon, Esq.</i>	283
	Breakout Session 2: Family Law Update: The Changes In The Practice Of Law And Our Judicial System Over 47 Years In Placer County <i>Speaker: Hon. John Paulsen, Comm., Ret.</i>	345
	Breakout Session 3: Estate Planning Tax Strategies for IRA-TCUT, A Tool Every Estate Planning Attorney Should Be Considering <i>Speaker: Edward Cotney</i>	351
11:15am—11:30am:	Break	
11:30am—1:00pm:	Hosted Lunch: Investigative Genetic Genealogy and Solving Violent Crime <i>Speaker: Anne Marie Schubert Esq.</i>	375
1:00pm—1:15pm:	Break	
1:15pm—2:45pm:	Breakout Session 1: E-Discovery 101 - Introduction to the Electronic Discovery Reference Model <i>Speaker: Jennifer Resnicke</i>	379
	Breakout Session 2: Cryptocurrency and NFT's in the World of Family Law <i>Speaker: Dorothy Haraminac</i>	393
	Breakout Session 3: Litigation 2022 Sentencing Laws: What Every Lawyer Needs to Know <i>Speaker: Hon. Richard J. Couzens, Ret.</i>	423
	Breakout Session 4: Trust Income Taxation <i>Speaker: Rebecca Van Loon, Esq.</i>	529

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KEEPING IT CIVIL DURING
OPENING STATEMENTS

FRIDAY, SEPTEMBER 9
9:00AM - 10:30AM

PRESENTED BY
HON. MICHAEL JONES
PLACER COUNTY SUPERIOR COURT

Hon. Michael Jones
Placer County Superior Court

Judge Jones was recognized as the 2020 Judge of the Year by the Sacramento Valley ABOTA Chapter.

He is the son of the late Wayne Jones and Manuela Campos. His father was of the Greatest Generation and fought in WWII, the Korean War, and two tours of duty in Viet Nam. His mother was the daughter of Agricultural Workers from Mexico. His maternal grandparents, Jesus and Manuel Campos Bernal, were citizens of Mexico. His Mother taught him about hard work and the hardworking decent people of her culture by having him work together with Agricultural Workers in the fields doing everything from picking onions, strawberries, asparagus, apples, and moving water pipelines in the wheat fields.

Judge Jones began his career in law as a Sworn Peace Officer in Los Angeles, CA. He worked undercover in South Central Los Angeles with a multi-agency narcotics task force where he became a recognized expert in Heroin and Gangs including providing expert testimony in these matters.

While a Peace Officer he attended and graduated from law school and became a Deputy District Attorney with the Los Angeles DA's Office. As a Prosecutor he taught Trial Advocacy to California Prosecutors and was a member of the CDAA Ethics Committee serving as a Hotline Adviser for Prosecutors encountering ethical issues. He taught Trial Advocacy to Prosecutors throughout the country with the American Prosecutors Research Institute including a full summer course to Hawaii Prosecutors through Tokai University in Hawaii.

He later joined a civil law firm started by the late Hartley T. Hansen in partnership with the late Congressman Bob Matsui known then as Hansen & Matsui and later as Hansen, Boyd, Culhane & Watson. He has received the Capitol City Trial Lawyers Association Advocate of the Year Award and served as a past President of the organization.

His trials as an attorney number in excess of 100 and include five death penalty cases in criminal law and multi-million dollar verdicts on behalf of injured clients in civil cases.

As a lawyer he was retained as an expert witness in prosecutorial ethics including crime charging in civil malpractice and civil rights cases and by a California District Attorney to provide expert testimony before a Grand Jury on these same subjects. He sat on a Committee with the Los Rios Community College School District overseeing the application and ABA approval of American River College becoming the first local public school to acquire an ABA accredited program to earn a Paralegal Degree.

Governor Edmund G. Brown Jr. appointed him to the Superior Court of the State of California for the County of Placer on December 25, 2012.

Judge Jones is a Judicial Master Emeritus with the Anthony M. Kennedy American Inn of Court. He has presented the required program for Judge Pro Tems on Judicial Demeanor, Ethics, Professionalism, Civility, and specifically on Implied Bias on a yearly basis. He is a Judge-Associate in the Sacramento Valley Chapter of the national organization known as the American Board of Trial Advocates or ABOTA. As an ABOTA member, he has presented on the subject of the United States Constitution and specifically on the separation of powers to higher education teachers. He is on the ABOTA Executive Committee and serves as the Membership Chair.

He is a former Adjunct Professor of Law at U.C. Davis School of Law, King Hall. He is also an instructor with the National Judicial College in Civil Mediation. He is a member of the California Latinx Judges Association, The National Center for State Courts, the American Judges Association and the California Judges Association.

He currently serves by appointment of the Chief Justice on the Judicial Council Civil Law and Small Claims Advisory Committee and the Committee on Civil Jury Instructions. He has been appointed by the Chief Justice numerous times to review, reply, and rule on challenges by parties and/or attorneys to disqualify judges across the state. The Chief Justice has appointed him to preside for all purposes over cases from other courts due to conflicts.

He is the Placer County Superior Court Supervising Civil Law Judge. His current assignment is a 4 day a week trial court and one day a week on civil law and motion. He supervises the complex civil cases including Class Actions and CEQA matters. He is appointed by the Chief Justice as a panel member Judge of the Appellate Division for Placer County Superior Court. He presided over Veterans Court for six years where he established a Mentor Program that became a nationally recognized program by the National Center for State Courts.

Judge Jones has performed in dozens of stage productions including *The Music Man*, *Fiddler on the Roof*, *Guys N' Dolls*, *Gypsy*, *Jekyll & Hyde*, *Urinetown*, *Cinderella*, *Joseph and the Amazing Technicolor Dreamcoat*, *Bye Bye Birdie*, *Annie*, *Evita*, *Damn Yankees*, *Footloose*, and several others including *Clarence Darrow: Stories of a Trial Lawyer*, a one man play which he wrote and plays Darrow. He is a prior Elly Award nominee for Best Supporting Actor in a Musical.

He has also appeared on television true crime shows and is a main subject of the book *Cheating Death*, by Ed Chen, describing his role in the death penalty prosecution of Dr. Richard Boggs, a Glendale Neurologist charged with murder in Los Angeles.

He and his beautiful wife Karen, a triple threat actress of singing, acting, and dancing, met on stage during one of multiple times he performed in *Jekyll & Hyde*. They are members of The Professional Voice Choir known as *Voce Miste*. They are active members of their church including the Voices Choir. Judge Jones leads a weekly Men's Bible Study Group.

He has earned two Masters Certificates from Stanford in Philosophy and in Economics. He completed a course last year through Stanford Law School in Technology and Civil Law. He has enrolled in a course in Medical Research Reports and Data through Yale.

Together, he and Karen have 4 adult children, 6 grandchildren, and two dogs – a Boxer named Cassius Clay and a Coton de Tulear named Carter.

KEEPING IT CIVIL IN OPENING STATEMENTS

2022 Placer County Bar
Association
Judge Michael W. Jones

1

KNOW YOUR JUDGE'S SPECIFIC RULES

Local Rules and Courtroom Rules



2

Judges must...

- Maintain the dignity and decorum of the court
- Assure the professional and courteous treatment of court staff, attorneys, jurors and others involved in the system
- Prevent and sanction abusive, discriminatory and unprofessional behavior
- Report breaches to the State Bar

Standards of Judicial Administration, Judicial Canons, Federal and State Constitutions

3

CHIEF JUSTICE RONALD GEORGE OF THE CALIFORNIA SUPREME COURT

- "The ability of the justice system to perform its role in our society rests in large part on the consent and confidence of those it serves. Whether the lack of faith that we see is grounded in actual flaws or in misguided perceptions, we must take seriously the public's views and work on many fronts to improve our relationship with those we serve. . . . ¶Whether based on the cost of litigation, undue emphasis on the business end of practice, or unrestrained advocacy, *many members of the public perceive lawyers as part of the problem, not part of the solution.*
- *And within the profession itself, many lawyers decry what they see as a decline in civility and collegiality, an increase in sharp practices, and the resulting low public opinion and loss of respect."*

4

CALIFORNIA RULES OF COURT, RULE 9.4 - REVISED ATTORNEY OATH

- Rule 9.4 of the California Rules of Court, effective May 27, 2014, was adopted to supplement the attorney oath for new lawyers. Rule 9.4 states:
- In addition to the language required by Business and Professions Code section 6067, the oath to be taken by every person on admission to practice law is to conclude with the following: *“As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy, and integrity.”*

5

CALIFORNIA ATTORNEY GUIDELINES OF CIVILITY AND PROFESSIONALISM

- “As officers of the court with responsibilities to the administration of justice, attorneys have an obligation to be professional with clients, other parties and counsel, the courts and the public. This obligation includes civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation, all of which are essential to the fair administration of justice and conflict resolution.”

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SECTION 14 – CONDUCT IN COURT

- Maintain respect for and confidence in a judicial office
- Address the Court, not opposing counsel
- Ensure that clients and witnesses know what behavior is expected of them in court

7

PREPARE

- “In all things success depends on previous preparation, and without such previous preparation there is sure to be failure.”
- Confucius, *The Doctrine of the Mean*, THE CHINESE CLASSICS 136 (James Legge trans., 1887).

8

What is the Most Important
Part of a Jury Trial?

WHY is the opening
statement so
important?

9

THEORY

- Why is a theory important?
- When do you establish your theory?

10

THEME

- On what should themes be based?
- Some examples:
 - *“This is a case about taking chances.”*
 - *“Mary Jones had a dream and a plan.”*
 - *“Revenge. That’s what this case is all about.”*
 - *“This is also a case about pain. Mr. Johnson’s only companion today is constant pain.”*
 - *“This is a case about police brutality”*

11

- What makes an opening statement **GOOD?**
- What makes an opening statement **GREAT?**
- What makes an opening statement **PRIZEWINNING?????**

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WHAT TO DO:

- Effectively tell a story.
 - Focus on the people, not the problem.
 - Who are the important players?
 - Most jurors view the world through emotional eyes.
 - Personalize your party.
 - Why?
 - Make the story **vivid**.
 - Re-create the incident.
 - Make it emotional and dramatic (we love drama!)
- KEEP IT SIMPLE.
- KEEP IT SIMPLE.
- KEEP IT SIMPLE.
- Be Logical and concise.
 - Walk the jurors through the events in chronological order.

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WHAT **NOT** TO DO:

- Do NOT include personal opinions
- Do NOT overstate the evidence

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SECRET WEAPON

- Anticipate weaknesses

15

The parts.

- Introduction
- Parties
- Scene
- Instrumentality
- Date, time, weather and lighting
- Issue
- What happened
- Basis of guilt/nonguilt
- Anticipating and refuting the other side
- Conclusion

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Introduction

- Themes
- Theory
- Enthusiasm, confidence, and integrity

17

PARTIES

- Introduce essential people
 - Parties
 - Critical witnesses
- **Prosecution's** counsel:
 - Tell a story about your client.
 - Build him/her up and make him/her sympathetic to the jury
 - Get the jury to relate
- **Defense's** counsel:
 - Important parties and witnesses that Plaintiff's counsel didn't mention/glossed over

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SCENE

- Describe the scene so the jury can visualize it.

19

Instrumentality

- Vehicle, machinery, equipment, etc.
- (most important in personal injury/products liability cases)

20

Date, time, weather, and lighting

- Set the stage.
- Describe the context.

21

ISSUE

- Important tool for defense:
 - Denial of Prosecution's version of the disputed facts of the case

22

What happened

- THIS IS YOUR MOMENT.
- Your job? Get the jury to believe your side of the story.

23

Basis of guilt/nonguilt

- PROSECUTION:
 - Summary of facts
 - Conclude that client is entitled to win
- DEFENSE:
 - Point out holes in plaintiff's story
 - Find ways plaintiff's story is not persuasive
 - Emphasize your OWN picture and conclusion

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Anticipating and refuting other side

- PROSECUTION:
 - Defuse the defense, without appearing defensive
- DEFENSE:
 - Can talk about evidence that Plaintiff has already described

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Special Challenge: Pro Se Parties

- Frame the issues as simply as you can
- Avoid impatience in responsive writings
- Do not present like *David vs. Goliath* (although the other side may well attempt to do so against you)
- Respect the difficult job the pro se has undertaken and the challenges he or she faces
- Recognize that the court has ethical duties when it comes to pro se litigants

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Canon 3, Code of Judicial Ethics, and Advisory Committee Comments

Canon 3. A judge shall perform the duties of judicial office impartially, competently, and diligently.”

“Impartial,” “impartiality,” and “impartially” mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties... .”

Comment: “The obligation of a judge to dispose of matters promptly and efficiently must not take precedence over the judge’s obligation to dispose of the matters fairly and with patience. For example, when a litigant is self-represented, a judge has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law and the canons, to enable the litigant to be heard...”

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“Tough, zealous, and successful trial lawyers do their best not to personalize issues, “win at all costs,” or do anything to sully their most important currency: a reputation for civility, candor, courtesy, and integrity. These lawyers understand that no legal or factual issue and no case is worth spoiling the reputation that they have worked to create and maintain.”

Hon. Mark W. Bennett, EIGHT TRAITS OF GREAT TRIAL LAWYERS, *The Review of Litigation* Winter 2013, Chapter VI, page 33.

[Mark W. Bennett is a U.S. district court judge for the Northern District of Iowa. He is a long-time adjunct professor at the Drake University School of Law.]

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A FINAL THOUGHT:

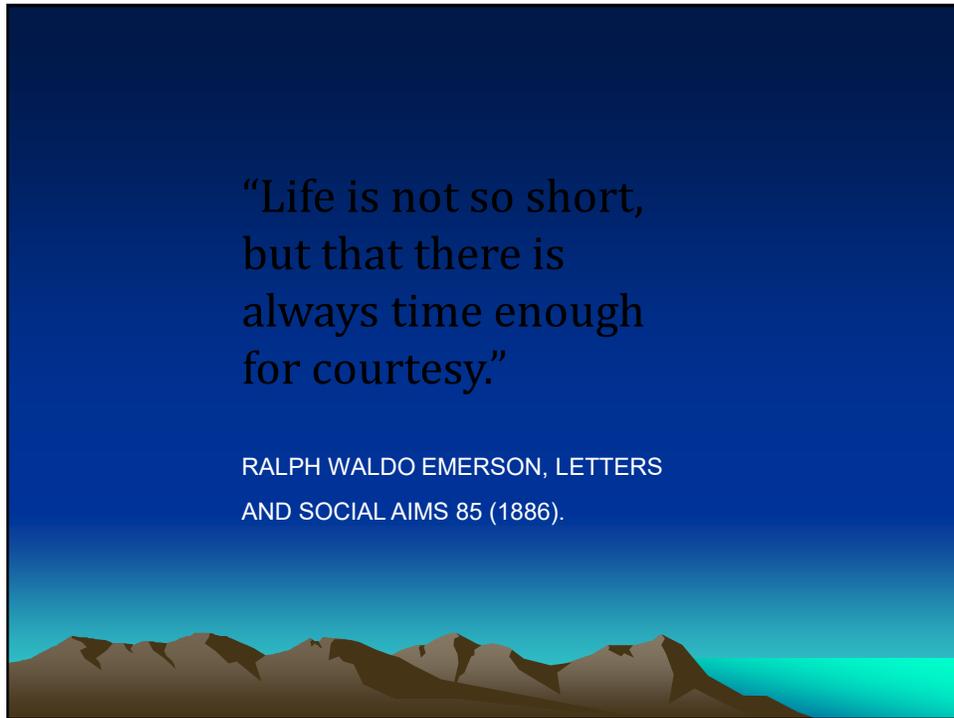
- Civility is the hallmark of a professional. That term was clearly described by Justice Anthony Kennedy in these words.
- “ (Civility...) is not some bumper-sticker slogan, ‘Have you hugged your adversary today?’ Civility is the mark of an accomplished and superb professional, but it is even more than this. It is an end in itself. Civility has deep roots in the idea of respect for the individual.”
- Justice Anthony Kennedy, 1997 Speech, American Bar Association Annual Meeting.

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Conclusion

- Keep it brief. KEEP IT SIMPLE.
- *Simply* and *directly* tell jury that facts of the case will support his/her side, and ask for a verdict.
 - *“Members of the jury, after you have heard the evidence, we are confident that you will find the defendant guilty of each count in this indictment: armed robbery and murder.” [Prosecution]*
 - *“At the conclusion of this case, you will have grave doubts that Tom Smith was anywhere near the robbery when it occurred. If anything, you will be convinced that someone else did it. Consequently, Tom Smith is simply not guilty of anything.” [Defense]*

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NAVIGATING THE DCSS

FRIDAY, SEPTEMBER 9

9:00AM - 10:30AM

PRESENTED BY

JONATHAN ROTONDO, ESQ.

PLACER COUNTY DEPT. OF CHILD SUPPORT SERVICES

JONATHAN ROTONDO, ESQ.

Statement: Northern California native, with a finance degree from Sacramento State University. Additionally, received my Juris Doctor from Lincoln Law School. Licensed attorney currently working for Placer County Department of Child Support Services. I have been part of the department for five plus years and currently employed as an Attorney IV. Duties include day to day legal operations of the department, including drafting pleadings and representing the department in court actions. Prior to my time with the department practiced family law as an attorney for a local law firm. I also have almost ten years in financial services assisting both business and consumer customers. Enjoy blending the practice of law with my financial services experience.

Work

Experience:

Placer County Department of Child Support Services, Rocklin, CA

Child Support Attorney (05/17-Present)

- Work within the Department of Child Support Services, performing the full range of legal activities involving establishing, modifying and enforcing child support obligations, including medical support; enforcing established support orders, and determining paternity of minor children in a civil suit; prepare and present cases in court.
- Enforce all orders using civil and criminal means; monitor all cases to modify existing support orders; file civil complaints; set cases for trial; negotiate settlements when appropriate; conduct discovery in the case; hold depositions of parties involved; issue subpoenas for necessary witnesses and evidence; participate in both court and jury trials; prepare and pursue any appropriate appeal of Court decisions; file liens against real property; pursue collection through workers compensation benefits, initiate action to seize personal property such as bank accounts, cars, boats and other such property; file actions for revocation of probation.
- Perform a wide variety of advanced legal research.
- Prepare opinions, briefs, pleadings, warrants, and other legal documents; dictate correspondence and reports.

Forester Purcell Stowell PC, Folsom, CA

Associate Attorney (10/15-05/17)

- Perform client consultations to assess legal needs.
- Prepare pleadings for family law matters, including, but not limited to, establishment or modification of child and spousal support, custody issues, and property issues.
- Provide legal representation for clients at judicial proceedings for matters such as establishment or modification of child and spousal support, custody issues, and property issues.
- Communication with opposing parties and opposing counsel regarding family law matters and/or disputes.
- Conduct discovery including production of documents, request for admissions, and interrogatories.
- Perform legal research.

Premier Community Credit Union, Stockton, CA

Service Center Manager/Commercial Lending Account Executive (07/12-09/15)

- Draft, review, and analyze new and existing contracts.
- Review annual budget.
- Write policies and procedures in conjunction with state and federal rules and regulations.
- Train all levels of credit union staff.
- Review third party contracts and agreements.
- Present findings on risk factors and mitigation ideas to senior management.
- Responsible for the management of twenty-four team members.
- Monthly and quarterly audits of branch locations to verify compliance with all state and federal regulations and to ensure branches comply with corporate policies and procedures.

1000 Sunset Blvd Ste. 200
Rocklin, CA 95765

(916) 435-5768
jonathan.rotondo@pldcss.ca.gov

Education: **LINCOLN LAW SCHOOL**
Juris Doctor
State Bar Number 308700

CALIFORNIA STATE UNIVERSITY, SACRAMENTO
B.S. Business Administration Finance

Skills: **Technology:** CSE, West Law, LexisNexis, Essential Forms, Dissomaster, and Windows applications including Microsoft Word, Excel, Power Point, Outlook, and Explorer.
Personal: Strong problem-solving techniques, organized, efficient, self-motivated, goal oriented, detail oriented, capable of multi-tasking, and working successfully in groups and independently.



Demystifying Child Support: How to Maximize the Services of Your Local Child Support Agency for Your Client's Benefit

JONATHAN ROTONDO
ATTORNEY, PLACER COUNTY DCSS

Objectives

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- ▶ Provide members of the private bar an overview and an insight into the Department of Child Support Services (DCSS)
- ▶ Provide ways the Department and the private bar can work together to help the citizens of Placer County.

Mission

3

- ▶ The mission of the California Child Support Services Program is to promote parental responsibility to enhance the well-being of children by providing child support services to establish parentage and collect child support.
- ▶ Child support services are available to the general public through 47 county Local Child Support Agencies.

Social Security Act

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- ▶ Title IV-D: Child Support Services is responsible for establishing and enforcing support [42 U.S.C. §§651-669]
- ▶ Title IV-A: Public Assistance [42 U.S.C. §§601-609]
- ▶ Title IV-E: Foster Care [42 U.S.C. §§670-679]

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Federal, State and County Roles

- ▶ Federal Government's Role
- ▶ Office of Child Support Enforcement (OCSE) located within the Administration of Children and Families (ACF) oversees the national child support program
- ▶ Helps child support agencies develop, manage and operate their programs
- ▶ Funds 66% of the program

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Federal, State and County Roles

- ▶ State Government's Role
 - ▶ In California -Overseen by the State Department of Child Support Services
 - ▶ Authority delegated by statute to administer child support services [FC§17400 et. seq.]
 - ▶ Funds 34% of the program
- ▶ County Government's Role
- ▶ Operational authority delegated by statute to the Local Child Support Agency in each county [FC§17400 et. seq.]

7

Federal Performance Measures

- ▶ Local Child Support Agencies are evaluated based upon five Federal Performance Measures (FPMs)
- ▶ Paternity
 - Cases with a support order-
 - Collection on current support
 - Collections on arrears
 - Cost effectiveness

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DCSS Operations

- ▶ DCSS is responsible for establishing, enforcing and collecting child support
- ▶ Approximately 1 million open cases statewide
- ▶ \$2.8 billion collected and disbursed in 2020; \$2.5 billion in 2019
- ▶ Partners with other agencies to identify the needs of the child support customer
- ▶ Jobs programs
- ▶ Behavioral Health
- ▶ Domestic Violence
- ▶ Homeless programs
- ▶ Criminal Justice

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DCSS Operations



- ▶ Not part of the District Attorney's Office since 2001
- ▶ Stand-alone agency
- ▶ Holistic case management/family focused approach

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DCSS Cases

- ▶ Child Support Services handles cases:
 - ▶ Where public assistance has been paid (mandatory)
 - ▶ The Local Child Support Agency is an indispensable party [W&I§11477]
- ▶ Where public assistance has not been paid (voluntary application of a party)
- ▶ Local Child Support Agency shall be served notice by the moving party in child support cases [FC§4251(f)]
- ▶ That are formerly assisted
- ▶ That are intergovernmental cases [FC§5700.101]

Cost for IV-D Services in Non-Assisted Cases

- ▶ \$35 Annual Service fee on non-assisted cases after the first \$500 of collections disbursed to the custodial parent
- ▶ Fee withheld from next support payment(s) until fully recovered
- ▶ Obligor gets credit for the full amount collected

Who Does DCSS Represent

- ▶ Local Child Support Agencies represent the public interest in establishing, modifying and enforcing support obligations [FC §17406(a)]
- ▶ No attorney-client relationship shall be deemed to have been created between the Local Child Support Agency and any person [FC§17406(a)]
- ▶ Local Child Support Agencies control the litigation [F.C. §17400(b)(1)]; however, parents receiving IV-D services may:
 - ▶ Be represented by a private attorney
 - ▶ With the consent of the Local Child Support Agency, take independent action to [FC§17404(f)]:
 - ▶ Enforce a support order
 - ▶ File a motion to modify support

Other DCSS Distinctions

- ▶ No filing fees and Court costs for the Local Child Support Agency(GC § 6103 and § 6103.9)
- ▶ Not subject to attorney fees and costs [FC § 273]
- ▶ If Child Support Services is enforcing child support but did not participate/sign stipulation, the stipulation is void [FC § 4065]
- ▶ Not bound by orders if no notice was given to the Local Child Support Agency (*IRMO Mena* (1989) 212 Cal.App.3d 12)
- ▶ Volume and Timeliness [FC § 17400(a)] –The Local Child Support Agency is required to promptly and effectively establish, modify and enforce child support

Confidentiality

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- ▶ Confidentiality [FC§17212] –Limitations on what can be shared
- ▶ DCSS files, records, data and other information are confidential and not subject to disclosure except:
 - ▶ In the administration of the Title IV-D Child Support program
 - ▶ A document requested by a person who wrote, prepared or furnished the document
 - ▶ Payment history
 - ▶ An income and expense declaration for the purpose of establishing or modifying a support order
 - ▶ Upon a Court finding of due process
 - ▶ Information indicating the existence of imminent threat of a crime against a child
- ▶ Substitution of Attorney and Authorized Representative form

Child Support Cases and Commissioners

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- ▶ All actions or proceedings where Child Support Services is involved are referred to a Commissioner pursuant to Family Code § 4251(a)
- ▶ Superior Court IV-D case number may be used for custody/visitation actions [FC § 17404(e)(4)]

Guideline Calculations

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- ▶ DCSS is required to obtain a Guideline support order where public assistance is being paid
- ▶ DCSS and the parties can obtain a non-guideline order in cases in which public assistance is not paid if certain criteria are met [FC § 4065]- LCSA must sign the stipulation if they are involved
- ▶ Cases involving the LCSA must use the Guideline Calculator for the child support calculations
 - ▶ <https://childsupport.ca.gov/guideline-calculator/>

How Can DCSS Help Your Client?

- ▶ Establishing parentage
 - ▶ By Court Order
 - ▶ By Voluntary Declaration of Parentage (VDOP)
 - ▶ Same force and effect as Judgment
 - ▶ <https://childsupport.ca.gov/establishing-legal-parentage/>
- ▶ Establishing a support order
- ▶ Modifying support order
- ▶ Enforcing an existing support order- with enforcement tools available only to the LCSA

How Can DCSS Help Your Client?

- ▶ Locate a party
- ▶ Supplement the legal services you provide
 - ▶ Ability for party to bring independent enforcement actions
 - ▶ Requires Written notice to the LCSA [FC § 17404(f)(2)]
- ▶ Keeping financial records- neutral record keeping
 - ▶ Child Support Audits
 - ▶ Screen shots and payment records
- ▶ Debt Reduction Program- Arrears owed to the State
 - ▶ Cannot reduce arrears owed to a non-aided party or other State
 - ▶ Repayment amount aligns with ability to pay

How Can DCSS Help Your Client?

- ▶ DCSS will work with you
 - ▶ Results focused
 - ▶ Stipulations are favored
 - ▶ LCSA will work with you at any stage of the process
 - ▶ LCSA will answer your questions and discuss case scenarios with an eye towards resolution

Orders LCSA Will Enforce

- ▶ Orders for child support, parentage, and medical support
- ▶ Reimbursement of health, dental, or vision expenses or Child-Care expenses [FC § 4062]
 - ▶ Placer only can enforce if reduced to a money judgment, Placer will not file motion
- ▶ Ostler-Smith (Bonus) Orders
 - ▶ Provide as much clarity as possible in the order to assist the LCSA in enforcing
 - ▶ This is a voluntary service of the LCSA, not offered by all LCSA offices

Orders LCSA Will Not Enforce

- ▶ Custody & Visitation Orders
 - ▶ LCSA evaluates such orders only to determine actual, not ordered, timeshare of the parties
- ▶ Spousal Support Only
 - ▶ Must have child support arrears/current order
- ▶ Divisions of Marital Property
 - ▶ Title IV-D courts lack jurisdiction
- ▶ Attorney Fees/ Sanctions

How to Open a Child Support Case

- ▶ Referral from the IV-A/Social Services Agency (HHS) when public assistance is paid
- ▶ By direct application of either parent when Public Assistance is not paid
 - ▶ Online Application <https://childsupport.co.gov/>
 - ▶ Mail
 - ▶ In Person

Case Opening

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- ▶ Once a IV-A referral is made, or a non -aid application is received from a party, the LCSA reviews the case to determine the next action:
- ▶ No prior child support order
 - ▶ Review for a Summons and Complaint or Summons and Petition (Interstate)
- ▶ Current existing Child Support order
 - ▶ Review for registration of order from other States [FC § 5700.607(a)] or other California Counties [FC § 5600]
 - ▶ File Substitution of Payee [FC § 4204, 4506.3]- Notice Regarding Payment of Support (NRPS)

Enforcement Tools Available to DCSS

24

- ▶ Wage and Health Insurance Assignments
- ▶ UIB/SDI intercepts (25% of benefit)
- ▶ Tax Intercepts - Federal and State Tax refund offsets
- ▶ Suspension of Driver's and Professional Licenses
 - ▶ Notice is provided to customer prior to suspension
- ▶ Additional enforcement tools:
 - ▶ Passport Denial, Bankruptcy claims, Real Property Liens, Probate Claims and Liens, QDROs, Bank Levies, credit reporting, WC and PI Liens.

How Can You Help DCSS Help Your Client

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- ▶ Clear, Unambiguous orders are very helpful with an attached calculation if possible
- ▶ Clearly Identify who the obligor is, the effective date of the order, and an allocation for multiple children
- ▶ Orders payable on the 1st of the month
- ▶ Include an order for either or both parties to provide health insurance
- ▶ Encourage some payment monthly and staying in contact with the LCSA
- ▶ Educate clients on interest and duration of support
- ▶ Educate the need for all payments to go through the SDU

Your Local LCSA

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- ▶ Placer County Department of Child Support Services
- ▶ Two locations to serve our customers:
 - ▶ Rocklin Child Support Office
1000 Sunset Boulevard, Suite 200
Rocklin, CA 95765
 - ▶ Tahoe Child Support Office
5225 N Lake Boulevard
Carmelian Bay, CA 96140
- ▶ There are 47 employees dedicated to the mission of assisting the children and families of Placer County

Speaker Contact Information

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- ▶ Jonathan Rotondo, Attorney Placer County DCSS
- ▶ 916-435-5768
- ▶ Jonathan.rotondo@pldcss.ca.gov

Questions?

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MEDI-CAL PLANNING UPDATE

FRIDAY, SEPTEMBER 9

9:00AM - 10:30AM

PRESENTED BY

RANDY ROSA, ESQ.

ROSA LAW OFFICES, P.C.

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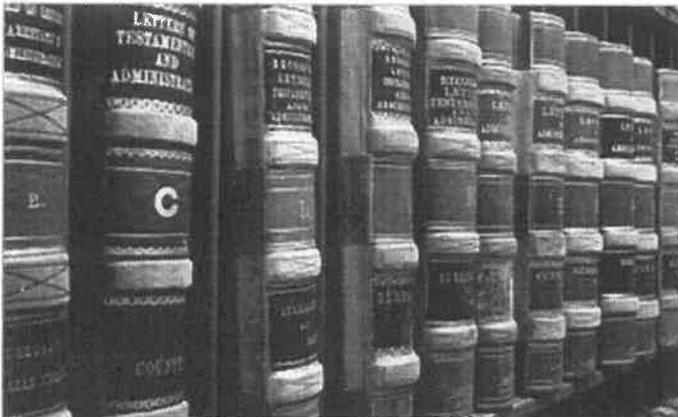
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Résumé and Professional Background



Presentation of Credentials

RANDALL W. ROSÁ
(pronounced Ro-zay)

Employment

President, Rosá Law Offices, PC, A Professional Law Corporation, with offices in Sacramento, Lodi, Stockton, Manteca, Tracy, and Modesto.

Education

Oregon State University (B.A. 1977)
Georgetown University Law Center (J.D. 1982)

Memberships

Member of National Academy of Elder Law Attorney (NAELA), California Advocates for Nursing Home Reform (CANHR), State Bar of California Probate, Trusts and Estate Planning Section, UC Davis Center

For Aging and Health, Speaker's Bureau of Geriatric Medicine.

License

Licensed in California and Oregon, Admitted to practice before Supreme Courts of California and Oregon, The United States District Court for The District of Oregon, The Eastern District of California, and The United States Ninth Circuit Court of Appeals. Licensed in California and Oregon, Admitted to practice before Supreme Courts of California and Oregon, The United States District Court for The District of Oregon, The Eastern District of California, and The United States Ninth Circuit Court of Appeals.

Honors and Awards

California Businessman of The Year Award, National Republican Congressional Committee, Business Advisory Council.

Attorney Advocacy Award, selected attorney of the year by California Advocates For Nursing Home Reform (CANHR), for consumer advocacy in estate planning for long-term care.

Certificate of Recognition, The Estate Planning, Trust, and Probate Law Section of the State Bar of California.

White House Conference on Aging, Facilitator For Sacramento Area Conference.

Certificate of Recognition, The California State Assembly.

Certificate of Community Service, The Mental Health Aging Coalition.

Certificate of Appreciation, The California Trial Lawyer Association.

Selected delegate to the 1988 ABA American Assembly Convention on "The Constitution and the Presidency." Elected Rapporteur of the convention, co-authored Assembly report submitted to President George H. W. Bush.

Publications and Media Appearances

"The Celebration of Abraham: Waging Relentless Peace". Published at CelebrationOfAbraham.com, January 12, 2013.

"Elder Abuse Settlements and Medi-Cal Planning For The At-Home Spouse", CANHR Legal Network News, March, 2001.

" **Medi-Cal Eligibility**for the Middle-Class in Long-Term Care Situations". Forum Magazine (1992).

Elder Law Articles, Del Oro Regional Resource Center for Brain Impaired Individuals, "Pathways" monthly publication.

"Rental Property Owners: Eligibility For Medi-Cal", PME Quarterly, Vol. 1, April and June 1998.

Monthly Elder Law column entitled "Randy Says", published throughout California by various publications.

Frequent appearances on television and radio and print media regarding Elder Law issues.

Content provider on the Internet and World-Wide Web.

Other Past Experiences

College Instructor, Gerontology and Behavioral Science courses dealing with aspects of Elder Law, American River College.

Ombudsman, licensed by California Department of Aging as an advocate for long-term care patients in skilled nursing facilities (1987).

Author of legislation regarding rights of the elderly, enacted by the California Legislature and signed into law by the Governor.

Co-host, Elder Law Radio Program, AM 650 KSTE, Sacramento

Sunday School Teacher, and member of Finance and Building committees, First United Methodist Church, Lodi, California.

Co-Founder, The Breakthrough Project, a non-profit corporation promoting diversity and combating hate crimes, sponsor of major anti-hate crime legislation enacted by California.

Director, Lodi Downtown Business Assoc., major sponsor of the redevelopment of Downtown Lodi (1992).

Organizer and Facilitator, "Celebrations of Abraham" between Christian, Jewish and Muslim communities throughout California.

Co-Founder, The Lodi Disaster Recovery Coalition, a non-profit organization coordinating public and private disaster relief.

Oregon State University Football Scholarship 1973-1976; Team Captain November 1975; recipient of

Elder Law Presentations

Mr. Rosā has presented Elder Law programs on behalf of dozens of organizations, among them: Wells Fargo Bank, Bank of America, American Savings Bank, Prudential Securities, IDS, American Express Co., Edward Jones Co., Dean Witter Reynolds & Co., Merrill Lynch & Co., Del Oro Resource Center, Mountain Valley Caregivers Regional Resource Center, The Alzheimer's Aid Society of Northern California, The Alzheimer's Disease and Related Disorders Association, The Parkinson's Disease Association of Sacramento Valley, The National Parkinson Foundation, Inc., The Sacramento Bee, The International Association For Financial Planning, Doctor's Medical Center Foundation, The University of California Davis, Alzheimer's Disease Center, Legal Services of Northern California, Inc., Senior's In Retirement (SIRS), Tuolumne County Adult Day Care, USAA Insurance Company, Stanislaus County Estate Planning Council, The Sacramento County Superior Court.

Rosa Law Offices, PC

Lodi: 209-333-8061
Sacramento: 916-442-2989
Modesto: 209-522-0120
Manteca: 209-825-0888
Stockton: 209-939-9000
Tracy: 209-833-0014

Please direct all
correspondence to:
P.O. Box 1223
Lodi, CA 95241
FAX: 209-333-8065

Business Hours:

Mon-Fri 9:00 AM - 5:00 PM
Sat-Sun Closed



Our Office Locations

Lodi
115 S. School St., Suite 6
Lodi, CA 95240
209-333-8061

Sacramento
916-442-2989

Modesto
209-522-0120



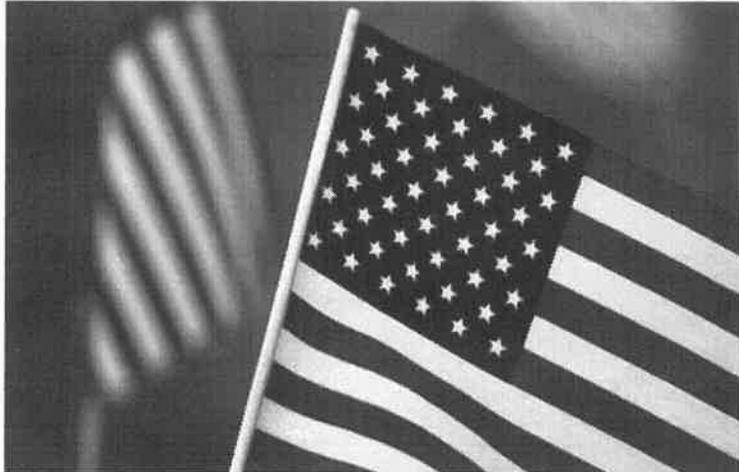
Manteca
209-825-0888

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209-939-9000

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209-833-0014

Like Us On:

VA Aid and Attendance (A&A) Benefit Eligibility



Are You Eligible for the A&A Benefit?

Determining eligibility isn't always easy and each case is ultimately decided by the VA. Here are the general guidelines to help you decide whether to apply for Aid and Attendance.

Veterans who served on active duty for at least 90 consecutive days, including at least one full day during a time of war, may be eligible for Aid and Attendance if they also qualify for the basic Veterans Pension and meet the clinical and financial requirements.

Service in a combat zone is not a requirement. Widowed spouses of eligible veterans may also qualify if they meet the clinical and income requirements and have not remarried.

How Is Wartime Service Defined?

Congress defines the wartime dates that the VA uses to decide which veterans qualify for benefits like Aid and

RESOURCES

[Senior Care Directory](#)

[Home Care Directory](#)

[Elder Resource Benefits](#)

[A Place for Mom](#)

ABOUT US



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Attendance:

- **World War II:** December 7, 1941 — December 31, 1946
- **Korean Conflict:** June 27, 1950 — January 31, 1955
- **Vietnam Era:** February 28, 1961 — May 7, 1975, for Veterans who served in the Republic of Vietnam during that period; otherwise August 5, 1964 — May 7, 1975
- **Gulf War:** August 2, 1990, through a future date to be set by Presidential proclamation or law (for VA benefits purposes, this time of war is still in effect)

Basic Veterans Pension Requirements

In addition to the active duty and wartime service requirements, eligible veterans must also meet at least **one** of these criteria to qualify for the basic pension:

- Be 65 or older with no or limited income
- Have a permanent and total disability
- Receive Supplemental Security Income
- Receive Social Security Disability Insurance
- Reside in a nursing home

Veterans and surviving spouses who meet the eligibility requirements for the basic pension must also meet clinical and financial requirements to qualify for Aid and Attendance.

Clinical Requirements for A&A

Veterans or surviving spouses must meet at least **one** of these clinical criteria:

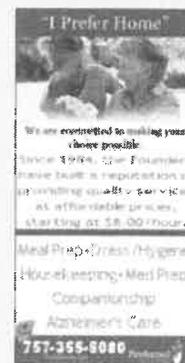
- Be bedridden except for medical and therapy appointments and treatments
- Have severe visual impairment (eyesight limited to a corrected 5/200 visual acuity OR less in both eyes OR concentric contraction of the visual field to five degrees or less)
- Reside in a nursing home because of physical or mental incapacity, including Alzheimer's and dementia
- Require help with some activities of daily living (ADL's) such as, but not limited to: bathing, dressing, eating, using the bathroom, etc.



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Financial Requirements for A&A

In December 2018, the VA set a clear upper limit for applicants' net worth of \$123,600 not including the applicant's

Hi, I'm Angela, your virtual advisor.
I'm here to get you started on your senior living search....

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payments.

There's also an upper limit on monthly countable income minus expenses such as unreimbursed medical bills, prescription out-of-pocket costs and Medicare and private health insurance premiums. (You can see a list of potential medical expenses here.) The VA pays benefit amounts that make up the difference between recipients' countable income and the monthly upper limit.

VA A&A, Basic Pension, and Housebound Pension Rates

BASIC PENSION FOR VETERANS	MAXIMUM ANNUAL PENSION RATE (MAPR)	MONTHLY RATE
Single veteran	\$13,931	\$1,161
Veteran with spouse or one dependent	\$18,243	\$1,521
Two veterans married to each other	\$18,243	\$1,521
BASIC PENSION FOR VETERANS PLUS AID & ATTENDANCE	MAXIMUM ANNUAL PENSION RATE (MAPR)	MONTHLY RATE
Aid & Attendance without dependents	\$22,238	\$1,937
Aid & Attendance with spouse or one dependent	\$27,549	\$2,296
Two veterans married to each other (both qualify for A&A)	\$36,861	\$3,072
BASIC PENSION FOR VETERANS PLUS HOUSEBOUND	MAXIMUM ANNUAL PENSION RATE (MAPR)	MONTHLY RATE
Housebound without dependents	\$17,034	\$1,419
Housebound with spouse or one dependent	\$21,337	\$1,779
Two veterans married to each other (both qualify for A&A)	\$24,428	\$2,036
IF QUALIFY TO ADD TO ANY RATES ABOVE	ADDITIONAL ANNUAL BENEFIT	MONTHLY RATE
Each additional dependent	\$2,392	\$199
SURVIVING SPOUSE RATES	MAXIMUM ANNUAL PENSION RATE (MAPR)	MONTHLY RATE
Widow, no dependents	\$9,343	\$779
Widow, no dependents with Aid & Attendance	\$14,953	\$1,247
Widow, no dependents with housebound	\$11,420	\$952
For each dependent add	\$2,244	\$196

If you or your loved one meets the Basic Pension requirements and the clinical and financial requirements, you should apply for the Aid and Attendance program.

If you have eligibility questions that aren't answered here, visit our FAQ page or visit the VA website.

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Benefits & Eligibility for the Aid & Attendance, Housebound & Basic Pensions for Veterans & Surviving Spouses

Last updated: November 29, 2021

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 - Disability / Age Requirements
- Application Process
- Proceed with Caution / Seek Assistance

Overview

Veterans Affairs (VA) pensions provide a monetary monthly benefit for wartime veterans (or their survivor spouses) who are in financial need of supplemental income. There are three types of pensions and their cash benefit amounts and eligibility criteria vary.

- Basic Veterans Pension and the Basic Survivors Pension (also called a "death pension").
- Aid & Attendance (A&A) Pension, called an "enhanced pension", provides cash assistance to help cover the cost of long-term care
- Housebound Pension, also an "enhanced pension", provides cash assistance for permanently disabled persons with limited ability to leave their home

*** Did You Know?** VA Pensions can be used to pay for assisted living. Veterans can get free assistance finding residences that accept VA Pensions. [Start here.](#)

Medicaid vs. VA Pensions

For persons who might be eligible for either Medicaid or a VA pension, a decision may need to be made about which to pursue. VA pensions come as cash benefits, and the benefit amounts often exceed Medicaid's income limits, which might make one ineligible for Medicaid. Some states count VA pension benefits as income towards Medicaid's income limit while other states do not. Some states require a veteran to apply for VA benefits, others do not.

To generalize, Medicaid is a better financial option for persons who require nursing home care and the VA pension is a better option for home care or assisted living. To be clear, this is not the case for all families. In some situations, for example, married couples who both have care needs but require different levels of care, it may be beneficial to pursue both options. The question quickly becomes

complicated when one spouse lives independently and the other needs nursing home care. It is strongly advised one seek the advice of a financial planner who is an expert in both areas. [Find a planner here](#).

VA Pension Rates (Maximum Annual Pension Rate or MAPR) for 2022

The Veterans Pension, Survivors Pension, A&A Pension, and Housebound Pension provide veterans (or their surviving spouses) with supplemental income. This monthly cash benefit is tax-free and can be used for any purpose, such as paying for home care, home modifications like stair-lifts or walk-in tubs, or assisted living.

Calculating the pension benefit amount for a veteran or surviving spouse is complicated, as one's current monthly income is considered, along with an applicant's unreimbursed medical expenses. That said, for the period from Dec. 1, 2021 – Nov. 30, 2022, the Maximum Annual Pension Rate (MAPR), which is the highest benefit amount one can receive each year, are as follows:

Basic Veterans Pension / Basic Survivors Pension

- Veteran who does not have a spouse or dependent child – \$14,752 / year (\$1,229 / month)
- Married veteran – \$19,319 / year (\$1,609 / month)
- Surviving spouse without any dependent children – \$9,895 / year (\$824 / month)

Aid & Attendance Pension for Veterans / Surviving Spouses

The A&A Pension is a monetary “add on” to the Basic Veterans / Survivors Pension. The amounts below are the **maximum benefit amount** a veteran or surviving spouse may be entitled to for Basic Veterans / Survivor Pension plus Aid & Attendance Pension.

- Veteran who does not have a spouse or dependent child – \$24,609/ year (\$2,050/ month)
- Married veteran – \$29,174/ year (\$2,431 / month)
- Surviving spouse without any dependent children – 15,815/ year (\$1,317 / month)

✳ A VA Pension calculator is [available here](#) that provides an accurate estimate of the monthly cash benefit available to veterans and / or their spouses.

Housebound Pension for Veterans / Surviving Spouses

The Housebound Pension is a cash “add on” to the Basic Veterans / Survivors Pension. The benefit amounts below are the maximum monetary amount a veteran or survivor spouse may be able to receive for Basic Veterans / Survivor Pension plus Housebound Pension.

- Veteran who does not have a spouse or dependent child – \$18,028 / year (\$1,502 / month)
- Married veteran – \$22,595 / year (\$1,882 / month)
- Surviving spouse without any dependent children – \$12,093 / year (\$1,007 / month)

Eligibility Requirements for VA Pensions

There are multiple eligibility criteria for a VA pension. Some of these criteria are common across all the types of VA pensions, and others are pension-specific. The rules are complicated, especially with regards to income and asset calculations. For this reason, we have partnered to provide a simple [VA Pension Eligibility tool](#). It is free and takes about 5 minutes to complete. [Start here](#). Also, [assistance is available](#) to help veterans who might be ineligible to understand how they can become eligible.

Military Service Requirements

A veteran must have been discharged from military, air, or naval service, and served a minimum of 90 days of active service (full time duty) with a minimum of 1 day served during a time of war. (See eligibility war time periods below). For those who became active duty in one of the above branches after 9/7/1980, there is an additional service requirement. These veterans must have served active duty a minimum of 24-months, and if a veteran served less than this amount of time, he / she must have finished an entire tour of duty (his or her period of obligated active duty service).

War Time Periods

- May 9, 1916 through April 5, 1917 – Mexican Border Period (Veterans who served in Mexico, the borders of Mexico, or adjacent

waters)

- April 6, 1917 through November 11, 1918 – World War I
- December 7, 1941 through December 31, 1946 – World War II
- June 27, 1950 through January 31, 1955 – Korean Conflict
- February 28, 1961 through May 7, 1975 – Vietnam Era (The above dates are for veterans who served in the Republic of Vietnam. If they didn't, the valid dates are August 5, 1964 through May 7, 1975.)
- August 2, 1990 through currently undetermined – Gulf War

! A dishonorable discharge does not meet the service requirement and a Veteran will be ineligible for VA pensions.

Countable Income Requirements for 2022

One's "countable income" must be less than the Maximum Annual Pension Rate. In simple terms, a veteran or surviving spouse cannot have annual income greater than the maximum annual VA pension benefit amount they potentially can receive. When a veteran is married, their spouse's income is also counted.

"Countable income" includes most income that a veteran or surviving spouse receives. Examples include earnings, retirement and pension payments, social security, and social security disability payments. However, one's "countable income" can be reduced by subtracting Unreimbursed Medical Expenses (UMEs) from their annual income. Examples of UMEs include the cost of home health services, dentures, hearing aids, wheelchairs, premiums for health insurance, and prescription drugs. While UMEs can be deducted to lower one's countable income, increasing one's pension benefit amount, it isn't as straightforward as it sounds. For UMEs to be deducted, the total amount must be greater than 5% of the MAPR.

For example, the MAPR for an unmarried veteran with no dependent children who is applying for the Basic Veterans Pension is \$13,931, and 5% of this amount is \$696. If the veteran has UMEs in excess of \$696, they can be deducted from the countable income. After income calculations (deducting UMEs from MAPR), if one's income is less than the MAPR, they are income eligible.

If confused by the income calculations, be aware that there are multiple types of VA benefits advisors that can help.

Net Worth Requirements for 2022

To be eligible, a veteran or surviving spouses' net worth (assets) must be limited. In 2018, the VA made dramatic changes to how net worth is treated by imposing a limit of \$123,600. In 2022 the net worth limit has been increased to \$138,489. Net worth includes savings and checking accounts, mutual funds, stocks, and vacation homes. **One's primary home does not count towards the asset limit.**

For persons whose income is greater than their unreimbursed medical expenses, their annual income after allowable deductions will be added to their net worth. For instance, if a veteran receives \$750 / month (\$9,000 / year) in Social Security and has no allowable unreimbursed medical costs, \$9,000 will be added to their net worth.

If an applicant is over the net worth limit, this does not mean they cannot still meet the limit. VA benefit planners can offer assistance in reallocating assets so that they are not counted towards one's net worth. Click here to contact a professional VA planner.

In addition, there is a look-back period for asset transfers to prevent veterans and survivors from gifting assets in an attempt to meet the new VA net worth limit of \$138,489. This rule became effective October 18, 2018 and does not include transfers made before this date. If a veteran (or surviving spouse) gives away assets or sells them under fair market value during this period immediately preceding pension application, a period of pension ineligibility up to 5 years may result. However, if an asset has been gifted and the veteran or surviving spouse is able to get it back, there will be no penalty period.

* A Simpler Way to Determine Eligibility

Our organization has partnered to provide veterans with a simple Pension Eligibility Test. It is free, fast (takes 5 minutes), and provides an estimate of the monthly cash assistance one can receive. Start here.

Disability / Age Requirements

The disability criteria vary depending on the specific VA pension from which the applicant is seeking assistance.

Basic Pension

To meet the disability requirement, a veteran must meet ONE of the following conditions:

- Be a minimum of 65 years old
- Have a permanent (there is not a chance or is very little chance the disability will improve) and total (100% disability rating) non-service connected disability
- Reside in a nursing home facility due to a disability and require long term care
- Be a recipient of disability benefits from Social Security

Aid & Attendance Requirements

For the A&A Pension, a veteran or his / her survivor must meet ONE of the conditions below:

- Need assistance with Activities of Daily Living (ADLs), such as bathing, grooming, dressing, eating, and mobility.
- Be bedridden (confined to one's bed)
- Be a resident of a nursing home facility due to the inability to function physically or mentally
- Have profound visual impairment (both eyes have equal or less than 5/200 visual acuity OR the visual field has concentric contraction equal to 5 degrees or less)

Housebound Requirements

- To be eligible for the Housebound Pension, a veteran or his / her surviving spouse must be "substantially confined" to his / her home due to a permanent disability.

Application Process

A veteran or surviving spouse cannot be eligible for the Aid & Attendance Pension or the Homebound Pension without being eligible for the Basic Veterans Pension or the Survivors Basic Pension (Death Pension). To apply for the Basic VA Pension, veterans must fill out form VA Form 21P-527EZ (Application for Veterans Pension), and for the Basic Survivor Pension, surviving spouses must fill out VA Form 21P-534EZ (Application for DIC, Death Pension, and / or Accrued Benefits). To apply for the Aid & Attendance or Housebound Pension, additional paperwork is required.

In addition to the completed application, specific information must also be provided. This may include documentation of income and assets, marriage certificate, military discharge papers, receipts for unreimbursed medical expenses, physician statement of injury / disability, or death certificate of veteran (for survivor spouses). Applications and documentation must be mailed to the [Pension Management Center](#) in one's state or one can apply at their [local VA regional benefit office](#).

! If an applicant is uncertain about their eligibility status, it is advised they seek professional counsel **prior to applying** as incomplete or partially qualified applicants can experience processing delays lasting many months or even years. [Take a free, non-binding eligibility test here.](#)

Proceed with Caution / Seek Assistance

Filing for VA pensions can be a complicated process, and if not done correctly, one's application may be delayed or denied. It is highly recommended that one seek assistance from a professional VA planner who can offer guidance through the application process. For more information about applying for VA benefits or for assistance with the application process, [contact a professional Veterans benefits planner](#).

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Pension benefits

Get benefits -

Eligibility
(<https://www.va.gov/pension>)

How to apply
(<https://www.va.gov/pension-to-apply>)

Apply now
(<https://www.va.gov/pension>)

Aid and Attendance benefits and Housebound allowance
(<https://www.va.gov/pension-attendance-housebound>)

Survivors Pension
(<https://www.va.gov/pension-pension>)

Manage benefits +

More resources +

In this section

benefits and Housebound allowance

VA Aid and Attendance or Housebound benefits provide monthly payments added to the amount of a monthly VA pension for qualified Veterans and survivors. If you need help with daily activities, or you're housebound, find out if you qualify.

You can still file a claim and apply for benefits during the coronavirus pandemic

Get the latest information about in-person services, claim exams, extensions, paperwork, decision reviews and appeals, and how best to contact us during this time.

Go to our coronavirus FAQs (<https://www.va.gov/coronavirus-veteran-frequently-asked-questions/#claims-and-applications>).

Am I eligible for VA Aid and Attendance or Housebound benefits as a Veteran or survivor?

VA Aid and Attendance eligibility

You may be eligible for this benefit if you get a VA pension and you meet at least one of these requirements.

At least one of these must be true:

- You need another person to help you perform daily activities, like bathing, feeding, and dressing, **or**
- You have to stay in bed—or spend a large portion of the day in bed—because of illness, **or**
- You are a patient in a nursing home due to the loss of mental or physical abilities related to a disability, **or**
- Your eyesight is limited (even with glasses or contact lenses you have only 5/200 or less in both eyes; or concentric contraction of the visual field to 5 degrees or

less)

Housebound benefits eligibility

You may be eligible for this benefit if you get a VA pension and you spend most of your time in your home because of a permanent disability (a disability that doesn't go away).

Note: You can't get Aid and Attendance benefits and Housebound benefits at the same time.

How do I get this benefit?

You can apply for VA Aid and Attendance or Housebound benefits in one of these ways:

Send a completed VA form to your pension management center (PMC)

Fill out VA Form 21-2680 (Examination for Housebound Status or Permanent Need for Regular Aid and Attendance) and mail it to the PMC for your state. You can have your doctor fill out the examination information section.

[Get VA Form 21-2680 to download \(https://www.va.gov/find-forms/about-form-21-2680\)](https://www.va.gov/find-forms/about-form-21-2680)
[Find your PMC \(https://www.va.gov/pension/pension-management-centers/\)](https://www.va.gov/pension/pension-management-centers/)

You can also include with your VA form:

- Other evidence, like a doctor's report, that shows you need Aid and Attendance or Housebound care
- Details about what you normally do during the day and how you get to places
- Details that help show what kind of illness, injury, or mental or physical disability affects your ability to do things, like take a bath, on your own

[Learn about the evidence you'll need to support your claim \(https://www.va.gov/resources/evidence-to-support-va-pension-dic-or-accrued-benefits-claims\)](https://www.va.gov/resources/evidence-to-support-va-pension-dic-or-accrued-benefits-claims)

If you're in a nursing home, you'll also need to fill out a Request for Nursing Home Information in Connection with Claim for Aid and Attendance (VA Form 21-0779).

[Get VA Form 21-0779 to download \(https://www.va.gov/find-forms/about-form-21-0779\)](https://www.va.gov/find-forms/about-form-21-0779)

Apply in person

You can bring your information to a VA regional office near you.

[Find your nearest VA regional office \(https://www.va.gov/find-locations/?facilityType=benefits\)](https://www.va.gov/find-locations/?facilityType=benefits)

How long does it take VA to make a decision?

It depends. We process claims in the order we receive them, unless a claim requires priority processing.

Last updated: March 29, 2022

[Feedback](#)



Jennifer Kent
Director

State of California—Health and Human Services Agency
Department of Health Care Services



EDMUND G. BROWN JR.
Governor

July 19, 2017

TO: ALL COUNTY WELFARE DIRECTORS Letter No. 17-25
ALL COUNTY ADMINISTRATIVE OFFICERS
ALL COUNTY MEDI-CAL PROGRAM SPECIALISTS/LIAISONS
ALL COUNTY HEALTH EXECUTIVES
ALL COUNTY MENTAL HEALTH DIRECTORS
CALIFORNIA DEPARTMENT OF AGING
CALIFORNIA DEPARTMENT OF DEVELOPMENTAL SERVICES
CALIFORNIA DEPARTMENT OF PUBLIC HEALTH
CALIFORNIA DEPARTMENT OF SOCIAL SERVICES
ALL HCBS WAIVER ADMINISTRATORS/COORDINATORS

SUBJECT: Home and Community-Based Services and Spousal Impoverishment Provisions
(References: All County Welfare Directors Letters, Numbers 90-01, 90-03, 91-84; Medi-Cal Eligibility Procedures Manual, Article 19-D)

The purpose of this letter is to clarify changes made by the Affordable Care Act (ACA) that broadened the definition of an “institutionalized spouse” [Section 1924(h) of the Social Security Act and by reference, therein, Section 1902(a)(10)(A)(ii)(VI)]. The new definition allows for a broader and more immediate application of the spousal impoverishment provisions for those receiving Home and Community-Based Services (HCBS). The spousal impoverishment provisions allow the community spouse to retain more income and resources upon submission of a Medi-Cal application for an institutionalized spouse or a spouse who requests HCBS.

This letter includes the following sections:

1. Description of Changes
2. Impacted Waivers and Programs
3. Process for Application of Spousal Impoverishment Provisions
 - Request for Services
 - Verification and Target Criteria
 - In-Home Supportive Services/Community First Choice Option (IHSS/CFCO)

- Coverage Groups
- Property and Income Eligibility or Share-of-Cost (SOC) - Examples 1 and 2
- 4. Ongoing Eligibility
- 5. Institutional Deeming Under The Waivers
 - Additional Waiver Property Exemptions or Income Deductions Apply Only At Waiver Participant's Start Date
 - Eligibility Worker and Waiver Administrator/Care Coordinator Collaboration Required for Institutional Deeming
- 6. What Happens If the Community Spouse Applies, Becomes Institutionalized or Requests HCBS - Example 3
- 7. Retroactive Implementation
 - CFCO
 - Denied Individuals
 - Individuals on Waiting Lists

1. Description of Changes

The changes are effective on January 1, 2014. The two major changes are described below.

- A) The spousal impoverishment provisions must be applied to individuals who will likely participate in the CFCO, part of the IHSS program, as verified by the Doctor's Verification form (see enclosure) or who pass the needs assessment for CFCO.
- B) The spousal impoverishment provisions must be applied as a Medi-Cal eligibility step upon request to participate in HCBS waivers or programs rather than once accepted into the applicable waiver or program. This letter instructs counties to immediately begin applying the spousal impoverishment provisions **at the time of application (application month), initial retroactive month, or in the month of initial request for HCBS (whichever comes first)**, upon:
 - 1. receipt of the attached Doctor's Verification form indicating the person would likely require nursing facility level of care for 30 consecutive days in the absence of HCBS services, or
 - 2. receipt of a completed needs assessment if the individual went to a HCBS Care Coordinator before applying for Medi-Cal. An HCBS Care Coordinator is designated by the waiver or program administrator to assist potential HCBS participants with the enrollment process. The spousal impoverishment provisions shall continue to apply regardless of the individual's length of time

on a waiver waiting list. This means that even if the HCBS spouse is on the waiting list for months/years, the HCBS spouse will remain eligible in a separate budget unit from his/her spouse and the community spouse will continue to receive the benefit of the spousal impoverishment provisions.

The spousal impoverishment provisions described in this All County Welfare Directors Letter (ACWDL) apply to HCBS spouses who:

1. request HCBS and meet the target criteria of the waiver or programs based upon the HCBS Program Eligibility Chart,
2. are married to a spouse who is not in a medical institution, nursing facility or otherwise an HCBS spouse¹, and
3. would likely require nursing facility level of care for at least 30 consecutive days in the absence of HCBS.

2. Impacted Programs and Waivers

The ACA expanded the federal definition of “institutionalized spouse” to permit the use of spousal impoverishment provisions for the following HCBS programs and waivers:

1. Section 1915(i) Developmental Disabilities State Plan Services
2. Assisted Living Waiver
3. Cal Medi-Connect Duals Demonstration Project for members eligible to receive Home and Community-Based Services and who would require institutionalization in the absence of HCBS – [Community Based Adult Services, Multipurpose Senior Services Program (MSSP)] and in lieu of institutional services provided under Care Plan Options)
4. California Community Transitions Home and Community-Based Services Money Follows the Person Grant
5. CBAS Medi-Cal 2020 Demonstration Waiver Benefit
6. Home and Community-Based Services for Persons with Developmental Disabilities (DD) Waiver
7. Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome Waiver
8. In-Home Operations Waiver
9. CFCO
10. MSSP Waiver
11. Nursing Facility/Acute Hospital – Transition and Diversion Waiver

¹ For the purposes of this ACWDL, an “HCBS spouse” is an individual for whom spousal impoverishment provisions are applied as described in this ACWDL. The HCBS spouse is an institutionalized spouse pursuant to the federal definition [Social Security Act, Section 1924(h)].

12. Pediatric Palliative Care Waiver
13. Program of All-inclusive Care for the Elderly
14. San Francisco Community Living Support Benefit Waiver
15. Self-Directed Program for Persons with DD Waiver (program in the approval process)
16. Senior Care Action Network Fully Integrated Dual Eligible Special Needs Plan

More information about HCBS may be found at the following link.

<http://www.dhcs.ca.gov/services/ltc/Pages/default.aspx>

3. Process for Application of Spousal Impoverishment Provisions

Request for Services - The person requesting HCBS services may initiate this process either by applying for Medi-Cal first, or by first contacting a waiver administrator or a care-coordinating agency that works with the waiver administrator to request participation in the waiver. The waiver administrator or care coordinator would then follow current processes to refer the individual to the County for a Medi-Cal eligibility determination.

Verification and Target Criteria - The County Eligibility Worker (CEW) provides the enclosed Doctor's Verification form unless the applicant has already completed a needs assessment for the waiver or program through the waiver administrator/care coordinator. The CEW must require the applicant, his/her spouse or authorized representative to sign the attached authorization for the doctor to release his/her information to the CEW, and provide the name and address of the individual's doctor. The individual's doctor must sign and return the form as evidence that the individual would likely require nursing facility level of care for at least 30 consecutive days without HCBS. Counties must provide translation services in accordance with state and federal law.

The doctor must be allowed at least 10 business days to submit the form to the county in a postage paid return envelope provided by the county or, if available in the county, by secured email or fax. If the doctor's office does not return the form, the CEW must contact the doctor's office to confirm that they received the form and to provide another copy of the form if it was not. If the client indicates that he/she wants to bring the form to the doctor's office, they may do so, but advise the client that the doctor must submit the completed form to the county. If the client returns the form, the CEW will need to contact the doctor's office to confirm the validity of the signature and information. If the CEW still does not receive the form, then the CEW must advise the applicant/beneficiary or authorized representative of the situation, and that the client will still receive a needs

assessment for CFCO or the waiver and, if approved, that the spousal impoverishment provisions will apply. When all efforts to obtain the Doctor's Verification form from the doctor's office have failed, if the CEW can establish eligibility for Medi-Cal without the benefit of spousal impoverishment provisions, the CEW must grant eligibility. The CEW must then revise the case if the needs assessment is approved, back to the month of application; or in the case of a beneficiary, the CEW should revise the case back to the date of initial request for HCBS. The CEWs will need to inform the waiver administrators or care coordinators regarding the outcomes of the Medi-Cal eligibility determinations, and the waiver administrators or care coordinators will need to inform the CEWs regarding participant approvals or disapprovals.

The waiver administrator/care coordinator needs to work with the CEW to establish, redetermine and discontinue cases as appropriate. Lines of communication between CEWs and HCBS waivers and programs already exist in most Counties. Contact information for each waiver administrator is included on the [County Operations Support](#) section of the Department of Health Care Services (DHCS) website and in the HCBS Program Eligibility Chart enclosure with this ACWDL.

The waiver administrator are able to provide the name and contact information for their contracted care coordinators. Each party should have an authorization to release information signed by the applicant, beneficiary, or their authorized representative. The CEW should document telephone contacts with and confirmations by, the waiver administrator/care coordinator in the case record.

In the past, the waiver administrator/care coordinator had to inform the CEW of approval pending Medi-Cal eligibility or confirm HCBS participation before the CEW could apply spousal impoverishment provisions. Now, if the client meets the target criteria for the waiver or program, and is otherwise eligible, the CEW will apply the spousal impoverishment provisions when the CEW receives the Doctor's Verification form unless he/she has already passed the waiver needs assessment. The **minimum target criteria of each HCBS waiver or program is nursing facility level of care for at least 30 consecutive days in the absence of HCBS and additional target criterion**, as described by the enclosed chart. If the waiver administrator/care coordinator has not completed the needs assessment, as described above, a completed Doctor's Verification form will establish that the individual meets the nursing facility level of care target criteria for the waiver or program. The CEW shall then apply the spousal impoverishment provisions in accordance with ACWDLs 90-01, 90-03, and 91-84, beginning with the first month in which the person requests both Medi-Cal and HCBS. That first month could be the initial retroactive month, the month of application, or, in the case of someone who is already a Medi-Cal beneficiary, the first month of the request for HCBS services.

IHSS/CFCO - Counties shall establish their own lines of communication between staff establishing eligibility for IHSS and Medi-Cal for the purposes of identifying CFCO individuals. The communication must occur as soon as the HCBS spouse requests IHSS. The CEW must still refer the individual to IHSS for a needs assessment, however, the CEW shall establish eligibility under the spousal impoverishment provisions as soon as either; the needs assessment indicates that the individual meets the clinical criteria for CFCO participation, **or** the doctor returns the completed Doctor's Verification form. Later on, if IHSS identifies the individual as not meeting the clinical standard for being a CFCO recipient, the CEW must redetermine the individual's eligibility without the spousal impoverishment provisions and adjust the SOC or discontinue for excess property, as necessary.

Coverage Groups - When determining the eligibility of an HCBS spouse, the CEW determines eligibility for the various Medi-Cal coverage groups in accordance with the Medi-Cal hierarchy. First, HCBS is available to individuals who are eligible for Medi-Cal under the Modified Adjusted Gross Income (MAGI) rules. The spousal impoverishment provisions are not relevant to the MAGI coverage groups. When determining eligibility for HCBS under the Non-MAGI programs, conduct the determination in the same manner as set forth in ACWDL 90-01 and 91-84, with the modifications described in this ACWDL. The Non-MAGI hierarchy for eligibility screening is Aged, Blind, and Disabled Federal Poverty Level (ABD FPL) group, the 250 percent Working Disabled program, and finally Medically Needy (MN) program with or without a SOC.

Property and Income Eligibility or SOC - Property eligibility is established allowing for the Community Spouse Resource Allowance (CSRA) and the property reserve for the HCBS spouse in a separate Medi-Cal Family Budget Unit pursuant to ACWDL 90-01 and 91-84 beginning in the initial month for which Medi-Cal HCBS is being requested. Then, the spousal income allocation to the community spouse is determined in the same manner as set forth in ACWDL 90-03 and ACWDL 91-84. If the community spouse's gross income minus health insurance premiums is greater than the Minimum Monthly Maintenance Needs Allowance (MMMNA), there is no spousal income allocation from the HCBS to the community spouse. Apply community eligibility rules with a budget unit for one person living in the community to the income of the HCBS spouse remaining after the spousal income allocation, if any. The personal needs allowance of \$35 does **not** apply to individuals in HCBS who are living in the community. If the HCBS spouse is eligible for one of the Non-MAGI no-SOC coverage groups (e.g. the ABD FPL group), eligibility is completed. No further actions are necessary unless:

- an annual redetermination is due – which will follow the same process for income, as depicted in ACWDL 90-03,

- the individual is found not to meet the clinical standard/needs assessment,
- there is a change in circumstances, or
- the HCBS spouse becomes ineligible.

Please Note: With the spousal impoverishment rules in the Medi-Cal eligibility determination, there is no need for a separate institutional deeming income calculation under the waiver if the HCBS spouse is eligible without a SOC.

Examples 1 and 2

Example 1: Mr. A., age 72, applies for Medi-Cal on May 3, 2015. He has a spouse, Mrs. A., who is not requesting Medi-Cal. They live together at home in the community. Mr. A. is not eligible for any of the MAGI programs or any other mandatory categorical coverage group, but he is requesting to participate in the MSSP Waiver and the spousal impoverishment provisions apply.

Mr. and Mrs. A. have combined net nonexempt property of \$98,000. That amount is within the property limit for one plus the 2016 CSRA of \$119,220, so they are property eligible. Mr. A. will have to remove his name from at least \$96,000 (\$98,000 - \$2,000 property limit for one) of this nonexempt property before the end of the CSRA transfer period (the end of the month that includes the 90th day from the date that the Notice of Action (NOA) is sent to Mr. A., stating that he is eligible).

Mr. A. is determined eligible for the Aged and Disabled FPL (A&D FPL) program and his income calculation is as follows:

Mr. A.'s Income		Mrs. A.'s Income	
\$2,000.00	Social Security	\$900.00	Social Security
- \$20.00	Any Income Deduction	- \$120.90	Medicare Premium
- \$120.90	Medicare Premium	\$779.10	Gross Income Minus Other Health Insurance
- \$230.00	Standard Deduction	\$3023.00	MMMNA (2017)
\$1629.10	Net Nonexempt Income	- \$779.10	Gross Income Minus Other Health Insurance
\$1629.00	Rounded	\$2243.90	Potential Spouse Income Allocation
- \$981.00	A&D FPL Income Limit (1)	((\$2244 Rounded))	
\$648.00	In this case, only \$648.00 is available to be allocated from Mr. A.		

Example 2: Mr. B., disabled and age 60, has Medicare and applies for HCBS. Mr. B. has a spouse, Mrs. B., who is not requesting Medi-Cal and has employer sponsored full coverage health insurance. Mr. B. is not working and receives disability retirement benefits from his job. Mr. B. is not MAGI eligible. The couple's combined net nonexempt property (\$60,000) is within the CSRA plus \$2,000 limit so Mr. B. will need to remove his name from \$58,000 of the \$60,000 net nonexempt property by the end of the CSRA transfer period.

Mr. B. has too much income to qualify for the A&D FPL program, so his eligibility must be determined under the MN program.

Mr. B.'s Income		Mrs. B.'s Income	
\$2200.00	Disability Retirement Benefits	\$2522.00	Gross Earned Income
- \$20.00	Any Income Deduction	- \$300.00	Health Insurance Premiums
- \$120.90	Medicare Premiums	\$2222.00	Gross Income Minus Other Health Insurance
\$2059.00	Net Nonexempt Income (rounded)	\$3023.00	MMMNA (2017)
- \$759.00	Spousal Income Allocation	- \$2222.00	Gross Income Minus Other Health Insurance
- \$600.00	MN Level for (one) 1*	\$759.00	Potential Spousal Income Allocation
\$700.00	SOC		

*If the waiver allows for special income deductions not already allowed under the MN calculation above, deduct them just before the final determination of the SOC amount.

4. Ongoing Eligibility

If an approved request for HCBS results in the individual's placement on a waiting list, then the spousal impoverishment provisions shall continue to apply. The HCBS care coordinator or administrator will provide verification of the level of care and eligibility for HCBS to the CEW during the clinical/needs assessment for HCBS participation. Once the individual becomes an HCBS spouse, he/she begins a continuous period of HCBS (also known as a continuous period of institutionalization). Once the continuous period of HCBS or institutionalization begins, the continuous period shall continue in tandem with and in the same manner as the continuous period of institutionalization in accordance with Section 50033.5 of ACWDL 90-01. This reduces difficulties for individuals who frequently transition on and off HCBS, or who go in and out of medical

institutions or nursing facilities. The HCBS spouse, community spouse, beneficiary representative, administrator, or care coordinator need only confirm continued HCBS participation at annual renewal, just as an institutionalized spouse would confirm continued institutionalization on their renewal forms, as long as the period of HCBS participation or institutionalization continues. The continuous period ends when the HCBS spouse or institutionalized spouse does not receive HCBS or inpatient care in a medical institution or nursing facility for a full calendar month. There is no need for additional verification of level of care, or of the CSRA after the first month of eligibility under the spousal impoverishment provisions, in accordance with ACWDL 90-01. At the end of the CSRA transfer period, CEWs should verify that the HCBS spouse has no more than \$2,000 of nonexempt property remaining in his or her name.

Once determined eligible using the spousal impoverishment provisions, the HCBS spouse remains eligible, aside from a change in circumstance, until the request for HCBS is denied because the individual did not meet the clinical standard for the waiver, or the individual is not identified as a CFCO recipient, and a 10-day notice of adverse action can be provided. Changes in circumstance would include such things as, death, moved out of state, dissolution of the marriage, or no longer in need of the services for a full calendar month ending the continuous period of institutionalization. This will require communication between the IHSS worker or the waiver administrator/care coordinator and the eligibility worker.

5. Institutional Deeming Under The Waivers

When the MN determination results in a SOC, even with the spousal income allocation, the CEW shall be consider the HCBS spouse under the institutional deeming provisions of the waiver. However, if the waiver allows an income allocation to the community spouse, then that would no longer apply under the institutional deeming rules because the community spouse is now receiving the benefit of the spousal income allocation up to the MMMNA initially in the eligibility determination.

Additional Waiver Property Exemptions or Income Deductions Apply Only At Waiver Participant's Start Date

Currently, the only property exemptions permitted beyond the spousal impoverishment provisions include the second modified vehicle available in some waivers and the Assisted Living Waiver's board and care income deduction. After the deduction of the CSRA from the spouses' combined community and separate property, any special waiver exemptions apply. After the deduction of the spousal income allocation, any special waiver deductions apply to the HCBS spouse's net nonexempt income that remains before the SOC result is determined. The CEW should discuss these special

waiver exemptions or deductions, if any, with the waiver administrator/care coordinator and apply them in the month of the waiver start date. If the individual does not have a start date to participate in the waiver and it is possible to establish eligibility under the spousal impoverishment provisions without the special waiver exemptions or deductions, CEWs should do so. When the start date is available, the CEW must redetermine eligibility with the special waiver exemptions and deductions to be effective the month of that start date.

Eligibility Worker and Waiver Administrator/Care Coordinator Collaboration Required for Institutional Deeming

The eligibility worker and waiver administrator/care coordinator, must work together to coordinate this dual process to have participation in the waiver and institutionally deemed Medi-Cal eligibility, with or without a SOC begin concurrently for the same month.

When the waiver administrator/care coordinator refers the HCBS spouse to the County for a Medi-Cal eligibility determination:

1. If the waiver administrator/care coordinator completed the needs assessment with a start date pending Medi-Cal eligibility, the eligibility worker can then complete the eligibility determination following the processes indicated above.
2. If the waiver administrator/care coordinator has not yet completed the needs assessment, the eligibility worker shall stop before completely granting eligibility. The eligibility worker must inform the waiver administrator/care coordinator about the individual's potential eligibility status. Meanwhile, the waiver administrator/care coordinator completes the needs assessment and informs the eligibility worker whether the individual has passed the clinical standard or needs assessment and is ready to participate in the waiver. If both are approvable, the eligibility worker shall establish the eligibility as institutionally deemed effective the first of the month of participation.

6. What Happens If the Community Spouse Applies, Becomes Institutionalized or Requests HCBS

If the community spouse requests Medi-Cal, then the community spouse will need to spend down his/her property to the property limit for one. A spousal income allocation would still be permitted and the couple is permitted to adjust the amount in whatever manner they determine is best in order to preserve the eligibility for each spouse (this

would also be applicable in the case of a spouse who is a recipient of Supplemental Security Income).

Example 3

Example 3: If the community spouse applied and had net nonexempt income that was \$200.00 under the A&D FPL limit and had previously been receiving a higher spousal income allocation from the institutionalized spouse, the couple may decide that it is important to them to ensure the eligibility of the community spouse. They may decide to reduce or stop the spousal income allocation, even though this would increase the net nonexempt income of the institutionalized spouse by the same amount and potentially increase his/her SOC.

Mr. C.'s Income		Mrs. C.'s Income	
\$2000.00	Social Security	\$900.00	Social Security
- \$20.00	Any Income Deduction	- \$120.90	Medicare Premium
- \$120.90	Medicare Premium	\$779.10	Gross Income Minus Other Health Insurance
- \$230.00	Standard Deduction	\$3023.00	MMMNA (2017)
- \$201.90	Spousal Income Allocation	\$779.10	Gross Income Minus Other Health Insurance
\$1427.00	Net Nonexempt Income	+ \$201.90	Mrs. C wants Medi-Cal under the A&D FPL program; therefore, only \$201.90 may be allocated
- \$600.00	MN Maintenance Need Allowance	\$981.00	Net Nonexempt Income
\$827.00	SOC	- \$981.00	A&D FPL Income Limit
		\$0	Excess Income

If the community spouse becomes institutionalized, even though he/she may not request Medi-Cal, he/she no longer meets the definition of a community spouse. Because the federal law has changed the definition of an institutionalized spouse to include an HCBS spouse, in this situation, there would be no community spouse. If both spouses request HCBS services, then the spousal impoverishment provisions would not apply. This couple would have their eligibility determined as living together in the community.

Please Note: This ACWDL does not change or broaden the definition of an institutionalized individual, as contained in ACWDL 90-01. An institutionalized individual is an actual "resident in a nursing facility or medical institution and receiving nursing

facility level of care” (see ACWDL 90-01, Section 50046.4 of that letter). In this ACWDL, HCBS spouses are included in the definition of institutionalized spouse only for receiving the benefit of the spousal impoverishment provisions.

7. Retroactive Implementation:

CFCO – In the past, the terms of the HCBS waivers or programs allowed spousal impoverishment provisions. Since CFCO did not have spousal impoverishment provisions applied at its implementation, retroactive eligibility determinations are required. CEWs shall utilize the spousal impoverishment provisions for HCBS spouses who requested IHSS and:

- Became CFCO participants on or after January 1, 2014, or
- Provide the Doctor’s Verification identifying them as likely to require nursing facility level of care for at least 30 consecutive days in the absence of HCBS beginning with a date that is on or after January 1, 2014.

For retroactive determinations, CEWs need to review eligibility of HCBS spouses who are, or were in CFCO aid code 2K with a SOC on or after January 1, 2014. A doctor’s letter is not required. The spousal impoverishment provisions shall apply back to the month in which the HCBS spouse became a 2K CFCO participant. Counties must immediately begin working with their IHSS staff and/or their Statewide Automated Welfare Systems to identify HCBS spouses in aid code 2K anytime on or after January 1, 2014.

Denied or Discontinued Individuals - CEWs must also complete retroactive eligibility determinations for married individuals who requested HCBS but were denied Medi-Cal or discontinued in accordance with the process above. This may have occurred upon discharge from a medical institution or nursing facility due to excess property at the time the individual requested HCBS participation. In these cases, the form from the doctor is required to establish when the individual required nursing facility level of care for 30 consecutive days at the time of the individual’s request for HCBS back to January 1, 2014.

The CEWs shall rescind any denials or discontinuances of eligibility due to excess property and retroactively adjust any SOCs as far back as January 1, 2014 whenever an the individual would have been an eligible HCBS spouse and:

- CEWs become aware of a cases, described above,
- at annual redetermination,
- when a fair hearing is requested, or

- when an individual requests a retroactive redetermination.

CEWs shall issue new NOAs and work with clients to obtain provider reimbursements by issuing the “Share-of-Cost Medi-Cal Provider Letter” (MC 1054) and “Eligibility Letter of Authorization” (MC 180) (otherwise known as the “More Than One-Year Letter”) as appropriate. CEWs shall also communicate and coordinate with County IHSS staff to procure reimbursement of SOCs paid for in-home care for the HCBS spouse. The County shall utilize *Conlan v. Bontá* and *Conlan v. Shewry* processes for both Medi-Cal and IHSS for reimbursements as necessary in accordance with ACWDL 07-01.

Individuals On Waiting Lists Prior to this ACWDL – DHCS in partnership with the County Welfare Directors Association, counties, and stakeholders will establish a plan to outreach and process retro eligibility for married individuals who were placed on a waiver waiting list after January 1, 2014 and prior to the release of this ACWDL. DHCS will issue further guidance on the processing of these cases. If a county becomes aware of a case, then the county must ensure retroactive eligibility determinations are completed for the HCBS spouses in accordance with this ACWDL.

The Statewide Automated Welfare Systems shall make all changes necessary to implement these policy changes in their next available release.
If you have questions about this letter, please contact one of the following staff by phone or email:

Name	Phone Number	Email Address
Sharyl Shanen-Raya	(916) 552-9449	Sharyl.Shanen-Raya@dhcs.ca.gov
Leanna Pierson	(916) 327-0408	Leanna.Pierson@dhcs.ca.gov
Tammy Kaylor	(916) 327-0406	Tammy.Kaylor@dhcs.ca.gov

Original Signed By Robert Sugawara for

Sandra Williams, Chief
Medi-Cal Eligibility Division

Enclosures

(COUNTY LETTERHEAD)

(DATE)

PATIENT'S INFORMATION (County Completes This Section)	
PATIENT NAME:	PATIENT DATE OF BIRTH:
CLIENT INDEX NUMBER (CIN):	

Dear Dr. _____

Please complete and return the statement below by _____ regarding your patient listed above so that we can determine his/her eligibility for Medi-Cal. Please use the postage paid pre-addressed envelope. You may also return it by fax or email as indicated below. Your patient has given authorization to release this information to us. Please see attached patient authorization.

County Worker Signature: _____ Date: _____

County Worker Printed Name: _____

Phone Number: _____ Fax Number: _____

County Worker Email: _____

Doctor's Verification for Home and Community Based Services Under Spousal Impoverishment Provisions

DOCTOR'S INFORMATION	
DOCTOR'S PRINTED NAME:	DATE:
TELEPHONE:	EMAIL:

Based on my examination, my patient, _____, will likely require nursing facility level of care for at least 30 consecutive days unless he/she receives in-home care and support services that will permit him/her to reside safely at home. My patient first began needing these services at a nursing facility level of care on _____, and has continued to need these services since that date.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the information contained in this Doctor's Verification is true and correct.
DOCTOR'S SIGNATURE:

(COUNTY LETTERHEAD)

(DATE)

Patient Authorization

I, _____

authorize doctor _____

to release the medical information on this form to _____ County for the purpose of establishing my eligibility for Medi-Cal.

- I authorize the use or disclosure of my individually identifiable health information as described above for the purpose listed.
- I have the right to withdraw permission for the release of my information. If I sign this authorization to use or disclose information, I can revoke that authorization at any time. The revocation must be made in writing and will not affect information that has already been used or disclosed.
- I have the right to receive a copy of this authorization.
- I am signing this authorization voluntarily and treatment, payment, or my eligibility for benefits under this program may not be possible if I do not sign this authorization.
- I further understand that a person to whom records and information are disclosed pursuant to this authorization may not further use or disclose the medical information unless another authorization is obtained from me or unless such disclosure is specifically required or permitted by law.

SIGNED: _____ DATE: _____

If not signed by the patient who is the subject of this disclosure, specify basis for authority to sign:

- Parent of Minor Guardian Spouse Authorized Representative

Explain relationship to the patient and why the patient is unable to sign:

WITNESS: I know the person signing this form or am satisfied of this person's identity: (Required for "X", illegible, or foreign character signatures)

Witness signature: _____ Date: _____

Street Address: _____ City/Zip Code: _____

This general and special authorization to disclose information has been developed to comply with the provisions regarding disclosure of medical and other information under: The Health Insurance Portability and Accountability Act, Section 262(a), 42 U.S.C., Section 1320d-1320d-8 (45 CFR Part 164); 42 U.S.C., Section 290dd-2 (42 CFR Part 2); 38 U.S.C., Section 7332; 20 U.S.C., Section 1232g (34 CFR Parts 99 and 300); and state law, including Civil Code, Section 56.10(b), Welfare and Institutions Code, Section 10850 and 14100.2 and Civil Code, Sections 1798-1798.78.

Using California's Spousal Impoverishment Rule for Home and Community Based Services

CANHR is a private, nonprofit 501(c)(3) organization dedicated to improving the quality of care and the quality of life for long term care consumers in California.

This fact sheet may be useful to California residents seeking Medi-Cal benefits to cover the cost of in-home caregiving or other services at home. Medi-Cal is California's version of the federal Medicaid program, providing health insurance to low-income or low-asset individuals. In addition to paying for nursing home care, Medi-Cal also covers the cost of in-home caregiving, assistance with household chores, and other "home and community-based services" (HCBS). Unfortunately, many Medi-Cal beneficiaries have difficulty accessing these benefits due to a high monthly Share of Cost;¹ others may be ineligible for Medi-Cal entirely due to excess assets.

If you are interested in obtaining Medi-Cal to assist with in-home care expenses, but are worried that your income or assets may be too high, the "Spousal Impoverishment Protections" described below may help you.

What are the "Spousal Impoverishment Protections"?

The spousal impoverishment protections are Medi-Cal rules designed to prevent the impoverishment of one spouse, when the other spouse enrolls in Medi-Cal payment for nursing home care, or "Home and Community Based Services." This means that certain married individuals can be eligible for Medi-Cal with more generous income and asset limits, enabling them to access services without depleting all of their resources.

Under the spousal impoverishment protections, Medi-Cal allows the spouse who isn't receiving Medi-Cal, (the "well spouse") to retain additional income and assets, without jeopardizing the eligibility for the Medi-Cal spouse. In 2021, the well spouse is permitted to retain a "Community Spouse Resource Allowance" (CSRA) of \$130,380 in countable assets, in addition to the \$2,000 in countable assets the Medi-Cal spouse may retain.

Example: John and Mary have \$50,000 in savings in January 2021. John has Parkinson's Disease and wants Medi-Cal to pay for in-home care through a Home and Community-Based Services program. John can be eligible for Medi-Cal immediately. Under the spousal impoverishment law, Mary can keep all of the \$50,000 since it is below the \$130,380 limit.

In addition to the CSRA, the well spouse is permitted to retain additional income without having to contribute it all to Share of Cost. The well spouse may retain all income in her own name and, if that income is less than \$3,260 (the Minimum Monthly Maintenance Needs Allowance, or MMMNA, for 2021), he/she may receive an allocation from the Medi-Cal spouse's income to reach \$3,260.

Example: John receives a pension of \$2,500 per month. Mary receives a pension of \$500 per month. Since Mary is allowed to retain at least a minimum income of \$3,260 per month, Mary can keep her \$500 and receive an allocation of all \$2,500 per month from John's income, to

¹ A Share of Cost functions like a deductible. It is the amount of money you must pay out of pocket each month towards your healthcare costs, before you start receiving covered services through Medi-Cal.

bring her income up to \$3,000, which is below the threshold of \$3,260. John will have **no Share of Cost**.

What are Home and Community Based Services?

Home and Community Based Services (HCBS), sometimes called “Medi-Cal Waivers,” are programs that offer an alternative to nursing homes. HCBS programs offer a package of services and supports to Medi-Cal beneficiaries who would otherwise require care in a nursing home, but who prefer to remain at home. Some of the benefits offered through HCBS programs include: caregiving (“personal care services”), assistance with chores and meal preparation, protective supervision, in-home nursing care, case management, and home modifications. Availability of HCBS programs varies from county to county, and the services offered through each program vary as well.

HCBS programs in California include:

- Community First Choice Option (CFCO) - *part of the IHSS program*
- *The Multipurpose Senior Services Program (MSSP)*
- *The Home and Community Based Alternatives Waiver (HCBA)*
- *The Assisted Living Waiver (ALW)*
- *Program for All Inclusive Care for the Elderly (PACE)*
- Community Based Adult Services (CBAS)
- Home and Community Based Services for Persons with Developmental Disabilities
- Pediatric Palliative Care
- Self-Directed Services for Persons with Developmental Disabilities

For more information about individual programs visit www.dhcs.ca.gov/services/medi-cal/Pages/Medi-CalWaiversList.aspx

Is In-Home Supportive Services (IHSS) an HCBS Program?

The answer is: it depends on which IHSS program you are enrolled in. IHSS has several different programs. A large percentage of people enrolled in IHSS are enrolled in the Community First Choice Option (CFCO), which is an HCBS program. If you are enrolled in IHSS’ CFCO program, then you are entitled to the spousal impoverishment protections.

IHSS recipients can call the county Medi-Cal office to verify whether they are enrolled in CFCO. Individuals enrolled in CFCO will have a “2k” Aid Code.

All County Letter 14-60 explains the eligibility requirements for the CFCO program: www.cdss.ca.gov/lettersnotices/EntRes/getinfo/acl/2014/14-60.pdf.

Step by Step Instructions: HOW TO APPLY FOR MEDI-CAL TO PAY FOR HCBS AND RECEIVE SPOUSAL IMPOVERISHMENT PROTECTIONS

STEP 1: APPLY FOR MEDI-CAL

To apply for Medi-Cal to pay for HCBS, and to ensure that the spousal impoverishment protections are properly applied to your case, you must complete a Medi-Cal application, and indicate on the application that you are interested in HCBS. On the *Single Streamlined Application*, you would answer “yes” to the

question on Page 4 that asks: “Does this person need help with long term care or home and community based services?”

Because staff at many Medi-Cal offices and HCBS programs may not yet be familiar with the expanded spousal impoverishment protections, you may want to write explicitly on your Medi-Cal application, “Applicant is applying for Medi-Cal using the Home and Community Based Services and spousal impoverishment provisions outlined in ACWDL 17-25.”

You can download the Single Streamlined Application here: www.dhcs.ca.gov/services/medi-cal/eligibility/Documents/2014_CoveredCA_Applications/ENG-CASingleStreamApp.pdf.

STEP 2: DEMONSTRATE YOU MEET THE CLINICAL CRITERIA

Second, you must establish that you meet the clinical eligibility requirements for HCBS, meaning you must demonstrate that you require nursing facility level of care. To do this, you have two options:

- A. Have your doctor complete a *Doctor’s Verification Form*, which the Medi-Cal office should send as soon as you indicate that you are interested in HCBS. (You can also download the Doctor’s Verification Form online at www.dhcs.ca.gov/formsandpubs/forms/Forms/MC604MDV.pdf) After your doctor completes the form, she must send it directly to the county Medi-Cal office.

OR

- B. Contact an HCBS program (i.e., one of the programs listed above) to begin the application process. The HCBS program will complete a needs assessment to determine whether you meet the clinical criteria for nursing home care. Once the needs assessment is complete, the HCBS program staff should communicate directly with your county Medi-Cal office to verify that you meet the clinical criteria for enrollment.

STEP 3: ENROLL IN A HOME AND COMMUNITY-BASED SERVICE PROGRAM

The first step to enroll in an HCBS program is to call the HCBS provider serving your county to initiate an intake process. Each HCBS program has a different intake and application process. Phone numbers for some HCBS providers, by county, can be found below.

1. Multipurpose Senior Services Program (MSSP):
www.aging.ca.gov/ProgramsProviders/MSSP/Contacts/
2. California Community Transitions Project (CCT):
www.dhcs.ca.gov/services/ltc/Documents/CCT_LO_Contact_Info_8-17-17.pdf
3. Program for All Inclusive Care for the Elderly (PACE):
www.canhr.org/factsheets/misc/fs/html/fs_PACE.html (scroll to bottom)

What if I Already have Medi-Cal?

If you are already enrolled in Medi-Cal, and you are **not** currently enrolled in one of the HCBS programs described above, you may contact an HCBS provider to begin the application process. Once you begin the application process for HCBS, and demonstrate you meet the clinical eligibility for HCBS (either by completing the HCBS needs assessment, or by having your doctor complete a verification form), the spousal impoverishment protections should be applied to your Medi-Cal case.

If you are already enrolled in Medi-Cal, and you are also already enrolled in one of the HCBS programs listed above, you are entitled to spousal impoverishment protections retroactive to January 1, 2014. If you believe you are entitled to retroactive spousal impoverishment, please call CANHR at (800) 474-1116 and ask to speak with an advocate.

What if the desired HCBS program has a waitlist?

Spousal impoverishment protections apply to HCBS applicants on waitlists.

Example: John and Mary live at home, and John has Parkinson's Disease. John needs a lot of care but wants to remain at home with Mary for as long as possible. John receives a pension of \$2,500 per month. Mary receives a pension of \$500 per month. They have savings of \$50,000.

John applies to Medi-Cal under the spousal impoverishment protections. He has his doctor submit the Doctor's Verification Form, and then calls the Multipurpose Senior Services Program (MSSP) serving his county to enroll.

Unfortunately, the MSSP program in John's county has a waitlist. Even though John is on the waitlist for MSSP, he is still entitled to Medi-Cal under the spousal impoverishment protections. Once he is enrolled in Medi-Cal, he can use his benefits to receive needed Medi-Cal care, or enroll in additional Home and Community-Based Service programs. For example, he can now use his Medi-Cal benefits to apply for IHSS and receive in-home caregiving, with no Share of Cost.

California Medi-Cal Asset Limit Increasing for Seniors and People with Disabilities

CANHR is a private, nonprofit 501(c)(3) organization dedicated to improving the quality of care and the quality of life for long term care consumers in California.

California will increase the asset limits for certain Medi-Cal programs, and is expected to eventually remove asset limit requirements all together. Beginning July 1, 2022, the state will raise the Medi-Cal asset limit for a single individual to \$130,000, \$195,000 for a couple, and \$65,000 for each additional family member. On January 1, 2024, the state is expected to eliminate the Medi-Cal asset limit completely.

What is the current asset limit?

Medi-Cal is a combined federal and California state program designed to help pay for medical care for public assistance recipients and other low-income persons. Currently, seniors and people with disabilities who apply for Medi-Cal must show that they are beneath the asset limit of \$2,000 for a single individual and \$3,000 for couples. If an individual has more than \$2,000, they will not be eligible. This limit, which has not been updated since 1989, counts money from savings, checking, and any excess cash surrender value of life insurance among other assets.

Are there other changes to Medi-Cal?

Medi-Cal income guidelines and share of cost calculations will remain the same. The rules for exempt and non-exempt assets will also remain the same. For information on exempt and non-exempt resources under Medi-Cal, read CANHR’s Resource Limits fact sheet: http://canhr.org/factsheets/medi-cal_fs/html/fs_medcal_limits.htm.

The asset limit changes only apply to California’s Medi-Cal program. Individuals who receive SSI benefits, or other public benefit support programs, will still need to comply with asset limit rules under those programs.

Medi-Cal Recovery rules will not change. If a beneficiary used certain services under Medi-Cal, it is possible that the State may make a claim against their estate when they die, if the estate is subject to probate under California law. There are simple steps people can take to protect their home, or other assets, from Medi-Cal Recovery. Read CANHR’s guide on Medi-Cal Recovery for additional information:

http://canhr.org/medcal/medcal_recoveryinfo.htm.

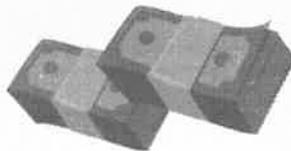
Before July 2022

People who need Medi-Cal can only have \$2,000 or less in cash or other non-exempt assets.



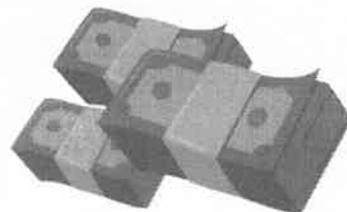
July 1, 2022

People who need Medi-Cal will be allowed up to \$130,000 + \$65,000 per household member.



Jan 1, 2024

People who need Medi-Cal can have unlimited assets.



Will the asset limits change if I am married or have a registered domestic partner?

Family members can be defined as individuals included within the Medi-Cal Family Budget Unit (MFBU). The MFBU is the number of people Medi-Cal includes in your household when determining a person's or family's eligibility and share of cost. Married couples and registered domestic partners may, or may not be included in the same MFBU depending on the type of services they receive under Medi-Cal.

Asset Limit Examples of Couples in the Same MFBU

Jose and Melia live together at home. Both receive Medi-Cal under the Aged and Disabled Program.
 $\$130,000 + \$65,000 = \$195,000$
Their combined asset limit is \$195,000.

Greg and Nancy have Medi-Cal under the Medically Needy program; live at home with a dependent son.
 $\$130,000 + \$65,000 + \$65,000 = \$260,000$
Their combined asset limit is \$260,000.

Marina and Dennis are married and want to apply for Medi-Cal because they each need in home care, and intend to apply for HCBS. Because no spousal impoverishment protections are established, their combined asset limit is \$195,000.

Examples of Couples Under Spousal Impoverishment Provisions

James is considered institutionalized as he is enrolled in a Home and Community-Based Services (HCBS) program. His wife Tara is not on Medi-Cal.

Alana is on Long Term Care Medi-Cal in a nursing home. Her wife Elaine lives at home, and is not on Medi-Cal.

There must be a community spouse for spousal impoverishment protections to be established, meaning at least one spouse must not be on Medi-Cal, and the other, deemed institutionalized either through placement in a skilled nursing facility, or through eligibility for an HCBS program. Once spousal impoverishment is applied, couples are separated into their own MFBUs, giving them separate asset limits. The community spouse retains up to the Community Spouse Resource Allowance (CSRA), and the Medi-Cal spouse retains up to the asset limit. Both couples above have similar asset limits. The Medi-Cal beneficiary may keep up to \$130,000, and the community spouse up to \$137,400 under the CSRA.¹

Examples of Couples Both Receiving Medi-Cal in Separate MFBUs

Crystal has been on Medi-Cal for 2 years, and is considered institutionalized because she is receiving Home and Community-Based Services. Her husband Sam later applies for Medi-Cal. Each are considered in their own MFBU, and each can keep separate assets up to \$130,000.

Carlos and Lisa are both on Medi-Cal living in a nursing home. They are considered to be in their own separate MFBU. Each will have their own asset limit of \$130,000.

If the community spouse applies for Medi-Cal, only the income protections under spousal impoverishment will continue to apply, meaning income allocation is still allowed. However, the community spouse will no longer be able to keep the CSRA and will be subject to the asset limit for a single person. If the community spouse also requests HCBS, there is no longer a community spouse, and income allocation will no longer be allowed. The spouses remain in separate MFBUs.² Once a Medi-Cal beneficiary transitions to Long Term Care Medi-Cal, they are considered to be in their own MFBU.³

¹ ACWDL 18-19, ACWDL 21-34

² ACWDL 18-19, p. 13, question 6

³ CCR Tit. 22, § 50377, MEM § 50373(F)

Will there still be transfer penalties after July 1, 2022?

Penalties for transferring or gifting away non-exempt assets will still only apply if a Medi-Cal beneficiary or applicant enters a nursing home. The transfer rules apply only to non-exempt (countable) assets. For example, there will be no transfer penalties for someone who has \$125,000, and transfers \$100,000, which is under the new \$130,000 asset limit. Transfers of assets over the new asset limit may create a transfer penalty, depending on the amount.

David has \$150,000, and transfers \$20,000 to his son in August, 2022. He applies for Medi-Cal in September of 2022. Because David is in a nursing home, and the amount transferred is over his asset limit of \$130,000, a transfer period will be applied. The amount transferred is divided by the 2022 APPR (\$10,933), and David will have a period of ineligibility of 1.8 months. Since California does not count partial months, he will be ineligible for one month, running from the month of transfer - August, 2022. David will not be eligible for August, but he will be eligible as of September 1, 2022.

Melia has \$150,000 and transfers \$100,000 to her son Tristan in August, 2022. Because she is over the exempt asset limit at the time of transfer, only the portion that put her above the asset limit is assessed a penalty. In this case, Melia's non-exempt transfer amount is \$20,000 (the amount by which she was over the asset limit). Similar to the previous example, she will be ineligible for long term care coverage for one month.

Please note that a transfer penalty only applies to those subject to the 30-month look back period when they are entering a nursing home. A transfer penalty does not apply when the person is in the community, but they should take into consideration how and when transfers are made, in the event they enter a nursing home in the future.

Relevant Resources

ACWDL 21-31: Increases to the Asset Limits for Non-Modified Adjusted Gross Income Medi-Cal Programs

ACWDL 21-34: Regarding Spousal Impoverishment Caps, includes changes to the Asset Limit and Spousal Impoverishment evaluations

MEDIL 22-02: Older Adult Expansion and Asset Limit Changes Global Outreach Language

DHCS Asset Limits Webpage: <https://www.dhcs.ca.gov/services/medi-cal/eligibility/Pages/Asset-Limit-Changes-for-Non-MAGI-Medi-Cal.aspx>

Special Alert for 2022

Currently, in order to be eligible for Medi-Cal, applicants must show that they are beneath the resource limit of \$2,000 for a single individual and \$3,000 for couples. Under a law enacted in 2021, California will phase in an elimination of the Medi-Cal asset test for all non-MAGI Medi-Cal programs over the next two and a half years. It is expected that around July 1, 2022, the state will raise the Medi-Cal asset limit for an individual to \$130,000, \$195,000 for a couple, and \$65,000 for each additional family member. No sooner than January 1, 2024, the state is expected to eliminate the Medi-Cal asset test completely. This page will be updated as implementation of the new law progresses.

- **Medi-Cal vs. Medicare**
- **Medi-Cal Eligibility**
- **Share of Cost**
- **What Does Medi-Cal Cover?**
- **Resource Limitations (Property/Assets)**
- **The Home**
- **Other Real Property/Business Property**
- **Spending Down/Gifting Assets**
- **Spousal Impoverishment Laws**
- **Ethical Considerations**

A. Medi-Cal vs. Medicare

1. Medicare

Medicare is a federal insurance program paid out of Social Security deductions. All persons over 65 or older who have made Social Security contributions are entitled to the benefits, as well as persons under 65 with disabilities who have been eligible for Social Security disability benefits for at least two years, and persons of any age with end-stage renal disease. Medicare has several parts including Hospital Insurance (Part A) and Medical Insurance (Part B). Those persons eligible for Social Security or Railroad Retirement benefits as workers, dependents or survivors, are eligible for Part A, Hospital Insurance, when they turn 65. If a person has not worked long enough to be covered for benefits, s/he may enroll in Part A and pay a monthly premium. If Medicare Hospital Insurance is purchased, that person must also enroll in Part B, Medical Insurance.

Participants in the Medicare program are liable for co-payments and deductibles as well as for monthly payments for Part B coverage. Medicare is not based on financial need. Anyone who meets the age, disability and/or coverage requirements is eligible.

Medicare does not pay for all medical expenses, and usually must be supplemented with private insurance ("medigap") or consumers can enroll in an HMO plan that contracts with Medicare. After 3 days of prior hospitalization, Medicare will pay up to 100% for the first 20 days of skilled nursing care. For the 21-100 days, the patient will pay a co-payment. The premiums and copayments are increased every year. There will be no Medicare coverage for nursing home care beyond 100 days in any single benefit period.

It should be noted that Medicare only pays for "skilled nursing care," does not pay for "custodial care" and the average stay in a nursing home under Medicare is usually less than 24 days. Thus, few can look to Medicare to pay for any substantial nursing home costs.

2. Medi-Cal

Medi-Cal is a combined federal and California State program designed to help pay for medical care for public assistance recipients and other low-income persons. Although Medi-Cal recipients may receive Medicare, the Medi-Cal program is not related to the Medicare program. Medi-Cal is a need-based program and is funded jointly with state and federal Medicaid funds.

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B. Medi-Cal Eligibility

SSI and other categorically-related recipients are automatically eligible. Others, whose income would make them ineligible for public benefits, may also qualify as "medically needy" if their income and resources are within the Medi-Cal limits, (current resource limit is \$2,000 for a single individual). This includes:

- Low-income persons who are 65 or over, blind or disabled may qualify for the Aged and Disabled Federal Poverty Level Program
- Low-income persons with dependent children
- Children under 21
- Pregnant women
- Medically indigent adults in skilled nursing or intermediate care or those who qualify for Medi-Cal funded home and community based waiver programs.

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C. Share of Cost

The State sets a "maintenance need standard". Since January 1, 1990 the maintenance need standard for a single elderly/disabled person in the community has been \$600 monthly; the Long Term Care maintenance need level (i.e., personal needs allowance when someone is in a nursing home) remains at \$35 monthly for each person.

Individuals whose net monthly income is higher than the state payment rate may qualify for the program if they pay or agree to pay a portion of their income on monthly medical costs. This is called the share of cost. Individuals eligible with a share of cost must pay or take responsibility for a portion of their medical bills each month before they receive coverage. Medi-Cal then pays the remainder, provided the Medi-Cal program covers the services. This works much like an insurance deductible. The amount of the share of cost is equal to the difference between the "maintenance need standard" and the individual's net non-exempt monthly income.

Important: All Medi-Cal beneficiaries who have a Medi-Cal share-of-cost of more than \$500 will no longer have their Medicare Part B premium covered by Medi-Cal, it will automatically be deducted from the beneficiary's Social Security check. This does not apply to Medi-Cal eligible nursing home residents as their Part B premium will continue to be covered by Medi-Cal.

Example #1 Community Based Medi-Cal

Seth is an aged (65) person who lives alone at home and receives \$1,600/ month in pension and Social Security benefits. His resources meet the standard set by the state, i.e., \$2,000 or less in liquid assets, but his income is too high.

\$1,600 = gross unearned income
 -20 = any income deduction
 1,580 = net non-exempt income
 -600 = Maintenance Need Level for 1 single person
 \$980 = Seth's share of cost

Note: If Seth's net non-exempt income were \$1,482 or less, he would be eligible for Medi-Cal at no share of cost under the Aged and Disabled Program (visit: http://canhr.org/factsheets/medi-cal_fs/PDFs/FS_Community-Based-Medi-Cal-Programs.pdf).

Example #2: Medi-Cal In a Nursing Home

Seth enters a skilled nursing facility. His income is still \$1,600/month.

\$1,600 = Gross unearned income
 -35 = Maintenance Need for Long Term Care person
 \$1,565 = Seth's share of cost to be paid each month to the nursing home or for medical costs not covered by Medi-Cal.

* The remaining \$35 is Seth's Personal Needs Allowance.

Other Deductions from the Share of Cost:

In addition to the "any income deduction" and the monthly maintenance needs allowance, any monthly medical premiums can also be deducted before the share of cost is determined such as your Medicare Part B premium. Other deductions can also be made, depending on the circumstances.

For example, under a legal settlement, *Hunt v. Kizer*, recipients may use old, unpaid medical bills for which the beneficiary is still legally responsible to reduce the monthly Medi-Cal share of cost. Some original documentation showing the billing statement is an outstanding balance should be provided to the County eligibility worker. The Share of Cost will be adjusted to reflect the cost of the outstanding balance, which could, for example, mean no share of cost until the old, unpaid bills are paid off. This is not automatic and should be discussed with the eligibility worker upon application for Medi-Cal.

Under the *Johnson v. Rank* settlement, recipients may use their share of cost to pay for medically necessary supplies, equipment or services not covered under the Medi-Cal program. A current physician's prescription is necessary and must be put in the recipient's record at the facility. This prescription must be a part of the physician's plan of care. After a copy of the prescription and the bill is presented to the facility, the facility will deduct the cost from that month's share of cost and bill the resident for the remaining share of cost.

D. What Does Medi-Cal Cover?

Medi-Cal pays for health care services which meet the definition of "medically necessary." Services include: some prescriptions (although the Medicare Part D program now covers most prescriptions), physician visits, adult day health service, some dental care, ambulance services, some home health, X-ray and laboratory costs, orthopedic devices, eyeglasses, hearing aids, some medical equipment, etc.

All covered services, or the remaining costs over the share of cost of nursing home care, will be covered if the individual meets income/resource requirements. Some services such as home health care, durable medical equipment, and some drugs require prior authorization.

Nursing home care is covered if there is prior authorization from the physician/health care provider. Residents are admitted on a doctor's order and their stay must be "medically necessary". Residents are allowed to keep \$35 of their income as a personal needs allowance. Residents with no income may apply for the Supplemental Security Income/State Supplemental Program (SSI/SSP), and, if eligible, they will receive a payment of \$50 as a personal needs allowance.

If the individual qualifies for Medi-Cal, s/he does not need private "medigap" or HMO insurance to pay for costs, though if such insurance is carried, the premiums are deducted from income when computing the share of cost, and therefore costs the beneficiary nothing. **If the HMO coverage includes drug benefits, maintaining the HMO coverage may become more important, as the beneficiary will continue to receive drug benefits from the HMO, which may be more comprehensive than the Medicare Part D coverage.**

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E. Resource Limitations (Property/Assets)

To qualify for Medi-Cal the recipient must demonstrate that s/he has limited resources available. Since January 1, 1989, the property limit for one person has been set at \$2,000.

Medi-Cal classifies property as "exempt" and "non-exempt." Exempt property is not counted in determining eligibility; non-exempt property is counted. If the applicant has more than \$2,000 in non-exempt property, he/she will not be eligible, unless the property is spent down for adequate consideration before the end of the application month.

The following property is generally exempt and, therefore, not counted in determining eligibility:

- **The Home:** totally excluded, if it is the principal residence. Includes mobile home, houseboat, or an entire multi-unit dwelling as long as any portion serves as the principal residence of the applicant, and buildings surrounding, contiguous to, or appertaining to the residence. The property remains exempt if a person in a nursing home or the person's representative expresses an intent to return home on the Medi-Cal Application and Statement of Facts, or if an "exempt" individual resides in the home, such as a spouse, a minor, blind or disabled child (of any age) or a sibling or son or daughter who has lived in the home continuously for at least one year before the applicant entered a nursing home. Note that when the home is exempt, it can be transferred without penalty and without affecting the Medi-Cal eligibility.
- **Other Real Property:** can be exempt if the net market value of the property (assessed value or fair market value, whichever is less – minus any encumbrances such as mortgages, loans, etc.) is \$6,000 or less and the beneficiary is "utilizing" the property, i.e., receiving yearly income of at least 6% of the net market value. Property used as a business can also be exempt if it meets the standards under the program, i.e., it is actually used as a business, reported to the IRS as such, etc. – see below for details on other real property and business property.
- **Household Goods and Personal Effects:** totally exempt.
- **Jewelry:** for a single person, wedding, engagement rings and heirlooms are totally exempt and other items of jewelry with a total net market value of \$100 or less are exempt; for spouses, when one spouse is in a nursing home, there is no limit on exempt jewelry for determining institutionalized spouse's eligibility.
- **Cars/motor Vehicles:** one vehicle used for transportation is totally exempt.
- **Whole Life Insurance:** policies with a total face value of \$1,500 or less. If the total face value of the policy or policies exceeds \$1,500, then the cash surrender value of the policies is counted toward the \$2,000 cash reserve. If the cash surrender value exceeds the \$2,000 cash reserve, the applicant will not be eligible unless, he/she reduces the value of the policy.
- **Term Life Insurance:** totally excluded.

- **Burial Plots:** totally excluded.
- **Prepaid irrevocable burial plan of any amount and \$1,500 in designated burial funds:** There is no limit on the amount of the irrevocable burial fund, but the \$1,500 in designated funds must be kept separate from all other accounts and designated as a burial account. Accumulated interest on burial funds is also exempt.
- **IRAs and work-related pensions:**
 - In applicant's/beneficiary's name: The balance of the IRA or the pension is considered unavailable if applicant/beneficiary is receiving periodic payments of interest and principal.
 - In spouse's name: The balance of the IRA or Pension fund is totally exempt from consideration and is not included in the community spouse resource allowance (CSRA).
- **Non-work-related annuities:**
 - Annuities purchased prior to 8/11/93: Balance is considered unavailable if applicant/beneficiary is receiving periodic payments (of any amount) of interest and principal.
 - Annuities purchased between 8/11/93 and 3/1/96: Annuities purchased between 8/11/93 (the date the federal law changed) and 3/1/96 (the date California law changed) that cannot be restructured to meet the new requirements will continue to be treated under the old rules (see above). Written verification from the company or agent who issued or sold the annuity must be obtained stating that the annuity cannot be restructured.
 - Annuities purchased on or after 3/1/96 by the applicant or the applicant's spouse: the individual and/or spouse must take steps to receive periodic payments of interest and principal; payments must be scheduled to exhaust the balance of the annuity at or before the end of the annuitant's life expectancy. Annuities structured to exceed the life expectancy will result in denial or termination of benefits due to transfer of non-exempt assets.
 - **Note: Annuities purchased by the applicant/beneficiary on or after 9/1/04 will be subject to Medi-Cal recovery when the beneficiary dies.**
 - **Cash reserve:** Applicant/beneficiary may retain up to \$2,000 in liquid assets, e.g., savings, checking, excess cash surrender value of life insurance.
- **Community Spouse Resource Allowance (CSRA):** Community (at home) spouse may retain up to \$130,380 in liquid assets, not including the home and other exempt assets, such as IRAs and retirement funds.
- Any assets above the property reserve limit of \$2,000 or \$130,380 in the case of a community spouse, or any asset that is not exempt will be counted by Medi-Cal in determining eligibility.

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F. The Home

The home of a Medi-Cal beneficiary continues to be exempt from consideration as a resource under a wide variety of circumstances. These are spelled out in detail in W&I Code §14006(b). Under these provisions, a home will continue to be considered an exempt principal residence if:

1. During any absence, including nursing home stays, the individual intends to return to the home and states so in writing. If the beneficiary is incapacitated, a family member or someone acting on his/her behalf may so state this intent.
2. The individual's spouse, child under the age of 21, or dependent relative continues to reside in the home.
3. The residence is inhabited by the recipient's sibling, who has an equity interest in the home, or by a son or daughter who has resided there continuously for at least one year prior to the date the recipient entered the nursing home.
4. There are legal obstacles preventing the sale and the applicant/beneficiary provides evidence of attempts to overcome such obstacles.
5. The home is a multiple dwelling unit, one unit of which is occupied by the applicant.

Just because the home is exempt for eligibility purposes, does not mean that the home is immune from an estate claim after the beneficiary dies.

(See CANHR's **consumer booklet on Medi-Cal Recovery**, for more information on the Medi-Cal Recovery Program)

Intent to Return

The principal residence is exempt based upon a person's subjective intent to return, even though he/she may never have the ability to return to that residence. If the applicant is unable to complete the application, his/her representative may indicate that intent. The eligibility worker may not restrict, in any way, the individual or his/her representative in the process of indicating that intent. As long as the applicant or beneficiary declares an intention to return home on the Medi-Cal application (i.e., checks the "yes" box), the house will be treated as a principal residence exempt from being counted as a resource by Medi-Cal. The Medi-Cal application and/ or supplemental forms may use the language "hope" or "expect" to return home, rather than "intend."

Unless the applicant is requesting an income deduction to maintain the home for the return within six months pursuant to Title 22, Section 50605, the county may not require any verification of the individual's ability to actually return home. If the applicant or his/her representative incorrectly states that there is no intent to return and later makes a correction, the county must accept that correction. (See ACWDL Nos. 95-48 and 00-11)

Intent to return home will also keep the home exempt if the community spouse dies first, but only for the life of the institutionalized spouse. To avoid a Medi-Cal recovery claim in cases where the community spouse dies first, the institutionalized spouse should do estate planning to avoid probate (i.e. a living trust).

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G. Other Real Property/Business Property

Real property other than the principal residence can be exempt if the net market value of the property (minus encumbrances) is \$6,000 or less and if the beneficiary is "utilizing" the property, i.e., receiving yearly income of at least 6% of the net market value. The net market value is the assessed value (which is often lower) or the appraised value, minus encumbrances, whichever is less.

Utilization Requirements

Other real property must meet utilization requirements in order to be exempt. This means that the property must generate at least 6% a year of the net market value. If the property does not generate income, then the full net market value of the property will be counted. (22 CCR § 50416(b),(j))

Good Cause

If the applicant has made bona fide efforts to meet the utilization requirements but is unable to do so, the utilization period can be extended indefinitely and the applicant can be eligible. For example, if the applicant has made bona fide efforts to sell the property, but is unable to do so, the property won't be included in the countable resources. Note that the regulations include specific criteria for what constitutes "good cause" and "bona fide" efforts to sell. (§§50416, 50417)

Market Value

The market value of property is very important, since it is used to determine the net market value. The market value of real property in California is one of the following, whichever is less: (22 CCR §50412)

- the assessed value determined under the most recent property tax assessment or
- the appraised value by a qualified real estate appraiser

The market value of real property outside of California is one of the following, whichever is less:

- the value established by the assessment method used where the property is located or
- the appraised value by qualified real estate appraiser.

Business Property

Property used in whole or in part as a business or as a means of self-support is exempt. Rental real property, however, will not be exempt unless the property is clearly held as a business. If the applicant can demonstrate with tax returns or other evidence that the property is clearly a "business," not just investment property, it can be exempt. (22 CCR §50485(d), ACWDL 91-28)

Income from Real Property

If a Medi-Cal beneficiary is renting real property, including the principal residence, the "net" income from the property is used in determining what will be counted toward the share of cost. Certain expenses are deducted from the gross rental income to determine the net income. These include taxes and assessments, interest payments (not principal), insurance, utilities and upkeep and repairs.

Upkeep and repairs are the greater of either: the actual amount expended for upkeep and repairs during the month or 15% of the gross monthly rental, plus \$4.17 per month. (22 CCR §50508). Note that other calculations are used for income from rental of rooms, rental of unit(s) in a multiple dwelling unit or other dwellings on the property. (22 CCR §50508)

Maintaining the Home for Return of LTC Resident

In addition to the \$35 for personal and incidental needs, a person in long term care can retain an amount of income for upkeep of a home if all of the following conditions are met:

1. The spouse or family of the LTC resident is not living in the home.
2. The home, whether rented or owned by the LTC patient, is actually being maintained for the return of the LTC resident.
3. There is a verified medical statement that the person will return home within six months.

The amount allowed for upkeep of the home depends on the living circumstances of the LTC resident. (See 22 CCR §50605(c))

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H. Spending Down/Gifting Assets

Resources must be reduced to the property limit for at least one day during the month in which a person is establishing eligibility. Giving away resources may render a person ineligible for a period of time running from the date of the transfer.

Penalties for transferring or gifting away non-exempt assets only apply if a Medi-Cal beneficiary or applicant enters a nursing home. If an applicant lives at home and gifts away property, there are no transfer penalties. The transfer rules are triggered when a person enters a nursing home and applies for Medi-Cal. The Medi-Cal application will ask if the applicant transferred any assets within the 30 months prior to the date of the application. The transfer rules apply only to non-exempt (countable) assets.

A transfer of non-exempt assets can result in a period of ineligibility which is the lesser of 30 months or the value of the transferred assets divided by the average private pay rate (APPR) at the time of application. The current APPR is \$10,184 (effective January 1, 2021).

Example:

Mr. D transfers \$15,000 to his son in June, 2021, and applies for Medi-Cal in July of 2021. Because Mr. D is in a nursing home, a transfer period will be triggered. The amount transferred (\$15,000) is divided by the 2021 APPR (\$10,184), and Mr. D will be subject to a period of ineligibility of 1.5 months. Since California does not count partial months, he will be ineligible for one month, running from the month of transfer (June, 2021). Thus, Mr. D will not be eligible for June of 2021, but he will be eligible as of July 1, 2021.

Example:

If Mr. D transfers \$9,900 to his son and \$10,900 to his daughter in June, 2021, each transfer is calculated separately. Each amount transferred (\$10,900) is divided by the APPR of \$10,184, and Mr. D will be ineligible for June, 2021 only.

Note: Assets in any amount can be transferred at any time to a blind or disabled child of any age. The child's disability must meet the requirements under the Social Security Act, i.e., the child must meet the disability requirements for SSA or SSI disability benefits. Transfers of a home or any asset to a blind or disabled child will not affect the Medi-Cal beneficiary or applicant's eligibility. However, a transfer of liquid assets may impact the benefits of a child who is receiving SSI benefits, in which case an SSI specialist should be consulted.

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I. Spousal Impoverishment Laws

California law allows the community spouse to retain a certain amount of otherwise countable resources available to the couple at the time of application. This is called Community Spouse Resource Allowance (CSRA) and it increases every year according to the Consumer Price Index. The current (2021) CSRA is \$130,380. [<https://www.dhcs.ca.gov/services/medi-cal/eligibility/letters/Documents/20-27.pdf>]

Separate property will be counted in the total resources and subjected to the \$130,380 limit. However, only non-exempt resources are counted in the spouses' combined, countable resources at the time of application for Medi-Cal. Thus, IRA's in the community spouse's name, household goods, personal effects, a car, the house, jewelry, etc. are all totally excluded, regardless of value, and the at home spouse can retain these, as well as the CSRA of \$130,380.

Resources acquired after the spouse is institutionalized and before he/she goes on Medi-Cal are not protected and will be counted at the time of application. However, once the spouse is eligible for Medi-Cal, any resources acquired after eligibility by the community spouse are protected and will not affect the institutionalized spouse's eligibility. For example, if the community spouse inherited \$100,000 after the nursing home spouse was on Medi-Cal, she could keep this without affecting the other spouse's eligibility. Resources held prior to the spouse's institutionalization may be transferred under certain conditions.

Spending Down: A spouse can spend down resources on anything, whether or not it is for his or her own benefit. Mortgage notes on property held in the names of both spouses could be paid in full by the institutionalized spouse without a period of ineligibility for transferring assets for less than fair market value.

Income: California law allows the community spouse to retain a maximum monthly maintenance needs allowance (MMMNA). The current (2020) MMMNA is \$3,260. [<https://www.dhcs.ca.gov/services/medi-cal/eligibility/letters/Documents/20-27.pdf>] This amount is adjusted annually by a cost of living increase.

Under the "name on the instrument rule," the community spouse may retain any income received in his/ her name alone, even if this exceeds the MMMNA. For example, if the community spouse's monthly income (in his or her name alone) is \$5,000, the community spouse may keep it all.

If the community spouse's monthly income is less than the MMMNA of \$3,260, he/she may receive an allocation from the institutionalized spouse's income until he/she reaches the \$3,260 MMMNA; file for a fair hearing to increase the CSRA to generate additional income; and/or obtain a court order to obtain additional income-generating resources. With current miniscule interest rates, it is relatively easy for a community spouse to retain assets above the CSRA, if his/her income is low.

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J. Family Allocation

Federal and state laws allow for a family allocation to be offset from the income of an institutionalized spouse for the support of a dependent "family member" when there is a community spouse at home. Family members include only natural or adopted minors or dependent children, or dependent parents or siblings of the institutionalized or community spouse who are residing with the community spouse. In order for the children to receive the maximum family member allocation, there must be a community spouse. Grandparents who have legal guardianship over grandchildren have been hit hard by this onerous rule, and foster children are not considered "children" or even "family members" for the purposes of long term care Medi-Cal.

The family member base allocation amount, which is used to determine how much income the long-term care beneficiary may allocate to family members, is increased annually. The current amount, \$2,178 is effective July 1, 2021 through June 30, 2022. Of course, the allocation is only possible if the institutionalized spouse has sufficient income left over after the spousal allocation to the community spouse.

The family allocation is calculated separately for each family member. Any income is deducted from the maximum allocation, and the remainder is divided by 3 to arrive at the total maximum allocation. If the child or children receive no income, the maximum family allocation amount would be \$704.67 for each child.

(maximum family allocation)

\$2,178

-300(Social Security income received by child)

\$1,878 divided by 3 = \$626 maximum family allocation for each child

(source: ACWDL 20-13; Form MC 176 W, section IX)

K. Ethical Considerations

Property reduction requirements can usually be easily handled and documented, and it can be tempting for many attorneys to advise clients to reduce excess property on the purchase of exempt assets prior to a nursing home entry. It may be difficult however, to find a nursing home placement for a person who has spent all of his/her resources or who has few resources.

Although "duration of stay" requirements, i.e., requiring private pay for a set period of time, are illegal, nursing homes can and do review potential patients' finances prior to admission. In most cases, they are unwilling to accept Medi-Cal eligible residents upon admission. The longer a person can pay privately, the more options there are available regarding nursing home placement.

In addition, a private pay patient may receive a higher level of service, e.g., a private room, although relatives of nursing home residents are now permitted to supplement the Medi-Cal rate to pay for non-covered services such as a private room, television or phone services. These factors should be considered when advising clients how to reduce excess resources. Once a patient has been admitted to a Medi-Cal certified facility, s/he cannot be transferred or evicted simply because of a change from private pay to Medi-Cal payment status. Thus, unless a person can pay privately for an indefinite period of time, s/he should be advised to seek out a Medi-Cal certified nursing home.

L. Medi-Cal Recovery

Medi-Cal applicants, beneficiaries and their spouses should always be aware of the Medi-Cal Recovery rules and plan ahead if they want to avoid recovery on their home or other assets. For detailed information on the Medi-Cal Recovery program, see CANHR's consumer booklet on [Medi-Cal Recovery](#).

For more detailed information about Long Term Care Medi-Cal, order a copy of CANHR's "If You Think You Need A Nursing Home: A Consumer's Guide to Financial Considerations and Medi-Cal Eligibility."

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**JURY SELECTION: ESSENTIAL STRATEGIES
AND TACTICS**

FRIDAY, SEPTEMBER 9
10:45AM - 11:45AM

PRESENTED BY
STEPHEN DUFFY
TRIAL BEHAVIOR CONSULTING

STEPHEN M. DUFFY

sduffy@trialbehavior.com

Office: (310) 826-2005

Cell: (949) 202-6913

RELEVANT EXPERIENCE

Trial Behavior Consulting

Los Angeles, CA

Vice President & Senior Consultant

2010 - Present

- Manage day-to-day operations of the Los Angeles office.
- Select juries throughout the country in high stakes litigation.
- Oversee all forms of juror research, including mock trials, focus groups, and shadow juries.
- Consult on trial strategy and themes.
- Conduct juror (post trial) and surrogate juror (shadow jury) interviews.
- Prepare witnesses for deposition and trial.
- Analyze quantitative data in serial litigation to identify optimal trial strategies.
- Draft and analyze change of venue surveys.

Jury Impact/M4 Strategies

Costa Mesa, CA

Senior Analyst/Account Executive

2008 - 2010

- Conducted numerous types of qualitative research; primary fields included civil litigation, political campaigns, and consumer research.
- Designed, implemented, and analyzed public opinion surveys at the local, regional, and national levels.
- Conducted quantitative analyses of mock juror data from dozens of medical malpractice research studies to inform trial strategy.
- Provided public affairs and crisis communications expertise, including development of messaging strategies.

EDUCATION

California State University, Fullerton

Fullerton, CA

Master of Arts, Political Science

2007 - 2008

University of California, Santa Barbara

Santa Barbara, CA

Bachelor of Arts, Political Science

1998 - 2002

STEPHEN M. DUFFY

sduffy@trialbehavior.com

Office: (310) 826-2005

Cell: (949) 202-6913

ACADEMIC HONORS, AWARDS, AND POSITIONS

2008 “Outstanding Graduate Student,” CSUF Department of Political Science.

Member, The Honor Society of Phi Kappa Phi.

Graduate Advisor, Cal State DC Program, 2007-08.

SELECTED PRESENTATIONS, PUBLICATIONS, AND PODCASTS

Deliberations Podcast with Chelsea Cox. August 30 2018

Discussion of the Stanley Liggins trial with Scott Reeder on the August 29th, 2018 episode of the NPR podcast Suspect Convictions.

Tips for Avoiding the Mini-Opening Trap; American Bar Association Section of Litigation, Trial Practice Summer 2018 Newsletter; Published July 31, 2018.

Panel Discussion: Minding Your Y's ad Z's: Selling Your Case to the Social Media Generations – American Bar Association Section of Litigation Annual Conference; San Diego, CA; May 3, 2018.

Jury Selection: Essential Strategies and Tactics – “What Makes Jurors Tick?” Bridgeport CLE; San Francisco, CA; April 28, 2017.

Panel Discussion: Witness Prep, Core Concepts and Difficult Witnesses – “What Makes Jurors Tick?” Bridgeport CLE; San Francisco, CA; April 28, 2017.

Civil Jury Selection: Getting Beyond the Conventional Wisdom – The Office of County Counsel; County of San Diego; San Diego, CA; November 16, 2016

The Evolving Wisdom on Jury Selection – California State Bar; Los Angeles, CA; November 15, 2016

Panel Discussion: Unnatural Selection: How to Pick and Connect with Your Jury – Association of Business Trial Lawyers; Newport Beach, CA; October 14, 2015.

Jury Selection: Best Practices – Santa Barbara Inns of the Court; Santa Barbara, CA, October 7, 2015.

Q&A: Juror Decision Making in Long Term Care Cases – Arkansas Healthcare Association Conference; Hot Springs, Arkansas; April 28, 2011.

Drivers of Decision Making in Medical Malpractice Cases – ProAssurance Defense Attorney Seminar; Quapaw, Oklahoma; October 12, 2010.

Panel Discussion: Advanced Deposition Practice – Association of Southern California Defense Counsel 49th Annual Seminar; Los Angeles, CA; March 4, 2010.

Politics of Preemption: The Nixon and Clinton Presidencies in Skowronek's Model of Executive Leadership. Presented at the 2008 Western Political Science Association Meeting, San Diego, CA.



Jury Selection: Essential Strategies and Tactics

Placer County Bar Association

September 2022

Stephen Duffy, M.A., Vice President & Senior Consultant

Jury Selection:

- **Provokes high anxiety (for clients, attorneys, and jurors)**
- **Is the part of trial where you have the least control**
- **Is a place where cases are seldom won, but often lost**

- **Problems with Conventional Wisdom**
- **Best Practices**
- **Online Juror Research**
- **New Challenges: COVID-19**

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Problems with Conventional Wisdom

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Conventional Wisdom on Jury Selection is Obsolete

- Is slow to change, in contrast to society and technology
- Shaped by anecdotes not data
- Often debunked by research
- Views jury selection through the prism of advocacy
 - Persuading the audience vs. shaping the audience

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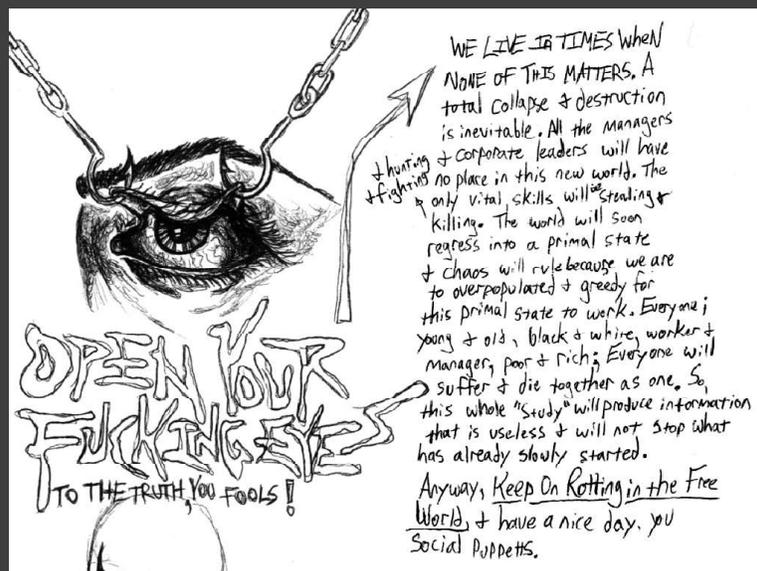
Conventional Wisdom Gone Wrong

- Jury selection isn't important because I can persuade anyone my client is right
- I'm going to find the good jurors
- Preconditioning works

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- I can ask the questions I always do
- Demographics and politics are all I need to know for striking
- There's no need to do online research of jurors
- We don't need to have jury selection transcribed

Juror "Artwork" on a Recent Questionnaire



- You cannot persuade every juror
- Good jurors who are “found” get struck
- Preconditioning is futile and counterproductive

- Case-specific questions are essential
- Case-specific experiences and attitudes supersede all else
- Online research is a must
- Always have jury selection transcribed

Best Practices

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Best Practices

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- **Go to school on your opponent and judge**
- **Propose a JQ, if beneficial**
- **Prioritize voir dire goals**
- **Tailor language to your goal**
- **Striking**

Go To School on Your Judge

- Open to a JQ?
- Organization
 - Seating charts – box or panel?
 - Tracking materials
- Voir dire
 - Extent of judicial voir dire
 - Time limits
 - Standard for cause (any “magic words”)
- Strike process
 - How/when does he/she refill the box
 - Any quirks to striking procedure? E.g. Back striking

Go to School on Opposing Counsel

- Identify questions:
 - That expose strikes and/or provide a platform for “cause” follow up
 - You do not need to ask
- Prepare to prevent inappropriate questions/tactics
 - Objections
 - Motions in limine

Propose a JQ, if Beneficial

- Advantages of a JQ
 - Know who is coming into the panel
 - Plan individual follow up ahead of time
 - Garner more candid responses, especially on taboo topics
 - Efficiency (sometimes)
- When to propose a JQ? When not to propose a JQ?
- What questions to include/exclude?

Prioritizing Goals

1. Obtaining cause challenges
2. Identifying priority strikes
3. Rehabilitation

99. Preconditioning

Tailor Language to Your Goal

- Design general questions for strategic advantage
 - Phrase questions to encourage affirmative responses
 - Skew language to expose strikes and bury keeps
- Cause
 - Normalize bias effectively
 - Set the lowest bar possible
- Rehab
 - Set the highest bar possible
 - Conduct at the conclusion of voir dire

Non-Strategic Question

Do you think that the police are justified in using force to apprehend suspects?



Strategic Defense Question

trial behavior
CONSULTING

Do you think that the police are sometimes justified in using force to apprehend suspects?



Strategic Plaintiff Question

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Do you think that the police are always justified in using force to apprehend suspects?



Set The Bar Correctly

- Questions intended to secure cause challenges should always adhere to the lowest bar possible
 - Use words and phrasing that encourage agreement
 - Avoid “fairness” language at all costs
- Questions intended to rehabilitate should always use the highest bar possible
 - Use words that discourage jurors from affirming bias
 - Stress fairness and ability to follow the law

Strike Effectively

- Jurors should always be evaluated on two axes
 - Likely orientation
 - Leadership
- Leaders likely to reject your case should be the priority
 - This can mean leaving a “worse” juror on the panel if they are unlikely to influence deliberations much

- Primary Factors:
 - Experiences
 - Attitudes
- Secondary Factors:
 - Body Language
 - Appearance
 - Demographics

- **FFOVs** (Friends and Family Of Victims) are often far more plaintiff-oriented than victims themselves
- Victims can be hypercritical of fellow victims
 - Often compare their experiences with that of the plaintiff
 - Sensitive to the gray areas of the case
- FFOV's are seldom critical of victims, and typically see the cases as "black and white" or "open and shut"

Juror Predispositions from a Sexual Harassment Case

Victim of Sexual Harassment or Discrimination



Friend or Family Member of Victim (FFOV)



... she had specifics ...

Probing Case Specific Attitudes Extensively is Paramount

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CONSULTING

- An essential element of jury research is creating a statistically sound juror profile
- Cases-specific attitudes are routinely the most predictive trait
- Demographics are often not (though there are exceptions in some cases)

Attitudes Supersede Demographics

trial behavior
CONSULTING



... drinking had nothing to do with accident ...

Potential Leaders Require Heightened Scrutiny

trial behavior
CONSULTING

- Relevant experience is a high risk/high reward proposition
- It can be tempting to have someone who might understand your case on the jury
- But, as you will see in the next clip, they can become de facto experts, and take over the jury

The Danger of “Expertise”

trial behavior
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... I know a little about fluid dynamics ...

The Danger of “Expertise”

trial behavior
CONSULTING



... Yeah, what he said ...

Online Juror Research

Online Juror Research is a Must

- **Standard practice in high-stakes litigation**
 - Strategic disadvantage not to do it – because the other side is
- **Typically involves two types of information:**
 - Background checks
 - Social media review
- **Low frequency/high-yield payoff**
- **Three primary uses:**
 - Crafting juror-specific questions
 - Informing strikes
 - Cause challenges (failure to disclose/dishonesty)

Factors Impacting Success of Online Juror Research

- **Time**
- **Skill of team**
- **Ubiquity of privacy settings in the venue**
- **Common surnames**
- **Corroborating information to accurately identify jurors**

- Age: 33
- White
- Masters in Computer Science
- Software Engineer/Square
- Married
- Former Business Data Analyst at AmTrust



Self-Proclaimed “leftist radical”

We're back in the proverbial desert, folks. It's time for us to start organizing, mobilizing, and building a progressive movement from the ground up. They don't call it "grassroots" for nothing. Trump is going to fail spectacularly, we're well aware. And yes, we're going to have to deal with all the hurt that's causing to real people, right now, in front of us. But we need to be working on the next 50-State Strategy.

The rich have successfully driven a new wedge between us. Those wedges used to be abortions, guns, God, and gays. This year the wedge was immigration and terrorism.

What we can't forget is that the true natural fault line is between the haves and the have-nots, the rich and poor.

It comes down to class. And when the lower classes unite, we win. We just need to convince everyone that our struggle and their struggle are one and the same.

Time to organize.

Georgia folks? Let's turn Georgia blue in 2018. And let's not just hand it over to the Democratic party for its own sake, let's hold the Democrats' feet to the fire too so they really represent the interests of the vast majority of the population. Organize.



New Challenges: COVID-19

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Differences During/Since COVID-19

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- **Docket congestion at an all-time high**
 - Civil litigation essentially on pause for more than a year
 - Many venues still not back to pre-pandemic trial volume
 - Stacked trial dates, trailing for extended periods

- **Observed changes in trial**
 - Anxious jurors staying home
 - Judges tougher on employment-related hardships
 - New and different processes and wrinkles for jury selection (online, socially distanced courtrooms, masks, smaller panels, etc.)
 - Inconsistent approaches to COVID diagnoses

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trial behavior
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INCOME AVAILABLE FOR SUPPORT/NEW
CASE RE: RELIABILITY OF
SELF-EMPLOYED TAX RETURNS

FRIDAY, SEPTEMBER 9
10:45AM - 11:45AM

PRESENTED BY
TOM COLLINS, CPA/ABV, CFA, MBA

THOMAS D. COLLINS, CPA/ABV, CFA, MBA
2020 5th Street #393
Davis, California 95616
916.756.5622

AREAS OF EXPERTISE

Divorce Financial Issues including Available Income Calculations, Separate Property Tracings, and Business Valuations.

PROFESSIONAL BACKGROUND

2002-Now – Thomas Collins, CPA/ABV, CFA

1999-2002 – Black & Company, Certified Public Accountants - Sacramento, California

1996-1999 – Arthur Andersen, LLP; Senior Business Consultant - Sacramento, California

1994-1996 – Cornelius & Company / Scott & Siegrist, CPAs; Staff Accountant

BUSINESS VALUATION DESIGNATION

Accredited in Business Valuation (ABV) certificate through the American Institute of Certified Public Accountants (AICPA)

Chartered Financial Analyst (CFA) designation through the Charter Financial Analyst Institute (CFAI)

Completed the American Society of Appraisers (ASA) Business Valuation Courses I, II, III & IV

EDUCATION

California State University, Sacramento, MBA – Finance, 1998

California State University, Sacramento, Business – Accounting, 1994

PROFESSIONAL AFFILIATIONS

Past-Chair of the Business Valuation Section of the California Society of Certified Public Accountants (CALCPA)

Past-Chapter Chair of the Sacramento Forensic Services Section of the CALCPA

American Institute of Certified Public Accountants / Member of the Forensic & Valuation Section

Chartered Financial Analysts Institute

Thomas D. Collins, CPA

2020 5th Street #393, Davis, CA 95616

Phone 916.756.5622

Unreported Income

Unreported income occurs most often in cash based businesses, such as bars, restaurants and other businesses where cash is a significant source of revenue. A sign of unreported income is when a cash based business has low reported profits in comparison to its owner's lifestyle.

Typically a business's unreported income is difficult to quantify with precision because of limited or unreliable information. However, it may be possible to reasonably estimate a business's unreported income using a combination of the following methods.

BANK STATEMENTS

A business's revenues may be estimated by totaling its bank statement deposits. However, since bank statements also show transfers between accounts as deposits, transfers should be subtracted in determining a business's revenues. The weakness of the bank statement method is that business owners wishing to hide revenue often do not deposit cash into bank accounts.

EXPENSE RATIOS

Often business owners will pay all of their expenses through the business's checking account because vendors and employees are reluctant to accept cash for payment. Business owners are also inclined to write checks to support tax deductions. Therefore most, if not all, of a business's expenses are likely to be reported. By knowing a business's expenses, a forensic accountant can estimate a business's true income and profitability based on studies of historical revenue to expense ratios for similar companies in the same industry. The expense ratio method's reliability is dependent upon the similarity between the company and the companies included in the industry studies.

ACTIVITY BASED REVENUE

Some business's revenues are based on the number of customers served or products produced. Therefore, a business's revenues can be determined by multiplying the number of customers served by the average revenue per customer.

LIFESTYLE ANALYSIS

Sometimes a forensic accountant can analyze an owner's lifestyle to determine their earnings. Two of the most common ways to perform a lifestyle analysis are to (1) analyze the owner's current lifestyle expenditures or (2) analyze the increase in an owner's wealth over a period of time.

ESTIMATES

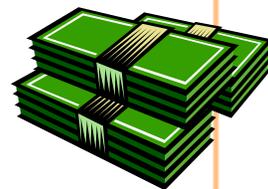
As you may already know, the above methods of determining a business's income and profitability are educated guesses of a business's earnings based on the information available.

Therefore, these types of analysis should only be relied upon when other more reliable information is unavailable. Using a combination of the above methods to support a conclusion of the business's revenues and profitability is more likely to stand up in court.

QUESTIONS OR COMMENTS

Please call me with your comments at 916.756.5622.

— Thomas Collins, CPA, ABV, CFA



Thomas D. Collins, CPA

2020 5th Street #393, Davis, CA 95616

Phone 916.756.5622

Calculating Income for Support

The following is a summary of how we calculate income for support for a small business person:

1. REVIEW OF DOCUMENTS. We review client provided documents including tax returns, financial statements and other relevant financial information.

2. WE PREFER TO INTERVIEW THE CLIENT, WHEN POSSIBLE. By interviewing the we gain valuable insight into how the client's business operates.

3. DETERMINE THE COMPANY'S CASH FLOW. We determine the company's cash flow adding up the company's taxable income, the owner's compensation, depreciation expense, amortization expense and perks received by the owner.

4. PERKS. We often are told by the spouse who is not running the business that the spouse running the business is using the Company's checking account or credit cards to pay for their personal or non-business expenses.

The easiest and fastest way to determine their personal expenses is to review their meals and entertainment expenses, travel and auto expenses to see if they are reasonable. We can estimate what reasonable expenses for most business.

To increase our accurately estimating personal expenses paid by the Company, we ask for the Company's accounting general ledger and review the individual expenses or items comprising each total expense reported on the tax return. We can review the transactions on the bank statements and verify the bank activity is properly recorded in the Company's accounting general ledger.

We also ask for copies of credit card statements to review charges on the credit cards for unusual items.

6. UNREPORTED INCOME. Sometime we are told by the spouse who is not running the business that the spouse running the business is not reporting all of their revenues. We can perform the following analysis to see if the income being reported for tax purposes is reasonable:

We can added up all of the clients deposits on the bank statements and compare it to the clients reported revenues. Transfers between the Company's accounts should be remove from the totals because transferred funds were most likely already considered income when entering another account. If the total adjusted deposits are more than the report revenues their maybe unreported revenues.

We can also request copies of personal bank account to look for unusual deposits that may actually be business receipts.

Another method is to analyzes a clients billing records and match them to the Company's collection to see if payments received from client billings are including in the Company's accounting general ledger.

WE LOOKS FOR SIDS (SUDDEN INCOME DEFICIENCY SYNDROME). Sometimes we notice the spouse running the business encounter tough business environments and often report low revenues and high expenses which often coincides the date of separation. We look for real reasons behind lower revenues such as deferred billings or "trade out" payments. We also look for expenses that have significantly increased from prior periods.

5. WRITE A REPORT. We write up a report to communicate our findings to the attorneys and possibly write a declaration.

Please call me with your comments at 916.756.5622.
— Thomas Collins, CPA, ABV, CFA



**IMPORTANT UPDATES TO
CONSERVATORSHIP LAWS**

FRIDAY, SEPTEMBER 9
10:45AM - 11:45AM

**PRESENTED BY
ALEXANDRIA GOFF
GOFF LEGAL PC**

GOFF LEGAL PC

WE CREATE PEACE OF MIND



ALEXANDRIA GOFF, ESQ.

OWNER AND FOUNDER
OF GOFF LEGAL, PC

- ESTATE PLANNING
- TRUST
ADMINISTRATION
- PROBATE

Alexandria, also known as "Ali" is the founder of Goff Legal, PC, a law firm focused on estate planning and probate & estate administration matters.

Ali is known for her in-depth knowledge and expertise with wills, trusts, durable powers of attorney, and her ability to explain complex matters in an understandable way. She was drawn to estate planning to help protect people and their families and provide peace of mind so they avoid complications for generations to come.

She is a frequent presenter for Non-profits located in California, the Professional Fiduciary Association of California, the Probate Section of the Placer County Bar and the National Business Institute.

Ali is passionate about helping others. She is a certified performance coach, helping women and business owners with their professional endeavors and goals.

916-625-6556

WWW.GOFFLEGAL.COM

Important Updates to Conservatorship Laws Placer County Bar Association September 9th, 2022

AB 1194

- Signed by Governor Newsom signed on September 30th, 2021
- Legislative updates indicate that there were issues due to
 - o Brittany Spears
 - o Netflix Video “I care a lot”; and
 - o 2012 Santa Clara Court
 - o But not reflection of what happened since 2012 and the actual issues that need to be dealt with
 - The 2006 legislation was never funded
 - No reports of fiduciary abuse in the legislative analysis
 - o This legislation does not attempt to make big changes for private conservators (non-professional fiduciaries)
- Updates
 - o Amended the Probate code, Business and Professions Code, and Welfare and Institutions Code

Implements a specific requirement under the Business and Professions Code that licensees list fee schedule on their website (on or before Jan 1, 2023)

- Bus & Prof Code §6563(a)–(b) is amended
 - o Mandates licensees list their fee schedule on their website, including but not limited to, hourly fees for services offered.
 - o If they do not have a website, then must provide fee schedule to a prospective client, and that they provide to all persons within the second degree (Prob. Code §1822(b)(2)) a fee schedule in ALL conservatorships.

Reporting and sanctions for fiduciaries for harm caused to the conservatee

- Bus & Prof Code §6580 is amended
 - o Investigations on abuse of a licensed private fiduciary and sanctions will be imposed for the following:
 - Breached legal or fiduciary duty that caused financial or physical harm or mental suffering to the client
 - Abused an elder under W&I Section 15610.07
 - Physical abuse, neglect, abandonment, isolation, abduction, or other harm
 - Deprivation by care custodian of good or services necessary to avoid mental harm of physical suffering
 - Financial abuse
 - Violated a statute or regulation in the B&P code
 - o If the court has removed a fiduciary for cause they must make a report to the bureau and provide information to the bureau

- Mandatory revocation of license if the professional “knowingly, intentionally, or willfully breached a legal or fiduciary duty...that constitutes abuse...” or “Caused serious physical or financial harm or mental suffering to a client through gross negligence or gross neglect.”

Ex-Parte Communications from the Court

- Prob. Code §1051 is amended
 - Added a subsection that if the court imposes a penalty (including surcharge, contempt, suspension or removal of a fiduciary) the court SHALL report to the Professional Fiduciaries Bureau.
 - And requires that confidential information to be provided to the bureau at no charge.

Study on Court effectiveness in conservatorship cases

- Prob. Code §1458 is added (new section) to the Probate Code
 - Outlines what items need to be measured and timelines for the report.
 - Why didn't they do this first, before amending the law????

Notice Changes

- Prob. Code §1460 is amended
 - Minor changes “to consider terminating” was added

Requires representation for all Proposed Conservatees (PC)

- Prob. Code §1471 is amended
 - Attorneys represent the person, NOT what is in their best interests
 - NOT Guardian ad litem
 - Even if the person doesn't want an attorney, they will be appointed one.
 - Conservatee/PC may select their own attorney, even if they are not on the court appointed list
 - PC will also receive representation for any matters that are set for appeal.

Increased Court Investigation Mandates

- Prob. Code §1826 is amended
 - Removed some gendered language to make it neutral
 - Cleaned up the investigators role re: asking if PC would like legal counsel.
 - Now required to gather relevant medical reports from primary care and other physical health care providers
 - Judicial Council must update the forms by January 1, 2023 to implement this section
- Prob. Code §1850 is amended
 - Six months after the initial appointment of conservator, and investigation shall be performed and must report to the court
 - Note: This is the current law, but never happens (in my experience)
 - Annual investigations are required and they must consider if the conservatorship shall be terminated.
- Prob. Code §1850.5 is amended

- At any reviews of the case, the court shall consider terminating the limited conservatorship
- Prob. Code §1851 is amended
 - (a)(1)(B) – Investigator must determine if the conservatee wishes to remove and replace conservator
 - (a)(1)(C) – Investigator must determine if the conservatee still meets criteria under 1081 for a conservatorship and if it is still the least restrictive means.
 - (a)(2) – If the investigator determines the criteria has been met, then they need to determine if the powers need to be expanded to restricted to ensure least restrictive means.
- Prob. Code §1851.1 is amended
 - Court is not required to perform the duties imposed in this section until the legislature makes an appropriation for this purpose.
- NOTE: For all of the above sections, the Court is not required to perform the duties imposed in this section until the legislature makes an appropriation for this purpose.

Whistle Blower Section

- Prob. Code §1851.6 is added to the code
 - Any interested person (as defined in PC 48 or PC 1822)
 - §48 “(1) An heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding.
 - (2) Any person having priority for appointment as personal representative.
 - (3) A fiduciary representing an interested person.”
 - May petition the court if they have personal knowledge, and request an investigation by the court.
 - An investigation shall be conducted if there is a prima facie case of abuse.
 - If an investigation has been done within the preceding 6 months, the court may order that an investigation is not necessary or order a limited investigation.
 - Court is not required to perform the duties imposed in this section until the legislature makes an appropriation for this purpose.

Termination of Temporary Conservatorship

- Prob. Code §1860 is amended
 - Minor updates. Any termination shall follow PC 1863 procedures
- Prob. Code §1860.5 is amended
 - (d)(2) – If investigation under 1850.5 recommends termination and no petition has been filed, then court shall order the conservator to show cause why the conservatorship should not be terminated
 - (e) requires appearance of conservator at termination proceedings unless exempt:
 - Out of state and not the petitioner
 - Medical inability
 - Communicated they do not wish to attend the hearing, doesn’t contest the proceedings, and doesn’t object to the conservatorship.

- (g) Court shall terminate the limited conservatorship unless they determine by clear and convincing evidence that it meets the criteria of appointment of a conservator and is the least restrictive means for protection.
- (h) – If the investigator determines the criteria has been met, then they need to determine if the powers need to be expanded to restricted to ensure least restrictive means.

Termination of Conservatorship

- Prob. Code §1862 is amended
 - If investigation under 1850(a)(2) recommends termination and no petition has been filed, then court shall order the conservator to show cause why the conservatorship should not be terminated
- Prob. Code §1863 is amended
 - At termination proceedings (b) requires appearance of conservator unless exempt:
 - Out of state and not the petitioner
 - Medical inability
 - Communicated they do not wish to attend the hearing, doesn't contest the proceedings, and doesn't object to the conservatorship.
 - (c) Court shall terminate the conservatorship unless they determine by clear and convincing evidence that it meets the criteria of appointment of a conservator and is the least restrictive means for protection.
 - (d) – If the investigator determines the criteria has been met, then they need to determine if the powers need to be expanded to restricted to ensure least restrictive means.

Enhanced Sanctions

- Prob. Code §2112 is added to the Code
 - (a)(1): If a court finds that a professional conservator has abused a conservatee: \$10,000 for each separate act of abuse, payable to the estate.
 - (a)(2): If a court finds that a lay conservator has abused a conservatee: \$1,000 for each separate act of abuse, payable to the estate
 - (b) Court to report abuse findings or any other sanction levied against the professional to the Professional Fiduciaries Bureau
 - (c)(1) “abused” as defined in W&I 15610.07
 - Physical abuse, neglect, abandonment, isolation, abduction, other treatment resulting in physical harm or mental suffering, deprivation by care custodian of goods or services necessary to avoid physical harm or mental suffering.
 - Financial abuse as defined in W&I 15610.30

Temporary Conservatorships – clean up and moving conservatee

- Prob. Code §2250 and §2250.6 are amended
 - Language updates to match other provisions
 - No discussion of mandatory appointment of counsel for underrepresented proposed temp conservatee

- Prob. Code §2253 is amended
 - Change of residence under Temporary conservatorship
 - Eliminates good cause exception for investigation
 - Investigator must review medical reports to determine if change of residence is required to prevent irreparable harm to conservatee and whether no less restrictive means will prevent harm.

Restrictions on Self-Dealing

- Prob. Code §2401 is amended
 - Non-trust company conservators may not hire or refer any business to an entity in which the conservator or an employee has a financial interest.
 - Defined as
 - Ownership in sole proprietorship, partnership, or closely held corporation; or
 - Ownership greater than 1% of publicly held corporation; or
 - Officer or director of a corporation
 - Fiduciaries can still hire employees without court approval
 - Removes ability to get approval from the court in advance, or ever

Financial Statements

- Prob Code §2629 is amended (2620(c)(3) is deleted)
 - No longer have to lodge ALL account statements, just the opening and closing
 - Don't forget about original closing escrow statements and care facility statements

Amends fee provisions regarding standards on fees

- Prob. Code §2623(a)(1)–(2)
 - The standard of the amount of reasonable expenses incurred and compensation for services rendered as the court determines is “just and reasonable” is changed to as the court determines is “just, reasonable, ***and in the best interest of the ward or conservatee.***”
- Prob. Code §2640(a)(1)–(3)
 - At any time after the filing of the I&A...the guardian or conservator of the estate may petition the court for an order fixing and allowing compensation to the conservator of the estate, person, their attorney, for services ***in the best interest of the ward or conservatee.***
- Prob. Code §2641(a)–(b)
 - At anytime permitted by Section 2640...the guardian or conservator of the person may petition the court for an order fixing and allowing compensation for services ***in the best interest of the ward or conservatee.*** Upon hearing, the court shall make an order allowing any compensation the court determines is just and reasonable to the guardian or conservator of the person for services rendered ***in the best interest of the ward or conservatee***
 - This is going to be awkward if the conservatee doesn't agree that your service was in their best interest.
 - This is going to make it more difficult/stringent to get fees approved

- Fee petitions and declarations are going to need to be revamped to account for the “best interests” standard.

Adds language and modifies the ability of the fiduciary to get fees in defense of their fees

- Prob. Code §2623(b)(1) / Prob. Code §2640(d)(1) / Prob. Code §2641(c)(1)
 - No compensation from the estate for any costs of fees incurred in unsuccessfully defending their fee request petition, opposing a petition, or any other unsuccessful action.
 - Removes the “good faith” exception (but see modification below).
- Prob. Code §2623(b)(2) / Prob. Code §2640(d)(2) / Prob. Code §2641(c)(2)
 - If the court finds by clear and convincing evidence that the fiduciary’s actions were made in good faith based on the best interest of the ward or conservatee, court may reduce the compensation awarded for the costs or fees incurred instead of denying it completely.

Amends language regarding fees on removal petition and adds reporting requirements for professional fiduciary’s removal

- Prob. Code §2653(c)(1)–(3)
 - If court removes a guardian or conservator, the Petitioner is awarded costs and other expenses and costs of litigation, including attorney’s fees.
 - Removes the “good faith” exception
 - The guardian or conservator may not deduct from, or charge to the estate, costs for opposing the petition and is personally liable for those costs and expenses
 - Basically restate existing law, but remove the “good faith” exceptions.
 - Thus, you must personally pay the cost for defending actions if conservatee is successful in removing the conservator.
 - If the court removes a professional fiduciary for cause, the court shall report the determination and basis to the Professional Fiduciary Bureau.
 - This is added to this section.
 - Court is not required to perform the duties imposed in the amendments to this section until the legislature makes an appropriation for this purpose.

Subject to funding

- Prob. Code: ex-parte communications, whistleblower, and sanctions

Not subject to funding

- Bus & Prof Code
- Prob. Code Section 1471; termination proceedings; self-dealing provision, fee restrictions (except 2653)

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SECTION 1. Section 6563 is added to the Business and Professions Code, to read:

6563. (a) On or before January 1, 2023, a licensee with an internet website shall post on that internet website a schedule or range of the licensee's fees, including, but not limited to, hourly fees, for services offered.

(b) On or after January 1, 2023, a licensee who does not have an internet website shall do all of the following:

(1) Provide a prospective client, before the execution of a contract for services, a schedule or range of the licensee's fees, including, but not limited to, hourly fees, for services offered.

(2) Upon receipt of a request, provide a client with a schedule or range of the licensee's fees, including, but not limited to, hourly fees, for services offered.

(3) If the prospective or current client is a proposed or current conservatee, provide all interested persons, as defined in paragraph (2) of subdivision (b) of Section 1822 of the Probate Code, with a schedule or range of the licensee's fees, including, but not limited to, hourly fees, for services offered.

SEC. 2. Section 6580 of the Business and Professions Code is amended to read:

6580. (a) (1) The bureau may upon its own, and shall, upon the receipt of a complaint from any person, investigate the actions of ~~any a~~ professional fiduciary, including a person with a license that either restricts or prohibits the practice of that person as a professional fiduciary, including, but not limited to, a license that is retired, inactive, canceled, or suspended. ~~The bureau shall review a professional fiduciary's alleged violation of statute, regulation, or the Professional Fiduciaries Code of Ethics and any other complaint referred to it by the public, a public agency, or the department, and may impose sanctions upon a finding of a violation or a breach of fiduciary duty.~~

(2) The bureau shall investigate a professional fiduciary's alleged violation of statute, regulation, or the Professional Fiduciaries Code of Ethics and any other complaint referred to it by the public, a public agency, or the department, and shall impose sanctions upon a finding that the professional fiduciary did any of the following:

(A) Breached a legal or fiduciary duty to a client and thereby caused financial or physical harm or mental suffering to the client.

(B) Abused an elder or a dependent adult client, as defined in Section 15610.07 of the Welfare and Institutions Code.

(C) Violated a statute or regulation related to this chapter.

(3) Paragraph (2) applies, but is not limited to, all of the following referrals:

(A) (i) A report from a court that the court has taken any of the following actions:

(I) Imposed a penalty on the professional fiduciary, as provided in subdivision (d) of Section 1051 of the Probate Code.

(II) Removed the professional fiduciary as a conservator or guardian for cause, as provided in paragraph (3) of subdivision (c) of Section 2653 of the Probate Code.

(III) Determined that the professional fiduciary has abused a conservatee, as provided in subdivision (a) of Section 2112 of the Probate Code.

(ii) The report from the court pursuant to this subparagraph shall include a copy of the court's finding and order and may include other supporting documentation. However, failure of the court to provide supporting documentation does not relieve the bureau of its duty to take action.

(B) A certified copy of a judicial or administrative finding that a professional fiduciary's violation of law, breach of fiduciary duty, or abuse, as defined in Section 15610.07 of the Welfare and Institutions Code, caused harm to a conservatee or ward in their care.

(4) If a court makes a referral described in paragraph (2), the court shall provide the bureau, at no charge, with access to the information, including confidential information, regarding its investigation of the professional fiduciary that is contained in court records. The bureau shall not disclose any confidential information contained in court records and shall use that information only for purposes of investigating allegations against the professional fiduciary or in a criminal, civil, or administrative proceeding brought by the bureau against the professional fiduciary. Confidential information derived from a court record and filed in a criminal, civil, or administrative proceeding shall be kept in the confidential portion of the court case file. If the bureau does not bring a criminal, civil, or administrative proceeding against the professional fiduciary as a result of the allegation, the bureau shall destroy the records in its possession that contain confidential information as soon as it determined that no further action will be taken regarding the allegations. This paragraph does not affect the admissibility of confidential information as evidence in a criminal proceeding.

(b) Sanctions shall include any of the following:

(1) Administrative citations and fines as provided in Section 125.9 for a violation of this chapter, the Professional Fiduciaries Code of Ethics, or any regulation adopted under this chapter.

(2) License suspension, probation, or revocation.

(c) The bureau shall provide on ~~the Internet~~ *its internet website* information regarding ~~any~~ sanctions imposed by the bureau on licensees, including, but not limited to, information regarding citations, fines, suspensions, and revocations of licenses or other related enforcement action taken by the bureau relative to the licensee.

(d) The bureau shall revoke the professional fiduciary's license if it finds that the professional fiduciary did either of the following:

(1) Knowingly, intentionally, or willfully breached a legal or fiduciary duty to an elder or dependent adult client that constitutes abuse of the client, as defined in Section 15610.07 of the Welfare and Institutions Code.

(2) Caused serious physical or financial harm or mental suffering to a client through gross negligence or gross incompetence.

SEC. 3. Section 1051 of the Probate Code is amended to read:

1051. (a) In the absence of a stipulation to the contrary between parties who have filed pleadings in a proceeding under this code, there shall be no ex parte communications between any party, or attorney for the party, and the court concerning a subject raised in those pleadings, except as permitted or required by law.

(b) Notwithstanding subdivision (a), in any case upon which the court has exercised its jurisdiction, the court may refer to the court investigator or take other appropriate action in response to an ex parte communication regarding either or both of the following:

(1) A fiduciary, as defined in Section 39, about the fiduciary's performance of their duties and responsibilities.

(2) A person who is the subject of a conservatorship or guardianship proceeding under Division 4 (commencing with Section 1400).

~~(b) (c) Notwithstanding subdivision (a), in any case upon which the court has exercised its jurisdiction, the court may refer to the court investigator or take other appropriate action in response to an ex parte communication regarding either or both of the following: (1) a fiduciary, as defined in Section 39, about the fiduciary's performance of his or her duties and responsibilities, and (2) a person who is the subject of a conservatorship or guardianship proceeding under Division 4 (commencing with Section 1400). Any action~~ *An action* by the court

pursuant to ~~this~~ subdivision (b) shall be consistent with due process and the requirements of this code. The court shall disclose the ex parte communication to all parties and counsel. The court may, for good cause, dispense with the disclosure if necessary to protect the ward or conservatee from harm.

~~(e) (d) The Judicial Council shall, on or before January 1, 2008, adopt a rule of court to implement this section. If the court imposes a penalty, including, but not limited to, a surcharge, punishment for contempt, suspension, or removal, on a professional fiduciary, the court shall report that action to the Professional Fiduciaries Bureau. If the court reports an action taken under this section, the court shall provide the bureau, at no charge, with access to the information, including confidential information, regarding its investigation of the professional fiduciary contained in the court records. The bureau shall maintain the confidentiality of the information, as required by paragraph (4) of subdivision (a) of Section 6580 of the Business and Professions Code or any other applicable state or federal law.~~

~~(d) Subdivisions (a) and (b) of this section shall become operative on January 1, 2008.~~

(e) A superior court shall not be required to perform any duties imposed by this section until the Legislature makes an appropriation identified for this purpose.

SEC. 4. Section 1458 is added to the Probate Code, to read:

1458. (a) On or before January 1, 2024, the Judicial Council shall report to the Legislature the findings of a study measuring court effectiveness in conservatorship cases, including the effectiveness of protecting the legal rights and best interests of a conservatee. The report shall include all of the following, with respect to the courts chosen for evaluation pursuant to subdivision (b):

(1) Caseload statistics from the 2018–19 fiscal year, for both temporary and general probate conservatorships, including, at a minimum, all of the following:

(A) The number of petitions filed requesting appointment of a conservator, the number of those petitions granted, and the number denied, with cases in which a professional fiduciary was appointed presented separately from cases in which a nonprofessional conservator was appointed.

(B) The number of conservatorships under court supervision at the end of the fiscal year in which a court investigation was conducted, with cases in which a professional fiduciary was appointed presented separately from cases in which a nonprofessional conservator was appointed.

(C) The number of conservatorships under court supervision at the end of the fiscal year in which a court review hearing was held, with cases in which a professional fiduciary was appointed presented separately from cases in which a nonprofessional conservator was appointed.

(D) The number of petitions or objections filed by or on behalf of a conservatee challenging a conservator's action, failure to act, accounting, or compensation; the number of those petitions that were granted; and the number of petitions that were denied, with cases in which a professional fiduciary was appointed presented separately from cases in which a nonprofessional conservator was appointed.

(E) The number of conservatorships under court supervision in which accountings due, and the number of accountings received after they were due, or not received at all, with cases in which a professional fiduciary was appointed presented separately from cases in which a nonprofessional conservator was appointed.

(F) The number of conservatorships of the estate, or of the person and the estate, under court supervision in which bond was not required of the conservator, with cases in which a professional fiduciary was appointed presented separately from cases in which a nonprofessional conservator was appointed.

(2) An analysis of compliance with statutory timeframes in the 2018–19 fiscal year.

(3) A description of any operational differences between courts that affect the processing of conservatorship cases, including timeframes and steps taken to protect the legal rights and best interests of conservatees.

(b) The Judicial Council shall select at least three courts for the evaluation required by this section, including one small court, one medium-sized court, and one large court.

(c) The report shall include recommendations for statewide performance measures to be collected, best practices that serve to protect the legal rights of conservatees, and staffing needs to meet case processing requirements.

(d) The report shall be submitted pursuant to Section 9795 of the Government Code.

(e) This section shall remain in effect only until January 1, 2026, and as of that date is repealed.

SEC. 5. Section 1460 of the Probate Code is amended to read:

1460. (a) Subject to Sections 1202 and 1203, if notice of hearing is required under this division but the applicable provision does not fix the manner of giving notice of hearing, the notice of the time and place of the hearing shall be given at least 15 days before the day of the hearing as provided in this section.

(b) Subject to subdivision (e), the petitioner, who includes, for purposes of this section, a person filing a petition, report, or account, shall cause the notice of hearing to be delivered pursuant to Section 1215, to each of the following persons:

(1) The guardian or conservator.

(2) The ward or the conservatee.

(3) The spouse of the ward or conservatee, if the ward or conservatee has a spouse, or the domestic partner of the conservatee, if the conservatee has a domestic partner.

(4) Any person who has requested special notice of the matter, as provided in Section 2700.

(5) For any hearing on a petition to terminate a guardianship, to accept the resignation ~~of,~~ *of a guardian*, or to remove ~~the a~~ guardian, the persons described in subdivision (c) of Section 1510.

(6) For any hearing ~~on a petition to terminate~~ *to consider terminating* a conservatorship, to accept the resignation ~~of,~~ *of a conservator*, or to remove ~~the a~~ conservator, the persons described in subdivision (b) of Section 1821.

(c) The clerk of the court shall cause the notice of the hearing to be posted as provided in Section 1230 if the posting is required by subdivision (c) of Section 2543.

(d) Except as provided in subdivision (e), this section does not excuse compliance with the requirements for notice to a person who has requested special notice pursuant to Chapter 10 (commencing with Section 2700) of Part 4.

(e) The court, for good cause, may dispense with the notice otherwise required to be given to a person as provided in this section.

SEC. 6. Section 1471 of the Probate Code is amended to read:

1471. (a) If a conservatee, proposed conservatee, or person alleged to lack legal capacity is unable to retain legal counsel and requests the appointment of counsel to assist in the particular matter, whether or not that person lacks or appears to lack legal capacity, the court shall, at or before the time of the hearing, appoint the public defender or private counsel to represent the ~~interest of that~~ person in the following proceedings under this division:

(1) A proceeding to establish or transfer a conservatorship or to appoint a proposed conservator.

(2) A proceeding to terminate the conservatorship.

(3) A proceeding to remove the conservator.

(4) A proceeding for a court order affecting the legal capacity of the conservatee.

(5) A proceeding to obtain an order authorizing removal of a temporary conservatee from the temporary conservatee's place of residence.

(b) If a conservatee or proposed conservatee ~~does not plan to retain~~ *has not retained* legal counsel and ~~has not requested the court to appoint~~ *does not plan to retain* legal counsel, whether or not that person lacks or appears to lack legal capacity, the court shall, at or before the time of the hearing, appoint the public defender or private counsel to represent the ~~interests of that~~ person in any proceeding listed in subdivision (a) ~~if, based on information contained in the court investigator's report or obtained from any other source, the court determines~~

~~that the appointment would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee or proposed conservatee. (a).~~

(c) In any proceeding to establish a limited conservatorship, if the proposed limited conservatee has not retained legal counsel and does not plan to retain legal counsel, the court shall immediately appoint the public defender or private counsel to represent the proposed limited conservatee. The proposed limited conservatee shall pay the cost for that legal service if ~~he or she is~~ *they are* able. This subdivision applies irrespective of any medical or psychological inability to attend the hearing on the part of the proposed limited conservatee as allowed in Section 1825.

(d) If a conservatee, proposed conservatee, or person alleged to lack legal capacity expresses a preference for a particular attorney to represent them, the court shall allow representation by the preferred attorney, even if the attorney is not on the court's list of a court-appointed attorneys, and the attorney shall provide zealous representation as provided in subdivision (e). However, an attorney who cannot provide zealous advocacy or who has any conflict of interest with respect to the representation of the conservatee, proposed conservatee, or person alleged to lack legal capacity shall be disqualified.

(e) The role of legal counsel of a conservatee, proposed conservatee, or a person alleged to lack legal capacity is that of a zealous, independent advocate representing the wishes of their client, consistent with the duties set forth in Section 6068 of the Business and Professions Code and the California Rules of Professional Conduct.

(f) In an appeal or writ proceeding arising out of a proceeding described in this section, if a conservatee or proposed conservatee is not represented by legal counsel, the reviewing court shall appoint legal counsel to represent the conservatee or proposed conservatee before the court.

SEC. 7. Section 1826 of the Probate Code is amended to read:

1826. (a) Regardless of whether the proposed conservatee attends the hearing, the court investigator shall do all of the following:

(1) Conduct the following interviews:

(A) The proposed conservatee personally.

(B) All petitioners and all proposed conservators who are not petitioners.

(C) The proposed conservatee's spouse or registered domestic partner and relatives within the first degree. If the proposed conservatee does not have a spouse, registered domestic partner, or relatives within the first degree, to the greatest extent possible, the proposed conservatee's relatives within the second degree.

(D) To the greatest extent practical and taking into account the proposed conservatee's wishes, the proposed conservatee's relatives within the second degree not required to be interviewed under subparagraph (C), neighbors, and, if known, close friends.

(2) Inform the proposed conservatee of the contents of the *petition and* citation, of the nature, purpose, and effect of the proceeding, and of the right of the proposed conservatee to oppose the ~~proceeding, petition,~~ to attend the ~~hearing,~~ *hearing on the petition,* to have the matter of the establishment of the conservatorship tried by jury, to be represented by legal ~~counsel if the proposed conservatee so chooses,~~ *counsel,* and to have legal counsel appointed by the court if unable to retain legal counsel.

(3) Determine if it appears that the proposed conservatee is unable to attend the hearing and, if able to attend, whether the proposed conservatee is willing to attend the hearing.

(4) Review the allegations of the petition as to why the appointment of the conservator is required and, in making ~~his or her~~ *the* determination, do the following:

(A) Refer to the supplemental information form submitted by the petitioner and consider the facts set forth in the form that address each of the categories specified in paragraphs (1) to (5), inclusive, of subdivision (a) of Section ~~1821.~~ *1821, as well as the medical reports received pursuant to paragraph (11).*

(B) ~~Consider;~~ *Determine,* to the extent ~~practicable,~~ *whether he or she practicable or possible, whether the court investigator* believes the proposed conservatee suffers from any of the mental function deficits listed in subdivision (a) of Section 811 that significantly impairs the proposed conservatee's ability to understand and

appreciate the consequences of ~~his or her~~ *the proposed conservatee's* actions in connection with any of the functions described in subdivision (a) or (b) of Section 1801 and ~~identify~~ *describe* the observations that support that ~~belief.~~ *belief, including information in the medical reports received pursuant to paragraph (11).*

(5) Determine if the proposed conservatee wishes to ~~contest~~ *oppose* the establishment of the conservatorship.

(6) Determine if the proposed conservatee objects to the proposed conservator or prefers another person to act as conservator.

(7) Determine if the proposed conservatee wishes to be represented by legal counsel and, if so, whether the proposed conservatee has retained legal counsel and, if not, ~~the name of an attorney the proposed conservatee wishes to retain.~~ *whether the proposed conservatee plans to retain legal counsel.*

(8) If the proposed conservatee does not plan to retain legal counsel, determine if the proposed conservatee desires the court to appoint legal counsel.

(9) Determine if the appointment of legal counsel would be helpful to the resolution of the matter or is necessary to protect the interests of the proposed conservatee in a case where the proposed conservatee does not plan to retain legal counsel and has not requested the appointment of legal counsel by the court.

~~(8)~~ (10) (A) Determine if the proposed conservatee is incapable of communicating, with or without reasonable accommodations, a desire to participate in the voting process, and may be disqualified from voting pursuant to Section 2208 of the Elections Code.

(B) The proposed conservatee shall not be disqualified from voting on the basis that ~~he or she~~ *the proposed conservatee* does, or would need to do, any of the following to complete an affidavit of voter registration:

(i) Signs the affidavit of voter registration with a mark or a cross pursuant to subdivision (b) of Section 2150 of the Elections Code.

(ii) Signs the affidavit of voter registration by means of a signature stamp pursuant to Section 354.5 of the Elections Code.

(iii) Completes the affidavit of voter registration with the assistance of another person pursuant to subdivision (d) of Section 2150 of the Elections Code.

(iv) Completes the affidavit of voter registration with reasonable accommodations.

~~(9)~~ (11) *If Gather and review relevant medical reports regarding* the proposed conservatee ~~has not retained legal counsel, determine if the proposed conservatee desires the court to appoint legal counsel.~~ *from the proposed conservatee's primary care physician and other relevant mental and physical health care providers.*

~~(10) Determine if the appointment of legal counsel would be helpful to the resolution of the matter or is necessary to protect the interests of the proposed conservatee in a case where the proposed conservatee does not plan to retain legal counsel and has not requested the appointment of legal counsel by the court.~~

~~(11)~~ (12) Report to the court in writing, at least five days before the hearing, concerning all of the foregoing, including the proposed conservatee's express communications concerning both of the following:

(A) Representation by legal counsel.

(B) If the proposed conservatee is not willing to attend the hearing, does not wish to contest the establishment of the conservatorship, and does not object to the proposed conservator or prefers that another person act as conservator.

~~(12)~~ (13) Deliver pursuant to Section 1215, at least five days before the hearing, a copy of the report referred to in paragraph ~~(11)~~ (12) to all of the following:

(A) The attorney, if any, for the petitioner.

(B) The attorney, if any, for the proposed conservatee.

(C) The proposed conservatee.

(D) The spouse, registered domestic partner, and relatives within the first degree of the proposed conservatee

who are required to be named in the petition for appointment of the conservator, unless the court determines that the delivery will harm the conservatee.

(E) Any other persons as the court orders.

(b) The court investigator has discretion to release the report required by this section to the public conservator, interested public agencies, and the long-term care ombudsperson.

(c) *(1)* The report required by this section is confidential and shall be made available only to parties, persons described in paragraph ~~(12)~~ *(13)* of subdivision (a), persons given notice of the petition who have requested this report or who have appeared in the proceedings, their attorneys, and the court. The court has discretion at any other time to release the report, if it would serve the interests of the conservatee. The clerk of the court shall provide for the limitation of the report exclusively to persons entitled to its receipt.

(2) Notwithstanding paragraph (1), confidential medical information and confidential information from the California Law Enforcement Telecommunications System (CLETS) shall be placed in a separate attachment to the report and shall be made available only to the proposed conservatee and the proposed conservatee's attorney.

(d) This section does not apply to a proposed conservatee who has personally executed the petition for conservatorship, or a proposed conservatee who has nominated ~~his or her~~ *their* own conservator, if ~~he or she~~ *the proposed conservatee* attends the hearing.

(e) If the court investigator has performed an investigation within the preceding six months and furnished a report thereon to the court, the court may order, upon good cause shown, that another investigation is not necessary or that a more limited investigation may be performed.

(f) An investigation by the court investigator related to a temporary conservatorship also may be a part of the investigation for the general petition for conservatorship, but the court investigator shall make a second visit to the proposed conservatee and the report required by this section shall include the effect of the temporary conservatorship on the proposed conservatee.

(g) The Judicial Council shall, on or before January 1, ~~2009, adopt~~ *2023, update the* rules of court and Judicial Council forms as necessary to implement ~~an expedited procedure to authorize, by court order, a proposed conservatee's health care provider to disclose confidential medical information about the proposed conservatee to a court investigator pursuant to federal medical information privacy regulations promulgated under the federal Health Insurance Portability and Accountability Act of 1996 (Public Law 104-191).~~ *this section.*

(h) *(1)* A superior court shall not be required to perform any duties imposed pursuant to the amendments to this section enacted by Chapter 493 of the Statutes of 2006 until the Legislature makes an appropriation identified for this purpose.

(2) A superior court shall not be required to perform any duties imposed pursuant to the amendments to this section enacted by the measure that added this paragraph until the Legislature makes an appropriation identified for this purpose.

SEC. 8. Section 1850 of the Probate Code is amended to read:

1850. (a) Except as provided in subdivision ~~(b);~~ *(e)*, each conservatorship ~~initiated~~ *established* pursuant to this part shall be reviewed by the court as follows:

(1) ~~At the expiration of six~~ *Six* months after the initial appointment of the conservator, the court investigator shall visit the conservatee, conduct an investigation ~~in accordance with the provisions of~~ *as provided in* subdivision (a) of Section 1851, and report to the court regarding the appropriateness of the conservatorship and whether the conservator is acting in the best interests of the conservatee regarding the conservatee's placement, quality of care, including physical and mental *health* treatment, and finances. ~~The court may, in~~ *In* response to the investigator's report, *the court may* take appropriate action including, but not limited ~~to:~~ *to, ordering a hearing or ordering the conservator to submit an accounting pursuant to subdivision (a) of Section 2620.*

~~(A) Ordering a review of the conservatorship pursuant to subdivision (b).~~

~~(B) Ordering the conservator to submit an accounting pursuant to subdivision (a) of Section 2620.~~

(2) One year after the *initial* appointment of the conservator and annually ~~thereafter. However, at the review that~~

~~occurs one year after the appointment of the conservator, and every subsequent review conducted pursuant to this paragraph, the court may set the next review in two years if the court determines that the conservator is acting in the best interest interests of the conservatee. In these cases, thereafter, the court investigator shall, as provided in Section 1851, visit the conservatee, conduct an investigation, and report the findings of the investigation to the court. On receipt of the investigator's report, the court shall require the investigator to conduct an investigation pursuant to subdivision (a) of Section 1851 one year before the next review and file a status report in the conservatee's court file regarding whether the conservatorship still appears to be warranted and whether the conservator is acting in the best interests of the conservatee. If the investigator determines pursuant to this investigation that the conservatorship still appears to be warranted and that the conservator is acting in the best interests of the conservatee regarding the conservatee's placement, quality of care, including physical and mental treatment, and finances, no hearing or court action in response to the investigator's report is required. consider terminating the conservatorship at a hearing pursuant to Section 1863 and take any other appropriate action.~~

(b) ~~The~~ *At any time, the* court may, on its own motion or upon request by any interested person, take appropriate action including, but not limited to, ordering a review of the ~~conservatorship, including conservatorship~~ at a noticed ~~hearing, and hearing or~~ ordering the conservator to ~~present submit~~ an accounting ~~of the assets of the estate~~ pursuant to Section 2620.

(c) Notice of a *review* hearing pursuant to ~~subdivision (b) shall be provided to all persons listed in subdivision (b) of Section 1822. this section shall be given to the persons, for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.~~

(d) This chapter does not apply to either of the following:

(1) A conservatorship for an absentee as defined in Section 1403.

(2) A conservatorship of the estate for a nonresident of this state where the conservatee is not present in this state.

~~(e) The amendments made to this section by the act adding this subdivision shall become operative on July 1, 2007.~~

~~(f)~~ *(e) (1)* A superior court shall not be required to perform any duties imposed pursuant to the amendments to this section enacted by Chapter 493 of the Statutes *of* 2006 until the Legislature makes an appropriation identified for this purpose.

(2) A superior court shall not be required to perform any duties imposed pursuant to the measure that added this paragraph until the Legislature makes an appropriation identified for this purpose.

SEC. 9. Section 1850.5 of the Probate Code is amended to read:

1850.5. (a) Notwithstanding Section 1850, each limited conservatorship for a developmentally disabled adult, as defined in subdivision (d) of Section 1801, shall be reviewed by the court one year after the appointment of the conservator and biennially thereafter.

(b) The court may, on its own motion or upon request by any interested person, take appropriate action, including, but not limited to, ordering a review of the limited ~~conservatorship, including conservatorship~~ at a noticed hearing, at any time.

(c) At any review pursuant to this section, the court shall consider terminating the limited conservatorship, as provided in Section 1860.5.

(d) Notice of a review hearing pursuant to this section shall be given to the persons, for the period and in the manner provided in subdivision (d) of Section 1860.5.

~~(e)~~ *(e) (1)* A superior court shall not be required to perform any duties imposed by this section until the Legislature makes an appropriation identified for this purpose.

(2) A superior court shall not be required to perform any duties imposed pursuant to the amendments to this section enacted by the measure that added this paragraph until the Legislature makes an appropriation identified for this purpose.

SEC. 10. Section 1851 of the Probate Code is amended to read:

1851. (a) (1) If court review is required pursuant to Section ~~1850, 1850 or 1850.5~~, the court investigator shall, without prior notice to the conservator except as ordered by the court for necessity or to prevent harm to the conservatee, visit the conservatee. The court investigator shall inform the conservatee personally that the conservatee is under a conservatorship and shall give the name of the conservator to the conservatee. The court investigator shall determine all of the following:

(A) If the conservatee wishes ~~to petition~~ the court ~~for termination of~~ *to terminate* the conservatorship.

(B) If the conservatee ~~is still in need of the conservatorship~~, *wishes the court to remove the conservator and appoint a successor conservator.*

(C) If both of the following are true:

(i) The conservatee still meets the criteria for appointment of a conservator of the person under subdivision (a) of Section 1801, a conservator of the estate under subdivision (b) of Section 1801, or both.

(ii) The conservatorship remains the least restrictive alternative needed for the protection of the conservatee, as required by subdivision (b) of Section 1800.3.

~~(C)~~ (D) If the conservator is acting in the best interests of the conservatee. In determining if the conservator is acting in the best interests of the conservatee, the court investigator's evaluation shall include an examination of the conservatee's placement, the quality of care, including physical and mental *health* treatment, and the conservatee's finances. To the extent practicable, the investigator shall review the accounting with a conservatee who has sufficient capacity. To the greatest extent possible, the court investigator shall interview individuals set forth in paragraph (1) of subdivision (a) of Section 1826, in order to determine if the conservator is acting in the best interests of the conservatee.

~~(D)~~ (E) (i) If the conservatee is incapable of communicating, with or without reasonable accommodations, a desire to participate in the voting process and may be disqualified from voting pursuant to Section 2208 or 2209 of the Elections Code.

(ii) The conservatee shall not be disqualified from voting on the basis that ~~he or she~~ *the conservatee* does, or would need to do, any of the following to complete an affidavit of voter registration:

(I) Signs the affidavit of voter registration with a mark or a cross pursuant to subdivision (b) of Section 2150 of the Elections Code.

(II) Signs the affidavit of voter registration by means of a signature stamp pursuant to Section 354.5 of the Elections Code.

(III) Completes the affidavit of voter registration with the assistance of another person pursuant to subdivision (d) of Section 2150 of the Elections Code.

(IV) Completes the affidavit of voter registration with reasonable accommodations.

(2) If the court ~~has made an order under Chapter 4 (commencing with Section 1870), the court~~ *investigator determines that the conservatee still meets the criteria for appointment of a conservator under Section 1801, the* investigator shall determine if the ~~present condition of the conservatee is such that the~~ terms of the *appointment* order should be modified *to reduce* or ~~the order revoked~~, *expand the conservator's powers and duties to ensure that the conservatorship is the least restrictive alternative needed for the conservatee's protection.*

(3) Upon request of the court investigator, the conservator shall make available to the court investigator during the investigation for inspection and copying all books and records, including receipts and any expenditures, of the conservatorship.

(b) (1) The findings of the court investigator, including the facts upon which the findings are based, shall be certified in writing to the court not less than 15 days before the date of review. A copy of the report shall be delivered pursuant to Section 1215 to the ~~conservator and to~~ *conservatee, the conservator, and* the attorneys of record for the conservator and conservatee at the same time it is certified to the court. A copy of the report, modified as set forth in paragraph (2), also shall be delivered pursuant to Section 1215 to the conservatee's

spouse or registered domestic ~~partner~~, *partner and* the conservatee's relatives in the first degree, ~~and, or~~, if there are no such relatives, to the next closest relative, unless the court determines that the delivery will harm the conservatee.

(2) Confidential medical information and confidential information from the California Law Enforcement Telecommunications System shall be in a separate attachment to the report and shall not be provided in copies sent to the conservatee's spouse or registered domestic ~~partner~~, *partner and* the conservatee's relatives in the first degree, ~~and, or~~, if there are no such relatives, to the next closest relative.

(c) In the case of a limited conservatee, the court investigator shall recommend ~~continuing—or terminating whether to continue, modify, or terminate~~ the limited conservatorship.

(d) The court investigator may personally visit the conservator and *any* other persons ~~as may be~~ necessary to determine if the conservator is acting in the best interests of the conservatee.

(e) The report required by this section shall be confidential and shall be made available only to parties, persons described in subdivision (b), persons given notice of the petition who have requested the report or who have appeared in the proceeding, their attorneys, and the court. The court shall have discretion at any other time to release the report if it would serve the interests of the conservatee. The clerk of the court shall limit disclosure of the report exclusively to persons entitled to the report under this section.

(f) *(1)* A superior court is not required to perform any duties imposed pursuant to the amendments to this section enacted by Chapter 493 of the Statutes of 2006 until the Legislature makes an appropriation identified for this purpose.

(2) A superior court shall not be required to perform any duties imposed pursuant to the amendments to this section enacted by the measure that added this paragraph until the Legislature makes an appropriation identified for this purpose.

SEC. 11. Section 1851.1 of the Probate Code is amended to read:

1851.1. (a) When a court issues an order provisionally granting a petition under Section 2002, the investigator appointed under Section 2002 shall promptly commence an investigation under this section.

(b) In conducting an investigation and preparing a report under this section, the court investigator shall do all of the following:

(1) Comply with the requirements of Section 1851.

(2) Conduct an interview of the conservator.

(3) Conduct an interview of the conservatee's spouse or registered domestic partner, if any.

(4) Inform the conservatee of the nature, purpose, and effect of the conservatorship.

(5) Inform the conservatee and all other persons entitled to notice under subdivision (b) of Section 2002 of the right to seek termination of the conservatorship.

(6) Determine whether the conservatee objects to the conservator or prefers another person to act as conservator.

(7) Inform the conservatee of the right to attend the hearing under subdivision (c).

(8) Determine whether it appears that the conservatee is unable to attend the hearing and, if able to attend, whether the conservatee is willing to attend the hearing.

(9) Inform the conservatee of the right to be represented by legal counsel if the conservatee so chooses, and to have legal counsel appointed by the court if the conservatee is unable to retain legal counsel.

(10) Determine whether the conservatee wishes to be represented by legal counsel and, if so, whether the conservatee has retained legal counsel and, if not, the name of an attorney the conservatee wishes to retain.

(11) If the conservatee has not retained legal counsel, determine whether the conservatee desires the court to appoint legal counsel.

(12) Determine whether the appointment of legal counsel would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee ~~in any case where~~ *when* the conservatee does not plan to retain legal counsel and has not requested the appointment of legal counsel by the court.

(13) Consider each of the categories specified in paragraphs (1) to (5), inclusive, of subdivision (a) of Section 1821.

(14) Consider, to the extent practicable, whether the investigator believes the conservatee suffers from any of the mental function deficits listed in subdivision (a) of Section 811 that significantly impairs the conservatee's ability to understand and appreciate the consequences of the conservatee's actions in connection with any of the functions described in subdivision (a) or (b) of Section 1801 and identify the observations that support that belief.

(c) The court shall review the conservatorship as provided in Section 2002. The conservatee shall attend the hearing unless the conservatee's attendance is excused under Section 1825. The court may take appropriate action in response to the court investigator's report under this section.

(d) The court investigator's report under this section shall be confidential as provided in Section 1851.

(e) Except as provided in paragraph (2) of subdivision (a) of Section 1850, the court shall review the conservatorship again one year after the review conducted pursuant to subdivision (c), and annually thereafter, in the manner specified in Section 1850.

(f) The first time that the need for a conservatorship is challenged by any interested person or raised on the court's own motion after a transfer under Section 2002, whether in a review pursuant to this section or in a petition to terminate the conservatorship under Chapter 3 (commencing with Section 1860), the court shall presume that there is no need for a conservatorship. This presumption is rebuttable, but can only be overcome by clear and convincing evidence. The court shall make an express finding on whether continuation of the conservatorship is the least restrictive alternative needed for the protection of the conservatee.

(g) (1) If a duty described in this section is the same as a duty imposed pursuant to the amendments to Sections 1826, 1850, 1851, 2250, 2253, and 2620 and the addition of Sections 2250.4 and 2250.6 enacted by Chapter 493 of the Statutes of 2006, and the addition of Section 1051 enacted by Chapter 492 of the Statutes of 2006, a superior court shall not be required to perform that duty until the Legislature makes an appropriation identified for this purpose.

(2) If a duty described in this section is the same as a duty imposed pursuant to the amendments to Sections 1826, 1850, 1851, 2250, 2250.4, 2250.6, 2253, and 2620 enacted by the measure that added this paragraph, a superior court shall not be required to perform that duty until the Legislature makes an appropriation identified for this purpose.

SEC. 12. Section 1851.6 is added to the Probate Code, to read:

1851.6. (a) *Any interested person, as defined in Section 48 or any person entitled to receive notice pursuant to Section 1822, if they have personal knowledge of a conservatee, may petition the court to investigate an allegation of abuse, as defined by Section 15610.07 of the Welfare and Institutions Code, of the conservatee by a conservator. The court shall investigate all such allegations that establish a prima facie case of abuse. If the court investigator has performed an investigation within the preceding six months and reported the results of that investigation to the court, the court may order, upon good cause shown, that a new investigation is not necessary or that a more limited investigation is sufficient.*

(b) A superior court shall not be required to perform any duties imposed pursuant to this section until the Legislature makes an appropriation identified for this purpose.

SEC. 13. Section 1860 of the Probate Code is amended to read:

1860. (a) A conservatorship continues until terminated by the death of the conservatee or by order of the ~~court,~~ *court pursuant to Section 1863,* subject to Section 2467 and Article 4 (commencing with Section 2630) of Chapter 7 of Part 4, and except as otherwise provided by law.

(b) At a hearing under Section 1850 or a hearing on a petition to terminate a conservatorship under Section 1861, the court shall proceed as provided in Section 1863.

~~(b)~~ (c) If a conservatorship is established for the person of a married minor, the conservatorship does not terminate *automatically* if the marriage is dissolved or is adjudged a nullity.

~~(e)~~ (d) This section does not apply to limited conservatorships.

(e) A superior court shall not be required to perform any duties imposed pursuant to the amendments to this section enacted by the measure that added this subdivision until the Legislature makes an appropriation identified for this purpose.

SEC. 14. Section 1860.5 of the Probate Code is amended to read:

1860.5. (a) A limited conservatorship continues until the authority of the conservator is terminated by one of the following:

- (1) The death of the limited conservator.
- (2) The death of the limited conservatee.
- (3) ~~By an~~ *An* order appointing a conservator of the former limited conservatee.
- (4) ~~By an~~ *An* order of the court ~~stating that the limited conservatorship is no longer necessary for the limited conservatee and~~ terminating the limited conservatorship.

(b) A petition for the termination of a limited conservatorship may be filed by any of the following:

- (1) The limited conservator.
- (2) The limited conservatee.
- (3) Any relative or friend of the limited conservatee.
- (c) The petition shall state facts showing that the limited conservatorship is no longer required.

(d) Notice of a hearing pursuant to Section 1850.5 or on a petition filed pursuant to this section shall be given to the same persons and in the same manner as provided for a petition for the appointment of a limited conservator.

~~(d) (1) The petition shall be set for hearing and notice thereof shall be given to the persons in the same manner as provided for a petition for the appointment of a limited conservator. The limited conservator in such case, if he or she~~ *If a petition is filed and the limited conservator* is not the ~~petitioner~~ *petitioner*, or has not joined in the petition, *the limited conservator* shall be served with a notice of the time and place of the hearing accompanied by a copy of the petition at least five days prior to the hearing. ~~Such~~ *This* service shall be made in the same manner provided for in Section 415.10 or 415.30 of the Code of Civil Procedure or in ~~such other manner as may be~~ *another manner* authorized by the court. If the limited conservator cannot, with reasonable diligence, be so served with notice, the court may dispense with notice.

(2) If the court sets a hearing pursuant to Section 1850.5 to consider termination of a limited conservatorship and no petition is filed, the court shall order the limited conservator to give notice of the hearing as provided in this subdivision and to appear at the hearing and show cause why the limited conservatorship should not be terminated.

(e) (1) The limited conservatee shall be produced at the hearing except in the following cases:

- (A) When the limited conservatee is out of the state and is not the petitioner.*
- (B) When the limited conservatee is unable to attend the hearing by reason of medical inability.*
- (C) When the court investigator has reported to the court that the limited conservatee has expressly communicated that the limited conservatee (i) is not willing to attend the hearing, (ii) does not wish to contest the continuation of the limited conservatorship, and (iii) does not object to the current limited conservator or prefer that another person act as limited conservator, and the court makes an order that the limited conservatee need not attend the hearing.*

(2) If the limited conservatee is unable to attend the hearing because of medical inability, that inability shall be established by the affidavit or certificate of a licensed medical practitioner or, if the conservatee is an adherent of a religion whose tenets and practices call for reliance on prayer alone for healing and is under treatment by an

accredited practitioner of that religion, by the affidavit of the practitioner. The affidavit or certificate is evidence only of the limited conservatee's inability to attend the hearing and shall not be considered in determining the issue of need for the continuation of the limited conservatorship.

(3) Emotional or psychological instability is not good cause for the absence of the conservatee from the hearing unless, by reason of that instability, attendance at the hearing is likely to cause serious and immediate physiological damage to the conservatee.

(e) (f) The limited conservator or any relative or friend of the limited conservatee may appear and ~~oppose the petition-~~ support or oppose termination of the limited conservatorship. The court shall hear and determine the matter according to the laws and procedures relating to the trial of civil actions, including trial by jury if demanded. ~~If it is determined that the limited conservatorship is no longer required, the limited conservatorship shall cease. If the petition alleges and if it is determined that the limited conservatee is able to properly care for himself or herself and for his or her property, the court shall make such finding and enter judgment accordingly. The limited conservator may at the hearing, the court terminates the limited conservatorship, the limited conservator may, either at the hearing~~ or thereafter on further notice and hearing, be discharged and ~~his or her~~ the bond exonerated upon the settlement and approval of the final account by the court.

(g) The court shall order the termination of the limited conservatorship unless the court finds by clear and convincing evidence, that the limited conservatee still meets the criteria for appointment of a limited conservator under Section 1801 and a limited conservatorship remains the least restrictive alternative needed for the limited conservatee's protection.

(h) If the court determines, by clear and convincing evidence, that the limited conservatee meets the criteria for appointment of a limited conservator under Section 1801, the court shall determine whether to modify the powers granted to the limited conservator to ensure that the limited conservatorship remains the least restrictive alternative needed for the limited conservatee's protection. If the court modifies any powers granted to the limited conservator, new letters shall issue.

SEC. 15. Section 1862 of the Probate Code is amended to read:

1862. (a) Notice of the hearing ~~on the petition-~~ to consider the termination of the conservatorship shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

(b) If the court sets a hearing pursuant to paragraph (2) of subdivision (a) of Section 1850 and no petition is filed, the court shall order the conservator to give notice of the hearing as provided in subdivision (a), and to appear at the hearing and show cause why the conservatorship should not be terminated.

SEC. 16. Section 1863 of the Probate Code is amended to read:

1863. (a) The court shall hear and determine the matter according to the law and procedure relating to the trial of civil actions, including trial by jury if demanded by the conservatee. The conservator, the conservatee, ~~or~~ the ~~spouse,~~ spouse or domestic partner, or any relative or friend of the conservatee or other interested person may appear and support or oppose the ~~petition-~~ termination of the conservatorship.

(b) (1) The conservatee shall be produced at the hearing except in the following cases:

(A) When the conservatee is out of the state and is not the petitioner.

(B) When the conservatee is unable to attend the hearing by reason of medical inability.

(C) When the court investigator has reported to the court that the conservatee has expressly communicated that the conservatee (i) is not willing to attend the hearing, (ii) does not wish to contest the continuation of the conservatorship, and (iii) does not object to the current conservator or prefer that another person act as conservator, and the court makes an order that the conservatee need not attend the hearing.

(2) If the conservatee is unable to attend the hearing because of medical inability, that inability shall be established by the affidavit or certificate of a licensed medical practitioner or, if the conservatee is an adherent of a religion whose tenets and practices call for reliance on prayer alone for healing and is under treatment by an accredited practitioner of that religion, by the affidavit of the practitioner. The affidavit or certificate is evidence only of the conservatee's inability to attend the hearing and shall not be considered in determining the issue of need for the continuation of the conservatorship.

(3) Emotional or psychological instability is not good cause for the absence of the conservatee from the hearing unless, by reason of that instability, attendance at the hearing is likely to cause serious and immediate physiological damage to the conservatee.

(b) (c) If ~~Unless~~ the court ~~determines that the conservatorship is no longer required or that grounds for establishment of a conservatorship~~ determines, on the record and by clear and convincing evidence, that (1) the conservatee still meets the criteria for appointment of a conservator of the person ~~or estate, or both, no longer exist, the court shall make this finding and shall~~ under subdivision (a) of Section 1801, a conservator of the estate under subdivision (b) of Section 1801, or both; and (2) a conservatorship remains the least restrictive alternative needed for the conservatee's protection, as required by subdivision (b) of Section 1800.3, the court shall enter judgment terminating the ~~conservatorship accordingly.~~ conservatorship.

(d) If the court determines, by clear and convincing evidence, that the conservatee meets the criteria for appointment of a conservator of the person under subdivision (a) of Section 1801, a conservator of the estate under subdivision (b) of Section 1801, or both, the court shall determine whether to modify the existing powers of the conservator to ensure that the conservatorship remains the least restrictive alternative needed for the conservatee's protection and shall order the conservatorship to continue accordingly. If the court modifies the existing powers of the conservator, new letters shall issue.

(e) (e) At the hearing, or thereafter on further notice and hearing, the conservator may be discharged and the bond given by the conservator may be exonerated upon the settlement and approval of the conservator's final account by the court.

(f) This section does not apply to limited conservatorships.

(d) (g) Termination of conservatorship does not preclude a new proceeding for appointment of a conservator on the same or other grounds.

SEC. 17. Section 2112 is added to the Probate Code, to read:

2112. *(a) (1) In addition to other remedies available under statutory or common law, if the court finds that a conservator who is a professional fiduciary licensed by the Professional Fiduciaries Bureau has abused a conservatee, the conservator shall be liable for a civil penalty of up to ten thousand dollars (\$10,000) for each separate act of abuse, payable to the estate of the conservatee.*

(2) In addition to other remedies available under statutory or common law, if the court finds that a conservator who is not a professional fiduciary licensed by the Professional Fiduciaries Bureau has abused a conservatee, the conservator shall be liable for a civil penalty of up to one thousand dollars (\$1,000) for each separate act of abuse, payable to the estate of the conservatee.

(b) If the court finds that a professional fiduciary has abused a conservatee, or if the court imposes a penalty on the professional fiduciary, including, but not limited to, surcharging, punishing for contempt, suspending, or removing the professional fiduciary as a conservator for cause, the court shall report that finding or penalty to the Professional Fiduciaries Bureau. If the court reports an action taken under this section, the court shall provide the bureau, at no charge, with access to the information, including confidential information, regarding its investigation of the professional fiduciary contained in court records. The bureau shall maintain the confidentiality of the information, as required by paragraph (4) of subdivision (a) of Section 6580 of the Business and Professions Code or any other applicable state or federal law.

(c) For purposes of this section, the following definitions apply:

(1) "Abused" means that the conservator engaged in an act described in Section 15610.07 of the Welfare and Institutions Code.

(2) "Professional fiduciary" has the same meaning as defined in Section 6501 of the Business and Professions Code.

(d) A superior court shall not be required to perform any duties imposed pursuant to this section until the Legislature makes an appropriation identified for this purpose.

SEC. 18. Section 2250 of the Probate Code is amended to read:

2250. (a) On or after the filing of a petition for appointment of a guardian or conservator, any person entitled to petition for appointment of the guardian or conservator may file a petition for appointment of:

(1) A temporary guardian of the person or estate, or both.

(2) A temporary conservator of the person or estate, or both.

(b) The petition shall state facts that establish good cause for appointment of the temporary guardian or temporary conservator. The court, upon that petition or other showing as it may require, may appoint a temporary guardian of the person or estate, or both, or a temporary conservator of the person or estate, or both, to serve pending the final determination of the court upon the petition for the appointment of the guardian or conservator.

(c) If the petitioner, proposed guardian, or proposed conservator is a professional fiduciary, as described in Section 2340, who is required to be licensed under the Professional Fiduciaries Act (Chapter 6 (commencing with Section 6500) of Division 3 of the Business and Professions Code), the petition for appointment of a temporary guardian or temporary conservator shall include the following:

(1) The petitioner's, proposed guardian's, or proposed conservator's proposed hourly fee schedule or another statement of ~~his or her~~ *their* proposed compensation from the estate of the proposed ward or proposed conservatee for services performed as a guardian or conservator. The petitioner's, proposed guardian's, or proposed conservator's provision of a proposed hourly fee schedule or another statement of ~~his or her~~ *their* proposed compensation, as required by this paragraph, shall not preclude a court from later reducing the petitioner's, proposed guardian's, or proposed conservator's fees or other compensation.

(2) Unless a petition for appointment of a guardian or conservator that contains the statements required by this paragraph is filed together with a petition for appointment of a temporary guardian or temporary conservator, both of the following:

(A) A statement of the petitioner's, proposed guardian's, or proposed conservator's registration or license information.

(B) A statement explaining who engaged the petitioner, proposed guardian, or proposed conservator or how the petitioner, proposed guardian, or proposed conservator was engaged to file the petition for appointment of a temporary guardian or temporary conservator or to agree to accept the appointment as temporary guardian or temporary conservator and what prior relationship the petitioner, proposed guardian, or proposed conservator had with the proposed ward or proposed conservatee or the proposed ward's or proposed conservatee's family or friends.

(d) If the petition is filed by a party other than the proposed conservatee, the petition shall include a declaration of due diligence showing both of the following:

(1) Either the efforts to find the proposed conservatee's relatives named in the petition for appointment of a general conservator or why it was not feasible to contact any of them.

(2) Either the preferences of the proposed conservatee concerning the appointment of a temporary conservator and the appointment of the proposed temporary conservator or why it was not feasible to ascertain those preferences.

(e) Unless the court for good cause otherwise orders, at least five court days before the hearing on the petition, notice of the hearing shall be given as follows:

(1) Notice of the hearing shall be personally delivered to the proposed ward if ~~he or she~~ *the proposed ward* is 12 years of age or older, to the parent or parents of the proposed ward, and to any person having a valid visitation order with the proposed ward that was effective at the time of the filing of the petition. Notice of the hearing shall not be delivered to the proposed ward if ~~he or she~~ *the proposed ward* is under 12 years of age. In a proceeding for temporary guardianship of the person, evidence that a custodial parent has died or become incapacitated, and that the petitioner or proposed guardian is the nominee of the custodial parent, may constitute good cause for the court to order that this notice not be delivered.

(2) Notice of the hearing shall be personally delivered to the proposed conservatee, and notice of the hearing shall be delivered pursuant to Section 1215 on the persons required to be named in the petition for appointment of conservator. If the petition states that the petitioner and the proposed conservator have no prior relationship

with the proposed conservatee and have not been nominated by a family member, friend, or other person with a relationship to the proposed conservatee, notice of hearing shall be delivered pursuant to Section 1215 on the public guardian of the county in which the petition is filed.

(3) A copy of the petition for temporary appointment shall be delivered pursuant to Section 1215 with the notice of hearing.

(f) If a temporary guardianship is granted ex parte and the hearing on the general guardianship petition is not to be held within 30 days of the granting of the temporary guardianship, the court shall set a hearing within 30 days to reconsider the temporary guardianship. Notice of the hearing for reconsideration of the temporary guardianship shall be provided pursuant to Section 1511, except that the court may for good cause shorten the time for the notice of the hearing.

(g) Visitation orders with the proposed ward granted before the filing of a petition for temporary guardianship shall remain in effect, unless for good cause the court orders otherwise.

(h) (1) If a temporary conservatorship is granted ex parte, and a petition to terminate the temporary conservatorship is filed more than 15 days before the first hearing on the general petition for appointment of conservator, the court shall set a hearing within 15 days of the filing of the petition for termination of the temporary conservatorship to reconsider the temporary conservatorship. Unless the court otherwise orders, notice of the hearing on the petition to terminate the temporary conservatorship shall be given at least 10 days before the hearing.

(2) If a petition to terminate the temporary conservatorship is filed within 15 days before the first hearing on the general petition for appointment of a conservator, the court shall set the hearing at the same time that the hearing on the general petition is set. Unless the court otherwise orders, notice of the hearing on the petition to terminate the temporary conservatorship pursuant to this section shall be given at least five court days before the hearing.

(i) If the court suspends powers of the guardian or conservator under Section 2334 or 2654 or under any other provision of this division, the court may appoint a temporary guardian or conservator to exercise those powers until the powers are restored to the guardian or conservator or a new guardian or conservator is appointed.

(j) If for any reason a vacancy occurs in the office of guardian or conservator, the court, on a petition filed under subdivision (a) or on its own motion, may appoint a temporary guardian or conservator to exercise the powers of the guardian or conservator until a new guardian or conservator is appointed.

~~(k) On or before January 1, 2008, the Judicial Council shall adopt a rule of court that establishes uniform standards for good cause exceptions to the notice required by subdivision (e), limiting those exceptions to only cases when waiver of the notice is essential to protect the proposed conservatee or ward, or the estate of the proposed conservatee or ward, from substantial harm.~~

~~(k)~~ (k) A superior court shall not be required to perform any duties imposed pursuant to the amendments to this section enacted by Chapter 493 of the Statutes of 2006 until the Legislature makes an appropriation identified for this purpose.

SEC. 19. Section 2250.6 of the Probate Code is amended to read:

2250.6. (a) Regardless of whether the proposed temporary conservatee attends the hearing, the court investigator shall do all of the following prior to the hearing, unless it is not feasible to do so, in which case the court investigator shall comply with the requirements set forth in subdivision (b):

(1) Interview the proposed conservatee personally. The court investigator also shall do all of the following:

(A) Interview the petitioner and the proposed conservator, if different from the petitioner.

(B) To the greatest extent possible, interview the proposed conservatee's spouse or registered domestic partner, relatives within the first degree, ~~neighbors~~ neighbors, and, if known, close friends.

(C) To the extent possible, interview the proposed conservatee's relatives within the second degree as set forth in subdivision (b) of Section 1821 before the hearing.

(2) Inform the proposed conservatee of the contents of the citation, of the nature, purpose, and effect of the

temporary conservatorship, and of the right of the proposed conservatee to oppose the ~~proceeding,~~ *petition*, to attend the hearing, to have the matter of the establishment of the conservatorship tried by jury, to be represented by legal ~~counsel if the proposed conservatee so chooses,~~ *counsel*, and to have legal counsel appointed by the court if unable to retain legal counsel.

(3) Determine whether it appears that the proposed conservatee is unable to attend the hearing and, if able to attend, whether the proposed conservatee is willing to attend the hearing.

(4) Determine whether the proposed conservatee wishes to ~~contest~~ *oppose* the establishment of the conservatorship.

(5) Determine whether the proposed conservatee objects to the proposed conservator or prefers another person to act as conservator.

(6) Report to the court, in writing, concerning all of the foregoing.

(b) If not feasible before the hearing, the court investigator shall do all of the following within two court days after the hearing:

(1) Interview the conservatee personally. The court investigator also shall do all of the following:

(A) Interview the petitioner and the proposed conservator, if different from the petitioner.

(B) To the greatest extent possible, interview the proposed conservatee's spouse or registered domestic partner, relatives within the first degree, ~~neighbors~~ *neighbors*, and, if known, close friends.

(C) To the extent possible, interview the proposed conservatee's relatives within the second degree as set forth in subdivision (b) of Section 1821.

(2) Inform the conservatee of the nature, purpose, and effect of the temporary conservatorship, as well as the right of the conservatee to oppose the ~~proposed general conservatorship,~~ *petition to appoint a general conservator*, to attend the hearing, to have the matter of the establishment of the conservatorship tried by jury, to be represented by legal ~~counsel if the proposed conservatee so chooses,~~ *counsel*, and to have legal counsel appointed by the court if unable to retain legal counsel.

(c) If the investigator does not visit the conservatee until after the hearing at which a temporary conservator was appointed, and the conservatee objects to the appointment of the temporary conservator, or requests an attorney, the court investigator shall report this information promptly, and in no event more than three court days later, to the court. Upon receipt of that information, the court may proceed with appointment of an attorney as provided in Chapter 4 (commencing with Section 1470) of Part 1.

(d) If it appears to the court investigator that the temporary conservatorship is inappropriate, the court investigator shall immediately, and in no event more than two court days later, provide a written report to the court so the court can consider taking appropriate action on its own motion.

(e) A superior court shall not be required to perform any duties imposed by this section until the Legislature makes an appropriation identified for this purpose.

SEC. 20. Section 2253 of the Probate Code is amended to read:

2253. (a) If a temporary conservator of the person proposes to fix the residence of the conservatee at a place other than that where the conservatee resided ~~prior to~~ *before* the commencement of the proceedings, that power shall be requested of the court in writing, unless the change of residence is required of the conservatee by a prior court order. The request shall be filed with the petition for temporary conservatorship or, if a temporary conservatorship has already been established, separately. The request shall specify in ~~particular detail~~ *particular detail* the place to which the temporary conservator proposes to move the conservatee, ~~and~~ the precise reasons ~~why it is believed that the~~ *that the petitioner or temporary conservator has concluded that the* conservatee will suffer irreparable harm if the change of residence is not permitted, and why no means less restrictive of the conservatee's liberty will suffice to prevent that harm.

(b) ~~Unless the court for good cause orders otherwise, the court~~ *The court* investigator shall do all of the following:

(1) Interview the conservatee personally.

(2) Inform the conservatee of the nature, purpose, and effect of the request made under subdivision (a), and of the right of the conservatee to oppose the request, attend the hearing, be represented by legal ~~counsel if the conservatee so chooses,~~ *counsel*, and to have legal counsel appointed by the court if unable to obtain legal counsel.

(3) Determine whether the conservatee is unable to attend the hearing because of medical inability and, if able to attend, whether the conservatee is willing to attend the hearing.

(4) Determine whether the conservatee wishes to oppose the request.

(5) Determine whether the conservatee wishes to be represented by legal counsel at the hearing and, if so, whether the conservatee has retained legal counsel and, if not, ~~the name of an attorney the proposed conservatee wishes to retain or whether the conservatee~~ *whether the conservatee plans to retain legal counsel or* desires the court to appoint legal counsel.

(6) If the conservatee does not plan to retain legal counsel and has not requested the appointment of legal counsel by the court, determine whether the appointment of legal counsel would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee.

~~(7) Determine~~ *Determine, by considering, among other things, the medical information received pursuant to paragraph (8),* whether the proposed change of place of residence is required to prevent irreparable harm to the conservatee and whether no means less restrictive of the conservatee's liberty will suffice to prevent that harm.

(8) Gather and review relevant medical reports regarding the proposed conservatee from the proposed conservatee's primary care physician and other relevant mental and physical health care providers.

~~(8)~~ *(9)* Report to the court in writing, at least two days before the hearing, concerning all of the foregoing, including the conservatee's express communications concerning representation by legal counsel and whether the conservatee is not willing to attend the hearing and does not wish to oppose the request.

(c) Within seven days of the date of filing of a temporary conservator's request to remove the conservatee from ~~his or her~~ *the conservatee's* previous place of residence, the court shall hold a hearing on the request.

(d) The conservatee shall be present at the hearing except in the following cases:

(1) Where the conservatee is unable to attend the hearing by reason of medical inability. Emotional or psychological instability is not good cause for the absence of the conservatee from the hearing unless, by reason of that instability, attendance at the hearing is likely to cause serious and immediate physiological damage to the conservatee.

(2) Where the court investigator has reported to the court that the conservatee has expressly communicated that the conservatee is not willing to attend the hearing and does not wish to oppose the request, and the court makes an order that the conservatee need not attend the hearing.

(e) If the conservatee is unable to attend the hearing because of medical inability, that inability shall be established (1) by the affidavit or certificate of a licensed medical practitioner or (2) if the conservatee is an adherent of a religion whose tenets and practices call for reliance on prayer alone for healing and is under treatment by an accredited practitioner of that religion, by the affidavit of the practitioner. The affidavit or certificate is evidence only of the conservatee's inability to attend the hearing and shall not be considered in determining the issue of need for the establishment of a conservatorship.

(f) At the hearing, the conservatee has the right to be represented by counsel and the right to confront and cross-examine any witness presented by or on behalf of the temporary conservator and to present evidence on ~~his or her~~ *their* own behalf.

(g) The court may approve the request to remove the conservatee from the previous place of residence only if the court finds (1) that change of residence is required to prevent irreparable harm to the conservatee and (2) that no means less restrictive of the conservatee's liberty will suffice to prevent that harm. If an order is made authorizing the temporary conservator to remove the conservatee from the previous place of residence, the order shall specify the specific place wherein the temporary conservator is authorized to place the conservatee. The temporary conservator may not be authorized to remove the conservatee from this state unless it is additionally

shown that such removal is required to permit the performance of specified nonpsychiatric medical treatment, consented to by the conservatee, which is essential to the conservatee's physical survival. A temporary conservator who willfully removes a temporary conservatee from this state without authorization of the court is guilty of a felony.

(h) Subject to subdivision (e) of Section 2252, the court shall also order the temporary conservator to take all reasonable steps to preserve the status quo concerning the conservatee's previous place of residence.

(i) (1) The report required by this section shall be confidential and shall be made available only to parties, their attorneys, and the court. The clerk of the court shall limit disclosure of the report exclusively to persons entitled to the report pursuant to this section.

(2) Notwithstanding paragraph (1), confidential medical information and confidential information from the California Law Enforcement Telecommunications System (CLETS) shall be placed in a separate attachment to the report and shall not be made available to the petitioner or proposed temporary conservator if the request is filed with the petition, the temporary conservatee's spouse or registered domestic partner, and the conservatee's relatives in the first degree or, if there are no such relatives, to the next closest relative.

~~(j)~~ *(j) (1) A superior court shall not be required to perform any duties imposed pursuant to the amendments to this section enacted by Chapter 493 of the Statutes of 2006 until the Legislature makes an appropriation identified for this purpose.*

(2) A superior court shall not be required to perform any duties imposed pursuant to the amendments to this section enacted by the measure that added this paragraph until the Legislature makes an appropriation identified for this purpose.

SEC. 21. Section 2401 of the Probate Code is amended to read:

2401. (a) The guardian or conservator, or limited conservator to the extent specifically and expressly provided in the appointing court's order, has the management and control of the estate and, in managing and controlling the estate, shall use ordinary care and diligence. What constitutes use of ordinary care and diligence is determined by all the circumstances of the particular estate.

(b) The guardian or conservator:

(1) Shall exercise a power to the extent that ordinary care and diligence requires that the power be exercised.

(2) Shall not exercise a power to the extent that ordinary care and diligence requires that the power not be exercised.

(c) Notwithstanding any other law, a guardian or conservator who is not a trust company, ~~in exercising his or her or an employee of that guardian or conservator, in exercising their~~ powers, may not hire or refer any business to an entity in which ~~he or she has a financial interest except upon authorization of the court. Prior to authorization from the court, the~~ guardian or conservator ~~shall disclose to the court in writing his or her financial interest in the entity. or an employee has a financial interest.~~ For the purposes of this subdivision, "financial interest" shall mean (1) an ownership interest in a sole proprietorship, a partnership, or a closely held corporation, or (2) an ownership interest of greater than 1 percent of the outstanding shares in a publicly held corporation, or (3) being an officer or a director of a corporation.

(d) Subdivision (c) does not prohibit a professional fiduciary appointed as a guardian or conservator from hiring and compensating individuals as employees, with court approval.

~~(e)~~ *(e) (1) Notwithstanding any other law, a guardian or conservator who is a trust company, in exercising its powers may not, except upon authorization of the court, invest in securities of the trust company or an affiliate or subsidiary, or other securities from which the trust company or affiliate or subsidiary receives a financial benefit or in a mutual fund, other than a mutual fund authorized in paragraph (5) of subdivision (a) of Section 2574, registered under the Investment Company Act of 1940 (Subchapter 1 (commencing with Sec. 80a-1) of Chapter 2D of Title 15 of the United States Code), to which the trust company or its affiliate provides services, including, but not limited to, services as an investment adviser, sponsor, distributor, custodian, agent, registrar, administrator, servicer, or manager, and for which the trust company or its affiliate receives compensation.*

~~Prior (2) to~~ *Before* authorization from the court, the guardian or conservator shall disclose to the court in

writing the trust company's financial interest.

SEC. 22. Section 2620 of the Probate Code is amended to read:

2620. (a) At the expiration of one year from the time of appointment and thereafter not less frequently than biennially, unless otherwise ordered by the court to be more frequent, the guardian or conservator shall present the accounting of the assets of the estate of the ward or conservatee to the court for settlement and allowance in the manner provided in Chapter 4 (commencing with Section 1060) of Part 1 of Division 3. By January 1, 2008, the Judicial Council, in consultation with the California Judges Association, the California Association of Superior Court Investigators, the California State Association of Public Administrators, Public Guardians, and Public Conservators, the State Bar of California, and the California Society of Certified Public Accountants, shall develop a standard accounting form, a simplified accounting form, and rules for when the simplified accounting form may be used. After January 1, 2008, all accountings submitted pursuant to this section shall be submitted on the Judicial Council form.

(b) The final court accounting of the guardian or conservator following the death of the ward or conservatee shall include a court accounting for the period that ended on the date of death and a separate accounting for the period subsequent to the date of death.

(c) Along with each court accounting, the guardian or conservator shall file supporting documents, as provided in this section.

(1) For purposes of this subdivision, the term "account statement" shall include any original account statement or verified electronic statement from any institution, as defined in Section 2890, or any financial institution, as defined in Section 2892, in which money or other assets of the estate are held or deposited. A court may also accept a computer-generated printout of an original verified electronic statement if the guardian or conservator verifies that the statement was received in electronic form and printed without alteration. A verification shall be executed by the guardian or conservator pursuant to Section 2015.5 of the Code of Civil Procedure.

(2) The filing shall include all account statements showing the account balance as of the closing date of the accounting period of the court accounting. If the court accounting is the first court accounting of the guardianship or conservatorship, the guardian or conservator shall provide to the court all account statements showing the account balance immediately preceding the date the conservator or guardian was appointed and all account statements showing the account balance as of the closing date of the first court accounting.

~~(3) If the guardian or conservator is a private professional or licensed guardian or conservator, the guardian or conservator shall also file all original account statements or verified electronic statements, as described in paragraph (1), showing the balance as of all periods covered by the accounting.~~

~~(4)~~ (3) The filing shall include the original closing escrow statement received showing the charges and credits for any sale of real property of the estate.

~~(5)~~ (4) If the ward or conservatee is in a residential care facility or a long-term care facility, the filing shall include the original bill statements for the facility.

~~(6)~~ (5) This subdivision shall not apply to the public guardian if the money belonging to the estate is pooled with money belonging to other estates pursuant to Section 2940 and Article 3 (commencing with Section 7640) of Chapter 4 of Part 1 of Division 7. Nothing in this section shall affect any other duty or responsibility of the public guardian with regard to managing money belonging to the estate or filing accountings with the court.

~~(7)~~ (6) If any document to be filed or lodged with the court under this section contains the ward's or conservatee's social security number or any other personal information regarding the ward or conservatee that would not ordinarily be disclosed in a court accounting, an inventory and appraisal, or other nonconfidential pleadings filed in the action, the account statement or other document shall be attached to a separate affidavit describing the character of the document, captioned "CONFIDENTIAL FINANCIAL STATEMENT" in capital letters. Except as otherwise ordered by the court, the clerk of the court shall keep the document confidential except to the court and subject to disclosure only upon an order of the court. The guardian or conservator may redact the ward's or conservatee's social security number from any document lodged with the court under this section.

~~(8)~~ (7) Courts may provide by local rule that the court shall retain all documents lodged with it under this subdivision until the court's determination of the guardian's or conservator's account has become final, at which time the supporting documents shall be returned to the deposing guardian or conservator or delivered to any

successor appointed by the court.

(d) Each accounting is subject to random or discretionary, full or partial review by the court. The review may include consideration of any information necessary to determine the accuracy of the accounting. If the accounting has any material error, the court shall make an express finding as to the severity of the error and what further action is appropriate in response to the error, if any. Among the actions available to the court is immediate suspension of the guardian or conservator without further notice or proceedings and appointment of a temporary guardian or conservator or removal of the guardian or conservator pursuant to Section 2650 and appointment of a temporary guardian or conservator.

(e) The guardian or conservator shall make available for inspection and copying, upon reasonable notice, to any person designated by the court to verify the accuracy of the accounting, all books and records, including receipts for any expenditures, of the guardianship or conservatorship.

(f) A superior court shall not be required to perform any duties imposed pursuant to the amendments to this section enacted by Chapter 493 of the Statutes of 2006 until the Legislature makes an appropriation identified for this purpose.

SEC. 23. Section 2623 of the Probate Code is amended to read:

2623. (a) Except as provided in subdivision ~~(b) of this section,~~ (b), the guardian or conservator shall be allowed all of the following:

(1) The amount of the reasonable expenses incurred in the exercise of the powers and the performance of the duties of the guardian or conservator (including, but not limited to, the cost of any surety bond furnished, reasonable attorney's fees, and such compensation for services rendered by the guardian or conservator of the person as the court determines is ~~just and reasonable~~; *just, reasonable, and in the best interest of the ward or conservatee*).

(2) Such compensation for services rendered by the guardian or conservator as the court determines is ~~just and reasonable~~; *just, reasonable, and in the best interest of the ward or conservatee*.

(3) All reasonable disbursements made before appointment as guardian or conservator.

(4) In the case of termination other than by the death of the ward or conservatee, all reasonable disbursements made after the termination of the guardianship or ~~conservatorship~~ *conservatorship*, but ~~prior to~~ *before* the discharge of the guardian or conservator by the court.

(5) In the case of termination by the death of the ward or conservatee, all reasonable expenses incurred ~~prior to~~ *before* the discharge of the guardian or conservator by the court for the custody and conservation of the estate and its delivery to the personal representative of the estate of the deceased ward or conservatee or in making other disposition of the estate as provided for by law.

(b) (1) The guardian or conservator shall not be compensated from the estate for any costs or fees that the guardian or conservator incurred in unsuccessfully *defending their fee request petition*, opposing a petition, or *any* other *unsuccessful* request or ~~action,~~ *action* made ~~by by,~~ or ~~on-~~ *on-* behalf ~~of of,~~ the ward or ~~conservatee,~~ *conservatee*; ~~unless the court determines that the opposition was made in good faith, based on the best interests of the ward or~~ *conservatee*.

(2) If the court determines, by clear and convincing evidence, that the defense, opposition, or other action described in paragraph (1) was made in good faith, was based upon the best interest of the ward or conservatee, and did not harm the ward or conservatee, the court may reduce the compensation awarded for the costs or fees incurred instead of denying it completely. The court shall state the reasons for its determination in writing or on the record.

SEC. 24. Section 2640 of the Probate Code is amended to read:

2640. (a) At any time after the filing of the inventory and appraisal, but not before the expiration of 90 days from the issuance of letters or any other period of time as the court for good cause orders, the guardian or conservator of the estate may petition the court for an order fixing and allowing compensation to any one or more of the following:

(1) The guardian or conservator of the estate for services *in the best interest of the ward or conservatee* rendered to that time.

(2) The guardian or conservator of the person for services *in the best interest of the ward or conservatee* rendered to that time.

(3) The attorney for services *in the best interest of the ward or conservatee* rendered to that time by the attorney to the guardian or conservator of the person or estate or both.

(b) Notice of the hearing shall be given for the period and in the manner provided for in Chapter 3 (commencing with Section 1460) of Part 1.

(c) Upon the hearing, the court shall make an order allowing (1) any compensation requested in the petition the court determines is just and reasonable to the guardian or conservator of the estate for services rendered or to the guardian or conservator of the person for services rendered, or to both, and (2) any compensation requested in the petition the court determines is reasonable to the attorney for services rendered to the guardian or conservator of the person or estate or both. The compensation allowed to the guardian or conservator of the person, the guardian or conservator of the estate, and to the attorney may, in the discretion of the court, include compensation for services rendered before the date of the order appointing the guardian or conservator. The compensation allowed shall be charged to the estate. Legal services for which the attorney may be compensated include those services rendered by any paralegal performing legal services under the direction and supervision of an attorney. The petition or application for compensation shall set forth the hours spent and services performed by the paralegal.

(d) (1) Notwithstanding subdivision (c), the guardian or conservator shall not be compensated from the estate for any costs or fees that the guardian or conservator incurred in unsuccessfully *defending their fee request petition*, opposing a petition, or *any* other *unsuccessful* request or ~~action,~~ *action* made ~~by by,~~ or ~~on~~ behalf ~~of of,~~ the ward or ~~conservatee,~~ ~~unless the court determines that the opposition was made in good faith, based on the best interests of the ward or~~ conservatee.

(2) If the court determines, by clear and convincing evidence, that the defense, opposition, or other action described in paragraph (1) was made in good faith, was based upon the best interest of the ward or conservatee, and did not harm the ward or conservatee, the court may reduce the compensation awarded for the costs or fees incurred instead of denying it completely. The court shall state the reasons for its determination in writing or on the record.

(e) Notwithstanding subdivision (c), the guardian, conservator, or attorney shall not be compensated with any government benefits program moneys unless deemed by the court as necessary to sustain the support and maintenance of the ward or conservatee, but in no event may this exceed the amount permitted by federal laws and regulations.

SEC. 25. Section 2641 of the Probate Code is amended to read:

2641. (a) At any time permitted by Section 2640 and upon the notice therein prescribed, the guardian or conservator of the person may petition the court for an order fixing and allowing compensation for services *in the best interest of the ward or conservatee* rendered to that time.

(b) Upon the hearing, the court shall make an order allowing any compensation the court determines is just and reasonable to the guardian or conservator of the person for services ~~rendered-~~ *rendered in the best interest of the ward or conservatee*. The compensation allowed to the guardian or conservator of the person may, in the discretion of the court, include compensation for services rendered before the date of the order appointing the guardian or conservator. The compensation allowed shall thereupon be charged against the estate.

(c) ~~The~~ (1) *Notwithstanding subdivision (b), the* guardian or conservator shall not be compensated from the estate for any costs or fees that the guardian or conservator incurred in unsuccessfully *defending their fee request petition*, opposing a petition, or *any* other *unsuccessful* request or ~~action,~~ *action* made ~~by by,~~ or ~~on~~ behalf ~~of of,~~ the ward or ~~conservatee,~~ ~~unless the court determines that the opposition was made in good faith, based on the best interests of the ward or~~ conservatee.

(2) If the court determines, by clear and convincing evidence, that the defense, opposition, or other action described in paragraph (1) was made in good faith, was based upon the best interest of the ward or conservatee, and did not harm the ward or conservatee, the court may reduce the compensation awarded for the costs or fees

incurred instead of denying it completely. The court shall state the reasons for its determination in writing or on the record.

(d) Notwithstanding subdivision (b), the guardian or conservator of the person shall not be compensated with any government benefits program moneys unless deemed by the court as necessary to sustain the support and maintenance of the ward or conservatee, but in no event may this exceed the amount permitted by federal laws and regulations.

SEC. 26. Section 2653 of the Probate Code is amended to read:

2653. (a) The guardian or conservator, the ward or conservatee, the spouse of the ward or the spouse or registered domestic partner of the conservatee, ~~any a~~ relative or friend of the ward or conservatee, and any interested person may appear at the hearing and support or oppose the petition.

(b) If the court determines that cause for removal of the guardian or conservator exists, the court may remove the guardian or conservator, revoke the letters of guardianship or conservatorship, and enter judgment accordingly and, in the case of a guardianship or conservatorship of the estate, order the guardian or conservator to file an accounting and to surrender the estate to the person legally entitled thereto. If the guardian or conservator fails to file the accounting as ordered, the court may compel the accounting pursuant to Section 2620.2.

(c) If the court removes the guardian or conservator for cause, as described in subdivisions (a) to (g), inclusive, of Section 2650 or Section 2655, ~~both all~~ of the following shall apply:

(1) The court shall award the petitioner the costs of the petition and other expenses and costs of litigation, including attorney's fees, incurred under this ~~article, unless the court determines that the guardian or conservator has acted in good faith, based on the best interests of the ward or conservatee.~~ *article.*

(2) The guardian or conservator may not deduct from, or charge to, the estate ~~his~~ *the guardian's* or ~~her conservator's~~ costs of ~~litigation, opposing the petition for removal,~~ and is personally liable for those costs and expenses.

(3) If the court removes a professional fiduciary as guardian or conservator for cause, the court shall report that determination and the basis for removal to the Professional Fiduciaries Bureau. If the court reports an action taken under this section, the court shall provide the bureau, at no charge, with access to the information, including confidential information, regarding its investigation of the professional fiduciary contained in court records. The bureau shall maintain the confidentiality of the information, as required by paragraph (4) of subdivision (a) of Section 6580 of the Business and Professions Code or any other applicable state or federal law.

(d) A superior court shall not be required to perform any duties imposed pursuant to the amendments to this section enacted by the measure that added this subdivision until the Legislature makes an appropriation identified for this purpose.


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WELFARE AND INSTITUTIONS CODE - WIC

DIVISION 9. PUBLIC SOCIAL SERVICES [10000 - 18999.98] (*Division 9 added by Stats. 1965, Ch. 1784.*)

PART 3. AID AND MEDICAL ASSISTANCE [11000 - 15771] (*Part 3 added by Stats. 1965, Ch. 1784.*)

CHAPTER 11. Elder Abuse and Dependent Adult Civil Protection Act [15600 - 15675] (*Heading of Chapter 11 amended by Stats. 1991, Ch. 774, Sec. 1.*)

ARTICLE 2. Definitions [15610 - 15610.70] (*Article 2 repealed and added by Stats. 1994, Ch. 594, Sec. 3.*)

15610. The definitions contained in this article shall govern the construction of this chapter, unless the context requires otherwise.

(*Repealed and added by Stats. 1994, Ch. 594, Sec. 3. Effective January 1, 1995.*)

15610.02. (a) The Legislature finds and declares all of the following:

(1) The adult protective services program (program), established by the Legislature as a statewide program in 1998, is a critical component of the state's safety net for vulnerable adults.

(2) The population served by the county-run, state-overseen program has grown and changed significantly since the program's inception and will continue to do so at a rapid pace, given the increasing number of older adults in California. California's over-65 years of age population is expected to be 87 percent higher in 2030 than in 2012, an increase of more than 4,000,000 people. The population over 85 years of age will increase at an even faster rate, with 489 percent growth between 2010 and 2060.

(3) The increasing population of older adults often has more complex needs, including persons with cognitive impairments and a growing number of those experiencing homelessness. Research indicates that approximately 50 percent of homeless individuals are over 50 years of age, and one-half of those individuals became homeless after 50 years of age.

(b) In order to address the safety and well-being of the growing number of diverse older adults who will need adult protective services, it is the intent of the Legislature to enhance the program in a number of ways, including enabling the program to provide longer term case management for those with more complex cases, expanding and making more flexible the Home Safe Program to aid clients facing homelessness, and encouraging the use of collaborative, multidisciplinary best practices across the state, including financial abuse specialist teams and forensic centers. It is further the intent of the Legislature to expand the age of clients served under the program in order to intervene earlier with aging adults before their situations reach a crisis point.

(*Added by Stats. 2021, Ch. 85, Sec. 62. (AB 135) Effective July 16, 2021.*)

15610.05. "Abandonment" means the desertion or willful forsaking of an elder or a dependent adult by anyone having care or custody of that person under circumstances in which a reasonable person would continue to provide care and custody.

(*Added by Stats. 1994, Ch. 594, Sec. 3. Effective January 1, 1995.*)

15610.06. "Abduction" means the removal from this state and the restraint from returning to this state, or the restraint from returning to this state, of any elder or dependent adult who does not have the capacity to consent to the removal from this state and the restraint from returning to this state, or the restraint from returning to this state, as well as the removal from this state or the restraint from returning to this state, of any conservatee without the consent of the conservator or the court.

(*Added by Stats. 1997, Ch. 663, Sec. 2. Effective January 1, 1998.*)

15610.07. (a) "Abuse of an elder or a dependent adult" means any of the following:

- (1) Physical abuse, neglect, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
 - (2) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.
 - (3) Financial abuse, as defined in Section 15610.30.
- (b) This section shall become operative on July 1, 2016.

(Repealed (in Sec. 1) and added by Stats. 2015, Ch. 285, Sec. 2. (SB 196) Effective January 1, 2016. Section operative July 1, 2016, by its own provisions.)

15610.10. "Adult protective services" means those activities performed on behalf of elders and dependent adults who have come to the attention of the adult protective services agency due to potential abuse or neglect.

(Amended by Stats. 2021, Ch. 85, Sec. 63. (AB 135) Effective July 16, 2021.)

15610.13. "Adult protective services agency" means a county welfare department, except persons who do not work directly with elders or dependent adults as part of their official duties, including members of support staff and maintenance staff.

(Added by Stats. 1994, Ch. 594, Sec. 3. Effective January 1, 1995.)

15610.15. "Bureau" means the Bureau of Medi-Cal Fraud within the office of the Attorney General.

(Added by Stats. 1994, Ch. 594, Sec. 3. Effective January 1, 1995.)

15610.17. "Care custodian" means an administrator or an employee of any of the following public or private facilities or agencies, or persons providing care or services for elders or dependent adults, including members of the support staff and maintenance staff:

- (a) Twenty-four-hour health facilities, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.
- (b) Clinics.
- (c) Home health agencies.
- (d) Agencies providing publicly funded in-home supportive services, nutrition services, or other home and community-based support services.
- (e) Adult day health care centers and adult day care.
- (f) Secondary schools that serve 18- to 22-year-old dependent adults and postsecondary educational institutions that serve dependent adults or elders.
- (g) Independent living centers.
- (h) Camps.
- (i) Alzheimer's Disease day care resource centers.
- (j) Community care facilities, as defined in Section 1502 of the Health and Safety Code, and residential care facilities for the elderly, as defined in Section 1569.2 of the Health and Safety Code.
- (k) Respite care facilities.
- (l) Foster homes.
- (m) Vocational rehabilitation facilities and work activity centers.
- (n) Designated area agencies on aging.
- (o) Regional centers for persons with developmental disabilities.
- (p) State Department of Social Services and State Department of Health Services licensing divisions.
- (q) County welfare departments.
- (r) Offices of patients' rights advocates and clients' rights advocates, including attorneys.
- (s) The office of the long-term care ombudsman.

(t) Offices of public conservators, public guardians, and court investigators.

(u) Any protection or advocacy agency or entity that is designated by the Governor to fulfill the requirements and assurances of the following:

(1) The federal Developmental Disabilities Assistance and Bill of Rights Act of 2000, contained in Chapter 144 (commencing with Section 15001) of Title 42 of the United States Code, for protection and advocacy of the rights of persons with developmental disabilities.

(2) The Protection and Advocacy for the Mentally Ill Individuals Act of 1986, as amended, contained in Chapter 114 (commencing with Section 10801) of Title 42 of the United States Code, for the protection and advocacy of the rights of persons with mental illness.

(v) Humane societies and animal control agencies.

(w) Fire departments.

(x) Offices of environmental health and building code enforcement.

(y) Any other protective, public, sectarian, mental health, or private assistance or advocacy agency or person providing health services or social services to elders or dependent adults.

(Amended by Stats. 2002, Ch. 54, Sec. 2. Effective January 1, 2003.)

15610.19. "Clergy member" means a priest, minister, rabbi, religious practitioner, or similar functionary of a church, synagogue, temple, mosque, or recognized religious denomination or organization. "Clergy member" does not include unpaid volunteers whose principal occupation or vocation does not involve active or ordained ministry in a church, synagogue, temple, mosque, or recognized religious denomination or organization, and who periodically visit elder or dependent adults on behalf of that church, synagogue, temple, mosque, or recognized religious denomination or organization.

(Added by Stats. 2002, Ch. 54, Sec. 3. Effective January 1, 2003.)

15610.20. "Clients' rights advocate" means the individual or individuals assigned by a regional center or state hospital developmental center to be responsible for clients' rights assurance for persons with developmental disabilities.

(Added by Stats. 1994, Ch. 594, Sec. 3. Effective January 1, 1995.)

15610.23. (a) "Dependent adult" means a person, regardless of whether the person lives independently, between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.

(b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

(Amended by Stats. 2018, Ch. 70, Sec. 5. (AB 1934) Effective January 1, 2019.)

15610.25. "Developmentally disabled person" means a person with a developmental disability specified by or as described in subdivision (a) of Section 4512.

(Added by Stats. 1994, Ch. 594, Sec. 3. Effective January 1, 1995.)

15610.27. "Elder" means any person residing in this state, 65 years of age or older.

(Added by Stats. 1994, Ch. 594, Sec. 3. Effective January 1, 1995.)

15610.30. (a) "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following:

(1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.

(2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.

(3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section

15610.70.

(b) A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult.

(c) For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an elder or dependent adult.

(d) For purposes of this section, "representative" means a person or entity that is either of the following:

(1) A conservator, trustee, or other representative of the estate of an elder or dependent adult.

(2) An attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney.

(Amended by Stats. 2013, Ch. 668, Sec. 2. (AB 140) Effective January 1, 2014.)

15610.35. "Goods and services necessary to avoid physical harm or mental suffering" include, but are not limited to, all of the following:

(a) The provision of medical care for physical and mental health needs.

(b) Assistance in personal hygiene.

(c) Adequate clothing.

(d) Adequately heated and ventilated shelter.

(e) Protection from health and safety hazards.

(f) Protection from malnutrition, under those circumstances where the results include, but are not limited to, malnutrition and deprivation of necessities or physical punishment.

(g) Transportation and assistance necessary to secure any of the needs set forth in subdivisions (a) to (f), inclusive.

(Added by Stats. 1994, Ch. 594, Sec. 3. Effective January 1, 1995.)

15610.37. "Health practitioner" means a physician and surgeon, psychiatrist, psychologist, dentist, resident, intern, podiatrist, chiropractor, registered nurse, dental hygienist, licensed clinical social worker or associate clinical social worker, marriage and family therapist, licensed professional clinical counselor, or any other person who is currently licensed under Division 2 (commencing with Section 500) of the Business and Professions Code, any emergency medical technician I or II, paramedic, or person certified pursuant to Division 2.5 (commencing with Section 1797) of the Health and Safety Code, a psychological assistant registered pursuant to Section 2913 of the Business and Professions Code, a marriage and family therapist trainee, as defined in subdivision (c) of Section 4980.03 of the Business and Professions Code, an unlicensed marriage and family therapist intern registered under Section 4980.44 of the Business and Professions Code, a clinical counselor trainee, as defined in subdivision (g) of Section 4999.12 of the Business and Professions Code, a clinical counselor intern registered under Section 4999.42 of the Business and Professions Code, a state or county public health or social service employee who treats an elder or a dependent adult for any condition, a coroner, or a substance use disorder counselor. As used in this section, a "substance use disorder counselor" is a person providing counseling services in an alcoholism or drug abuse recovery and treatment program licensed, certified, or funded under Part 2 (commencing with Section 11760) of Division 10.5 of the Health and Safety Code.

(Amended by Stats. 2017, Ch. 407, Sec. 1. (AB 575) Effective January 1, 2018.)

15610.39. "Imminent danger" means a substantial probability that an elder or dependent adult is in imminent or immediate risk of death or serious physical harm, through either his or her own action or inaction, or as a result of the action or inaction of another person.

(Added by Stats. 2002, Ch. 54, Sec. 6. Effective January 1, 2003.)

15610.40. "Investigation" means that activity undertaken to determine the validity of a report of elder or dependent adult abuse.

(Added by Stats. 1994, Ch. 594, Sec. 3. Effective January 1, 1995.)

15610.43. (a) "Isolation" means any of the following:

(1) Acts intentionally committed for the purpose of preventing, and that do serve to prevent, an elder or dependent adult from receiving his or her mail or telephone calls.

(2) Telling a caller or prospective visitor that an elder or dependent adult is not present, or does not wish to talk with the caller, or does not wish to meet with the visitor where the statement is false, is contrary to the express wishes of the elder or the dependent adult, whether he or she is competent or not, and is made for the purpose of preventing the elder or dependent adult from having contact with family, friends, or concerned persons.

(3) False imprisonment, as defined in Section 236 of the Penal Code.

(4) Physical restraint of an elder or dependent adult, for the purpose of preventing the elder or dependent adult from meeting with visitors.

(b) The acts set forth in subdivision (a) shall be subject to a rebuttable presumption that they do not constitute isolation if they are performed pursuant to the instructions of a physician and surgeon licensed to practice medicine in the state, who is caring for the elder or dependent adult at the time the instructions are given, and who gives the instructions as part of his or her medical care.

(c) The acts set forth in subdivision (a) shall not constitute isolation if they are performed in response to a reasonably perceived threat of danger to property or physical safety.

(Added by Stats. 1994, Ch. 594, Sec. 3. Effective January 1, 1995.)

15610.45. "Local law enforcement agency" means a city police or county sheriff's department, or a county probation department, except persons who do not work directly with elders or dependent adults as part of their official duties, including members of support staff and maintenance staff.

(Added by Stats. 1994, Ch. 594, Sec. 3. Effective January 1, 1995.)

15610.47. "Long-term care facility" means any of the following:

(a) Any long-term health care facility, as defined in subdivision (a) of Section 1418 of the Health and Safety Code.

(b) Any community care facility, as defined in paragraphs (1) and (2) of subdivision (a) of Section 1502 of the Health and Safety Code, whether licensed or unlicensed.

(c) Any swing bed in an acute care facility, or any extended care facility.

(d) Any adult day health care facility as defined in subdivision (b) of Section 1570.7 of the Health and Safety Code.

(e) Any residential care facility for the elderly as defined in Section 1569.2 of the Health and Safety Code.

(Added by Stats. 1994, Ch. 594, Sec. 3. Effective January 1, 1995.)

15610.50. "Long-term care ombudsman" means the State Long-Term Care Ombudsman, local ombudsman coordinators, and other persons currently certified as ombudsmen by the Department of Aging as described in Chapter 11 (commencing with Section 9700) of Division 8.5.

(Amended by Stats. 2002, Ch. 54, Sec. 7. Effective January 1, 2003.)

15610.53. "Mental suffering" means fear, agitation, confusion, severe depression, or other forms of serious emotional distress that is brought about by forms of intimidating behavior, threats, harassment, or by deceptive acts performed or false or misleading statements made with malicious intent to agitate, confuse, frighten, or cause severe depression or serious emotional distress of the elder or dependent adult.

(Amended by Stats. 2000, Ch. 559, Sec. 3. Effective January 1, 2001.)

15610.55. (a) "Multidisciplinary personnel team" means any team of two or more persons who are trained in the prevention, identification, management, or treatment of abuse of elderly or dependent adults and who are qualified to provide a broad range of services related to abuse of elderly or dependent adults.

(b) A multidisciplinary personnel team may include, but need not be limited to, any of the following:

(1) Psychiatrists, psychologists, or other trained counseling personnel.

(2) Police officers or other law enforcement agents, including district attorneys.

(3) Health practitioners, as defined in Section 15610.37.

- (4) Social workers with experience or training in prevention of abuse of elderly or dependent adults.
- (5) Public guardians, public conservators, or public administrators.
- (6) The local long-term care ombudsman.
- (7) Child welfare services personnel.
- (8) Representatives of a health plan.
- (9) Housing representatives.
- (10) County counsel.
- (11) A person with expertise in finance or accounting.

(Amended by Stats. 2021, Ch. 85, Sec. 64. (AB 135) Effective July 16, 2021.)

15610.57. (a) "Neglect" means either of the following:

- (1) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.
- (2) The negligent failure of an elder or dependent adult to exercise that degree of self care that a reasonable person in a like position would exercise.

(b) Neglect includes, but is not limited to, all of the following:

- (1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.
- (2) Failure to provide medical care for physical and mental health needs. A person shall not be deemed neglected or abused for the sole reason that the person voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.
- (3) Failure to protect from health and safety hazards.
- (4) Failure to prevent malnutrition or dehydration.
- (5) Substantial inability or failure of an elder or dependent adult to manage their own finances.
- (6) Failure of an elder or dependent adult to satisfy any of the needs specified in paragraphs (1) to (5), inclusive, for themselves as a result of poor cognitive functioning, mental limitation, substance abuse, or chronic poor health.

(c) Neglect includes being homeless if the elder or dependent adult is also unable to meet any of the needs specified in paragraphs (1) to (5), inclusive, of subdivision (b).

(Amended by Stats. 2021, Ch. 85, Sec. 65. (AB 135) Effective July 16, 2021.)

15610.60. "Patients' rights advocate" means a person who has no direct or indirect clinical or administrative responsibility for the patient, and who is responsible for ensuring that laws, regulations, and policies on the rights of the patient are observed.

(Added by Stats. 1994, Ch. 594, Sec. 3. Effective January 1, 1995.)

15610.63. "Physical abuse" means any of the following:

- (a) Assault, as defined in Section 240 of the Penal Code.
- (b) Battery, as defined in Section 242 of the Penal Code.
- (c) Assault with a deadly weapon or force likely to produce great bodily injury, as defined in Section 245 of the Penal Code.
- (d) Unreasonable physical constraint, or prolonged or continual deprivation of food or water.
- (e) Sexual assault, that means any of the following:
 - (1) Sexual battery, as defined in Section 243.4 of the Penal Code.
 - (2) Rape, as defined in Section 261 of the Penal Code.
 - (3) Rape in concert, as described in Section 264.1 of the Penal Code.
 - (4) Spousal rape, as defined in Section 262 of the Penal Code.
 - (5) Incest, as defined in Section 285 of the Penal Code.
 - (6) Sodomy, as defined in Section 286 of the Penal Code.

(7) Oral copulation, as defined in Section 287 or former Section 288a of the Penal Code.

(8) Sexual penetration, as defined in Section 289 of the Penal Code.

(9) Lewd or lascivious acts as defined in paragraph (2) of subdivision (b) of Section 288 of the Penal Code.

(f) Use of a physical or chemical restraint or psychotropic medication under any of the following conditions:

(1) For punishment.

(2) For a period beyond that for which the medication was ordered pursuant to the instructions of a physician and surgeon licensed in the State of California, who is providing medical care to the elder or dependent adult at the time the instructions are given.

(3) For any purpose not authorized by the physician and surgeon.

(Amended by Stats. 2018, Ch. 423, Sec. 129. (SB 1494) Effective January 1, 2019.)

15610.65. "Reasonable suspicion" means an objectively reasonable suspicion that a person would entertain, based upon facts that could cause a reasonable person in a like position, drawing when appropriate upon his or her training and experience, to suspect abuse.

(Added by Stats. 1994, Ch. 594, Sec. 3. Effective January 1, 1995.)

15610.67. "Serious bodily injury" means an injury involving extreme physical pain, substantial risk of death, or protracted loss or impairment of function of a bodily member, organ, or of mental faculty, or requiring medical intervention, including, but not limited to, hospitalization, surgery, or physical rehabilitation.

(Added by Stats. 2012, Ch. 659, Sec. 1. (AB 40) Effective January 1, 2013.)

15610.70. (a) "Undue influence" means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity. In determining whether a result was produced by undue influence, all of the following shall be considered:

(1) The vulnerability of the victim. Evidence of vulnerability may include, but is not limited to, incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim's vulnerability.

(2) The influencer's apparent authority. Evidence of apparent authority may include, but is not limited to, status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification.

(3) The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following:

(A) Controlling necessities of life, medication, the victim's interactions with others, access to information, or sleep.

(B) Use of affection, intimidation, or coercion.

(C) Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.

(4) The equity of the result. Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship.

(b) Evidence of an inequitable result, without more, is not sufficient to prove undue influence.

(Added by Stats. 2013, Ch. 668, Sec. 3. (AB 140) Effective January 1, 2014.)

ETHICS LESSONS LEARNED
FROM FICTIONAL ATTORNEYS

FRIDAY, SEPTEMBER 9

12:45PM - 1:45PM

PRESENTED BY

CARL CHAMBERLIN, ESQ.

ADJUNCT PROF. HASTINGS SCHOOL OF LAW

AND

JOANNA STOREY, ESQ.

CARL W. CHAMBERLIN

PROFESSIONAL EXPERIENCE

State of California, Court of Appeal, First Appellate District. San Francisco, Ca.

Lead Appellate Court Attorney, 1999-present. Duties include evaluating claims of trial court error and drafting the court's opinion in over 700 appeals involving civil, criminal, family, and juvenile law.

University of California, Hastings College of the Law. San Francisco, Ca. Adjunct Professor of Trial Advocacy (1999-present), Moot Court (1998), and Legal Research & Writing (1997-1998). Trial advocacy class includes instruction on direct examination, cross-examination, opening statements, closing arguments, evidence, strategy, and legal ethics.

Orrick, Herrington & Sutcliffe. San Francisco and Menlo Park, Ca. Associate and Of Counsel, 1985-1999. Represented clients in intellectual property, securities, and complex commercial litigation before California courts, federal courts, and the United States Supreme Court. Managed cases and handled all aspects of discovery, motions, settlement conferences, preliminary injunctions, and trials. Founder and Chair of the firm's Internet and Computer Litigation Group. Supervisor of training for the litigation department nationwide.

Office of the District Attorney for the City and County of San Francisco. San Francisco, Ca.

Acting Assistant District Attorney, 1992. While on loan to the District Attorney's Office, prosecuted jury trials in misdemeanor cases, argued motions, and negotiated dispositions.

PROFESSIONAL ACTIVITIES

Judge Pro Tem. San Francisco Superior Court (2017-present); Alameda Superior Court (2020-present); San Mateo Superior Court (1998). Presiding over cases in the traffic division, small claims division, and settlement conferences in unlawful detainer matters.

Faculty, National Institute for Trial Advocacy (1993-present). Instructing attorneys in trial skills, deposition skills, motions practice, negotiations, and appeals. Served as program director and created programs on legal strategy/client relations and civil procedure. Recipient, 2020 Robert E. Oliphant Award for Outstanding Service.

Chair, Legal Ethics Committee, Bar Association of San Francisco (2016 - present). Contributor to the committee's published opinions on ethics issues and formal comments on proposed amendments to the California Rules of

Professional Conduct. Author of numerous legal ethics articles and frequent presenter at CLE programs, including legal ethics in a remote world, conflicts of interest, access to justice, and annual programs on trending ethics issues.

Executive Committee, Trial Practice Section, Alameda County Bar Association (2021-present).

Member, Racial Justice Committee, California Lawyers Association (2021-present).

Instructor, Administrative Office of the Courts (now Judicial Council of California), Center for Judicial Education and Research (2012). Advanced Legal Writing & Editing Webinars.

Judicial Arbitrator, Santa Clara County Superior Court (1998-2004).

Adjunct Professor, Santa Clara University School of Law (1998-1999). Advanced Litigation Techniques.

Instructor, USF Law School Intensive Advocacy Program (1997-1998, 2013).

LEGAL PUBLICATIONS

“The Legal Ethics of Access to Justice,” BASF (2021).

“Legal Ethics and Attorney Mistakes,” Practice Area Corner, BASF (2021).

“Legal Ethics and COVID-19,” Legal by the Bay, BASF (2020).

“Legal Ethics in Negotiating,” Legal by the Bay, BASF (2019).

“Ethical Issues in Researching Prospective Jurors,” Legal by the Bay, BASF (2018).

Trial Advocacy: Strategy, Evidence, Skills & Ethics (2018).

“The Ethics of Facebook Friending,” Legal by the Bay, BASF (2017).

“Another Look at Answering the Court’s Questions in Motions Practice,” The Legal Advocate (2017).

“Making the Record,” The Legal Advocate (2013).

To the Millennium: Emerging Issues for the Year 2000 and Cyberspace, 13 NOTRE DAME JOURNAL OF LAW, ETHICS & PUBLIC POLICY 131 (1999).

Johnny Can’t Read ‘Cause Jane’s Got a Gun: The Effects of Guns in Schools, and Options After *Lopez*, 8 CORNELL JOURNAL OF LAW AND PUBLIC POLICY 281 (Winter 1999).

“When Reach Exceeds Grasp,” Cyber Esq. (Fall 1997).

“Recent Case Holds: Email is Minimum Contact,” The National Law Journal (Oct. 20, 1997).

“Recent Developments in State Antitrust Law,” Int’l Comm. Litigation (June 1995) (co-author).

Rule 30(b)(6): Procedure and Strategy, 13 SAN FRANCISCO BARRISTER L.J. 10 (1994).

Punitive Damages in California: The Drunken Driver, 36 HASTINGS L.J. 793 (1985).

EDUCATION

University of California, Hastings College of the Law. San Francisco, Ca. J.D., 1985 (magna cum laude). Order of the Coif. Thurston Honor Society. Milton D. Green Scholar. Editor, Hastings Law Journal.

Stanford University. Stanford, Ca. A.B., 1980, Political Science and Psychology. Academic Distinction. Departmental Honors.

PUBLIC SERVICE AWARDS

Recipient, Jack Berman Advocacy Center, Community Service Award.

Recipient, Wiley W. Manuel Pro Bono Service Award (multiple years).

JOANNA STOREY

— STORYTELLER | ATTORNEY —

CONTACT

 [LinkedIn](#)

 408-396-4383

 joannamish@yahoo.com

ABOUT ME

After over twenty years of practicing law, I am on a career pause to spend time with family, take a few adventures, and continue my life-long learning. We'll see where the wind takes me after this pause.

As a regular speaker and writer, I offer practical tips to help legal professionals navigate the intersection of ethics, risk management, and cybersecurity, with a focus on effective communication strategies and technology competence. I work with clients to proactively mitigate the risk of potential loss and find creative solutions when thorny problems arise.

EXPERIENCE

- LEGAL ETHICS
- RISK MANAGEMENT
- WELL-BEING
- MENTORSHIP
- CYBERSECURITY

EDUCATION

Santa Clara University

School of Law

Juris Doctor 2001

Computer & High Tech Law Journal

Indiana University

B.A. Telecommunications 1997

Liberal Arts & Management Program

American University

Washington Semester Program 1996

Discovery Communications Internship

PROFESSIONAL HIGHLIGHTS

Presentations

- * How Generational Differences Affect Risk Management
- * Ethics Lessons Learned from Fictional Attorneys
- * Civility and Communication in a Hybrid World
- * Legal Ethics and Cybersecurity
- * Hot Mics and Live Video

Publications

- * Don't Be Willfully Blind to Suspected Client Fraudulent Conduct
- * Legal Ethics Learned from TV Lawyers
- * Practical Ethics Tips for Remote Depositions
- * ABA Offers Tips for Effective Client-Lawyer Communications
- * Don't Fall for the Trust Account Scam

Community & Professional Organizations

- * Bar Association of San Francisco Legal Ethics Committee (Vice Chair)
- * Association of Professional Liability Lawyers
- * American Bar Association
- * International Association of Privacy Professionals (CIPP/US)
- * Burlingame School District, McKinley School Site Council (Chair)

Law Firms

Hinshaw & Culbertson LLP, San Francisco, 2018-2022

Hassard Bonnington LLP, San Francisco, 2005-2018

Robinson & Wood, Inc., San Jose, 2001-2005

Ethics Lessons Learned from Fictional Attorneys

PLACER COUNTY BAR
ASSOCIATION

MCLE CONFERENCE

SEPTEMBER 9, 2022

Presenters



Carl Chamberlin

UC Hastings College of the Law, Adjunct Professor

Chair, BASF Legal Ethics Committee

<https://www.linkedin.com/in/carl-chamberlin-6708a525/>



Joanna L. Storey

Vice-Chair, BASF Legal Ethics Committee

<https://www.linkedin.com/in/joannastorey/>

Preview

The Set Up

Open Discussion

Rules of Professional Conduct

Ethics Opinions

Practical Tips

Repeat

If you will be watching this presentation live

Do not read past this slide

Wait for us to advance the slides

SPOILER ALERT!

A Million Little Things

NON-ESSENTIAL

A Million Little Things - Non-Essential

Rule 1.2 Scope of Representation and Allocation of Authority

Rule 1.4 Communication with Clients

Rule 1.7 Conflict of Interest: Current Clients

Rule 1.8.1 Business Transactions with a Client

Rule 8.4 Misconduct

ABA Formal Opinion 481 Duty to Inform of Material Error

A Civil Action

(1998 FILM)

A Civil Action

Rule 4.2 Communication with a Represented Person

Rule 4.3 Communicating with an Unrepresented Person

Colorado Opinion 69

D.C. Opinion 287

Oregon Opinion 2005-80 [Revised 2016]

Virginia Opinion 1890

Rule 1.4 Communication with Clients

Rule 1.4.1 Communication of Settlement Offers

Rule 1.8.7 Aggregate Settlements

The Good Wife

LONG WAY HOME

The Good Wife – Long Way Home

Rule 1.4 Communication with Client

Rule 1.6 Confidential Information of a Client

Rule 1.7 Conflict of Interest: Current Clients

Rule 3.3 Candor Toward the Tribunal

Rule 3.4 Fairness to Opposing Party and Counsel

Rule 8.4 Misconduct

California Opinion 2019-200 Witness Perjury

See Additional Sources

Parenthood

THERE'S SOMETHING I NEED TO TELL YOU

Parenthood

There's Something I Need to Tell You

Rule 1.2 Scope of Representation and Allocation of Authority

Rule 1.3 Diligence

Rule 1.4 Communications with Clients

Rule 3.3 Candor Toward the Tribunal

Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers

ABA Formal Opinion 481 Duty to Inform of Material Error

Class Action

(1991 FILM)

Class Action

Rule 1.7 Conflict of Interest: Current Clients

Rule 3.2 Delay of Litigation

Rule 3.4 Fairness to Opposing Party and Counsel

Rule 8.4 Misconduct

ABA Formal Opinion 494 Conflicts Arising Out of a Lawyer's Personal Relationship with Opposing Counsel

Bull

NO PROBLEM

Bull – No Problem

Rule 3.4 Fairness to Opposing Party and Counsel

Rule 8.4 Misconduct

Comment [1]: “A violation of this rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity.”

The Good Wife

RAW DEAL

The Good Wife – Raw Deal

Rule 1.1 Competence

Comment on Technology Competence

Rule 1.6 Confidential Information of Client

ABA Formal Opinion 477R Securing Communication of Protected Client Information

California Opinion 2020-203 Data Breach

California Opinion 2015-193 Ethical Duties Handling ESI

All Rise

LEAP OF FAITH

All Rise – Leap of Faith

Rule 1.2.1 Advising or Assisting the Violation of the Law

Rule 1.6 Confidential Information of a Client

Rule 3.3 Candor Toward the Tribunal

Rule 3.4 Fairness to Opposing Party and Counsel

A Million Little Things

JUSTICE

A Million Little Things - Justice

Rule 1.6 Confidentiality of Information

Rule 8.4 Misconduct

ABA Formal Opinion 494 Conflicts Arising Out of a
Lawyer's Personal Relationship with Opposing Counsel

The Practice

HONOR CODE

The Practice – Honor Code

**Rule 1.2 Scope of Representation and
Allocation of Authority**

Rule 1.6(b) Confidential Information of a Client

L.A. Law

“CANNON” OF ETHICS

L.A. Law – “Cannon” of Ethics

Rule 1.6 Confidentiality of Information

Additional Sources

ABA 481 Duty to Inform of Material Error

Alabama Opinion 2009-01 Client Perjury

California Opinion 1983-74 Client Perjury

California Opinion 2020-203 Data Breaches

California Opinion 2015-193 Ethical Duties Handling ESI

D.C. Opinion 234 Client False Testimony

Texas Opinion 692 Correcting False Statements by Clients

Thank you

The views expressed are the speakers' own, represent only a sampling of ethical issues that might arise, and do not constitute legal advice or suggest the outcome of any pending or future proceeding.

CROSS-EXAMINATION OF AN
EXPERT WITNESS

FRIDAY, SEPTEMBER 9
2:00PM - 3:00PM

PRESENTED BY
FRANK NOEY, ESQ.
ASSISTANT PLACER COUNTY DISTRICT ATTORNEY

FRANK E. NOEY

Roseville, CA 95678 • (916) 543-8010 • fnoey@placer.ca.gov

PROFESSIONAL EXPERIENCE

Placer County District Attorney's Office Deputy District Attorney

January 2012-Present

- Perform the full range of legal activities involving the investigation and prosecution of criminal cases, including serious and violent strikes, domestic violence, and life cases.
- Responsible for all phases of criminal prosecution including investigation, evaluation of evidence, charging, trial, and appeal.
- Work closely with law enforcement and other supporting agencies during the investigative phase, including reviewing search warrants, initial reports and interviewing witnesses with the assistance of victim advocates.
- Research, analyze, and apply laws, court decisions and other legal authorities in drafting opinions, pleadings, and other briefs in connection with trials, pre-trial hearings and other legal proceedings.

Downey Brand LLP Litigation Associate

March 2007-January 2012

- Represented clients in all aspects of litigation from pre-litigation strategy through trial and appeal.
- Successfully tried cases in both state and federal court.
- Regularly appeared in court for case management conferences and successfully argued noticed and ex parte motions, including opposing a motion for summary judgment.
- Researched specific questions of law and drafted various pleadings and motions, including dispositive motions, oppositions, and appellate briefs.
- Closely worked with experts in both the defense and prosecution of cases.
- Mediated multiple cases, one of which obtained a 3.6 million dollar recovery for large public contractor client.
- Voted by peers onto 4-Member Associate Liaison Committee, representing more than sixty associates to the firm's management.

California Court of Appeal, Third Appellate District Judicial Extern to The Honorable Ronald Boyd Robie

August 2006-November 2006

- Conducted extensive research on specific questions of criminal law.
- Conferred directly with the chamber law clerks and Justice Robie regarding legal analysis.
- Assessed the merits of arguments made to the Court and drafted opinions regarding the same.

United States District Court for the Eastern District of California Judicial Extern to The Honorable Morrison C. England, Jr.

June 2006-August 2006

- Conducted extensive research on specific questions of law.
- Conferred directly with the chamber law clerks and Judge England regarding legal analysis.
- Assessed merits of various motions and drafted bench memoranda regarding the same.

MILITARY SERVICE

California Army National Guard

August 2012-Present

Senior Defense Counsel, Trial Defense Service

- Represent and Advise Soldiers pending adverse administrative actions/investigations.
- Represent and Advise Soldiers pending quasi-criminal actions/investigations.
- Lead/mentor other Defense Counsel in the Pacific Region.

Defense Counsel, Trial Defense Service

- Represent and Advise Soldiers pending adverse administrative actions.
- Represent and Advise Soldiers pending quasi-criminal actions.

Judge Advocate, 40th Infantry Division, Operations Company

- Legal Advisor to Operations Company Commander and Soldiers.
- Support Division Legal Section during Division exercises.

United State Marine Corps

September 1997-June 2002

Marine Security Guard Battalion, Madrid, Spain and Port-au-Prince, Haiti

- Held Top Secret Clearance and provided armed internal security for United States embassies and consulates.
- Led security inspections to ensure safety and protection of all levels of classified material.
- Non-Commissioned Officer in Charge of the operational readiness and training of nine Marines.
- Participated in security details for Presidents Clinton and Bush and Secretary of State Colin Powell.

Weapons Company, 3rd Battalion, 7th Marines

- Worked in a Combined Anti-Armor Team in 29 Palms, California and Okinawa, Japan.
- Led small team of Marines to Thailand to teach weapons courses to Royal Thai Marines.

EDUCATION

The United States Army Judge Advocate Officer Basic Course

Certification of Completion, October, 2013

Rated Superior in Written Communication

Rated Superior in Leadership

University of the Pacific, McGeorge School of Law

Juris Doctor, With Distinction, December, 2006

Class Rank: 7/109 Evening Division; 30/299 Combined Classes

GPA: 3.37

Roger J. Traynor Honor Society

Dean's List: 2004, 2005, 2006

International Advocacy Teacher's Assistant

California State University, Hayward

Bachelor of Arts, International Studies in European History, 2003

GPA: 3.8

Annual Dean's List

CSUH Men's Soccer Team

HONORS/AWARDS

Col. Patrick Barnett Leadership Award 2021

THE ART OF CROSS EXAMINATION

1

Acknowledgments/Sources

- Irving Younger
- Michelle Albright
- Frank Bittar
- CA Evidence Code
- Experiences/Failures

2

Goals For Our Time Together

- General overview
- Paradigm to assist your preparation/approach
- Irving Younger's 10 Commandments
- Things to remember
- Legal Bases

3

Where We Are Going

- Bottom Line up front
- Preparation/Purpose
- What to do
- How to do it
- Style
- Types of Witnesses
- Things to remember

4

Bottom Line Up Front

- Cross examination is an art form
- Beauty of which is confined within certain parameters
- You must know and live within these parameters
- And know when it's okay to deviate
- You must always be yourself
- Prepared and purposeful

5

Preparation

- This cannot be overstated—Preparation is everything
 - Know your case
 - Know your opponent's case
 - Facts
 - Strengths
 - Weaknesses
 - Narrative
- You must know these things before deciding if, what, and how to cross
- Prepare the jury—tough questions, no questions
- Prepare your impeachment materials

6

Purposeful

Do I cross-examine a witness or not?

Does the testimony hurt, support or do nothing to my narrative?

If it hurts your narrative, then consider challenging:

- **Their foundation;**
- **Their motive;**
- **Their character;**

If it supports your narrative, then consider:

- **Reinforcing/highlighting the helpful fact (be careful)**
- **Eliciting facts supporting your narrative (perm.)**

If one of the above goals are not met, then pass

Any point made must support your closing

7

What to Question:

- If you make the decision to cross-examine a witness, what you ask depends on your purpose:
 - **Highlight**
 - **Elicit**
 - **Foundation**
 - **Motive**
 - **Character**
 - **Prior Inconsistent Statement**

8

Highlight/Elicit

- An opponent's witness may support your narrative!
- Consider re-affirming or fleshing out fact during cross.
 - Foundation/motive/character
 - Be careful—may want to just highlight fact in closing w/ tx
- Elicit fact outside the scope
 - May want to discuss in MILs (Evid. Code § 773)

9

Foundation—E.C. § 780

- Evidence is only as strong as its foundation!!
- Foundation establishes the admissibility of other evidence. The court determines sufficiency to determine admissibility, but the fact finder determines weight!
- The primary areas to analyze!
 - **The witness' perception**
 - **The witness' memory**
 - **The witness' ability to comprehend**
 - **The witness' knowledge**

10

Foundation—E.C. § 780(c) & (d)

- **The witness' ability/opportunity to perceive fact**
 - See, hear, taste, feel, smell
 - Is perception reasonable given circum.
- **The witness' memory of fact**
 - Is the memory reasonable
 - Did witness review anything to assist memory and is source reliable
 - Is it the witness' memory of someone else's
- **The witness' ability to comprehend**
 - Ability to communicate
 - Mature/life experience/education

11

Foundation—E.C. § 780(i)

- **The witness' knowledge**
 - Existence or non-existence of a fact
 - In criminal cases, basis of opinion or evidence or reputation for relevant character train E.C. § 1102.
- **The witness' ability to comprehend**
 - Ability to communicate
 - Mature/life experience/education

12

Motive —E.C. § 780(f)

- Does the witness have a motive, either knowing or unknowing, that influences testimony
 - **Bias**
 - **Prejudice**
 - **Interest**
 - **Bribed**
- One or all can be present

13

Character —E.C. § 780(e)

- The witness' character is such that he/she should not be believed.
- Bad Character of witness can be shown in three way:
 - Dishonest (E.C. § 780(e))
 - Bad Character evidence (Crim. Cases)
 - Prior felony convictions (E.C. § 788)

14

Inconsistent Statements—E.C. § 780(h)

- The witness should not be believed because they said something different before
 - Prior Inconsistent Statements (E.C. § 1235)
 - Know Requirements (E.C. § 770)
 - Be prepared with prior statements

15

How to Cross-Examine Effectively

- Cross examination is an art form
- Like any artist, life-long learning
- General Guidelines that will keep you and your case out of trouble

16

Younger's Rules to Know and Live

- Be Brief
- Plain words
- Leading questions
- Be Prepared-No questions you don't know the answer
- Listen
- Do not quarrel
- Avoid Repetition
- Do not allow witness to explain
- Limit Questioning
- Save for Summation

17

Style

- Be yourself---trust is key!
- Begin and end strong
- Get up and into the well
- You must understand how the fact finder perceives witness
- Confidence and control
- Use the court when necessary

18

Types of Witnesses

- Foundational
- Percipient
- Child
- Party opponent
- Character Witness
- Expert

19

Expert Witnesses

- You must prepare
 - Reports/CV/prior testimony/talk to them
 - Review opinion with your own expert
- Listen!!
 - Have your expert present if possible
- Ask for a break if necessary
- Analyze Motive Framework
 - Only work for plaintiff/defense?
 - Professional expert?
 - Compensation (E.C. § 722)
- Highlight points consistent with your narrative
- Foundation for their opinion
 - Garbage in, Garbage out
 - Opinion consistent standard/peer reviewed/consistent with another conclusion

20

Things to Remember

1. The first time you stand up is the most they're paying attention. Have some solid points up front.
2. Don't sit down on a low point or when you got smacked by the witness or judge/sustained objection
3. When a witness hits you with a point you didn't see coming, confidently carry on to a different point "right but isn't it true.." You never want to look like you took a blow.
4. Never regurgitate direct testimony, especially if damaging
5. Don't be loud/combative. Save the argument for closing

21

In Summary

- Cross Examination is an art form that needs to be **practiced**
- Staying within the **guidelines** will keep you safe as your master this craft
- **Preparation** is fundamental
- **Purpose** will keep you organized
- Your **style** will ensure trust with the fact-finder and make you more effective

22

CRIMINAL AND CIVIL DV: CROSSOVER ISSUES

FRIDAY, SEPTEMBER 9

2:00PM - 3:00PM

PRESENTED BY

HON. SUZANNE GAZZANIGA

PLACER COUNTY SUPERIOR COURT

AND

JESSICA HOPPER, ESQ.

PLACER COUNTY SUPERIOR COURT

Suzanne Gazzaniga
Placer County Superior Court Judge

Placer County Superior Court Judge January 2013-present; Supervising Family Law Judge 2018-present; Placer County Superior Court Appellate Panel 2016 – present; Grand Jury Supervising Judge 2018-2023; Placer County Judicial Mentor Program Committee 2022-present; Judicial Council Family and Juvenile Law Advisory Committee 2014-2024; CJER Family Law Curriculum Committee; Participant in Judicial Council Jury Video Project 2022; CJER Criminal Law Primary Assignment Orientation Workgroup; CJER DV Online Course Contributor; CJER Faculty for Qualifying Ethics 7 and 8; CJER Faculty for Family Law Primary Assignment. Prior to becoming a Judge, Judge Gazzaniga handled both criminal and civil matters in private and public practice.

PROFESSIONAL EXPERIENCE

Placer Superior Court, (Roseville, CA) Self-Help Managing Attorney / Family Law Facilitator, (09/2019-Current)

- Provide procedural legal information to Self-Represented Litigants with family law, restraining order, child support, eviction, name change, guardianships, conservatorships and small claims cases.
- Develop and implement policies and procedures for the Self-Help Center and manage the team.
- Conduct family law settlement services in which one or more of the parties is self-represented.

Placer County Bar Association, Family Law Section Executive Committee (01/2019-09/2019)

- Plan and implement family law section meetings and networking events.
- Promulgate proposed changes to Placer County local rules of Court relating to family law.

Miller & Associates, Attorneys, (Rocklin, CA) Associate Attorney (11/2017 – 09/2019)

- First chair domestic relations litigation practice, focused on short and long cause hearings, drafting family law Requests for Order, Declarations, Memorandum of Points & Authorities.

Hamilton County Prosecutor's Office, (Carmel, IN)

Community Prosecuting Attorney, (12/2014 – 07/2017)

- Stationed at local police department and served as liaison between county prosecutor's office and local law enforcement, providing onsite legal analysis and coordination in ongoing criminal investigations.
- Develop and present trainings to law enforcement, centered on best practices in criminal investigation.

Director, Sex Crimes Division, (01/2010 – 11/2011)

- Manage all aspects of criminal prosecution of serious sex crimes, from screening and charging information through jury or bench trial in first chair role.
- Worked closely with federal, state, and local law enforcement on investigation and screening of sex offenses, motion and discovery practice, victim advocacy, and trial & sentencing.
- Led in comprehensive development of office policy and procedure, best practices, and education for law enforcement while investigating major felonies, sex crimes and other offenses.

Deputy Prosecuting Attorney (01/2007 – 01/2010)

- Manage all aspects of criminal prosecution through jury or bench trial either in first or second chair role.

Hollingsworth & Zivitz, P.C., (Carmel, IN) Associate Attorney (11/2011 – 12/2014)

- First chair domestic relations litigation practice.

BAR ADMISSIONS

California (2017), Indiana (2007), United States Supreme Court (2013)

EDUCATIONAL BACKGROUND

Western Michigan Cooley Law School – J.D. (2007)

Mercyhurst University – B.A. English Literature, B.A. Secondary Education, (2004)

- Member, Women's Varsity Soccer (Division II) Team Captain

Cross-over Issues with Criminal and Civil Domestic Violence Restraining Orders

and

Review of Judicial Council Domestic Violence Restraining Orders Forms

**Presented by:
Honorable Suzanne Gazzaniga
Jessica L. Hopper**

- I. Cross-over Issues Related to Service of Process
Learning goal: The student will obtain information regarding the and steps required to perfect service.
- II. 5th Amendment Rights
Learning goal: The student will be reminded of the Fifth Amendment to the U.S. Constitution and how it may relate their client's criminal or civil domestic violence restraining order hearing or trial.
- III. Responsibilities of Counsel/Parties with respect to conflicting orders
Learning goal: The student will receive instruction on the responsibilities that arise when conflicting orders are in place.
- IV. Family Code 3044 and Family Code 4320
Learning goal: The student will understand general court procedures and options for cases involving Family Code 3044 and Family Code 4320.
- V. Review of Mandatory and Optional Judicial Counsel forms
Learning goal: The student will have a basic understanding of the forms needed to file for a domestic violence restraining order.
- VI. Common Mistakes Practitioners make when e-filing Request for DVRO
Learning goal: The student will be made aware of common mistakes made when e-filing Request for DVRO and steps to take to avoid them.
- VII. Instruction regarding California Rule of Court 5.495
Learning goal: The student will receive instruction on the procedures and steps to take to ensure their clients are complying with the law.

ASSESSING AND AVOIDING ESTATE PLANNER LIABILITY

FRIDAY, SEPTEMBER 9
2:00PM - 3:00PM

PRESENTED BY
TYSON HUBBARD, ESQ.
AND
SEAN MCKISSICK, ESQ.
DOWNEY | BRAND



Tyson E. Hubbard Partner

621 Capitol Mall | 18th Floor
Sacramento, CA 95814

916.520.5216 | Direct
thubbard@downeybrand.com

Practice Areas

Complex Business Litigation | Trust & Estate Litigation

Tyson Hubbard is an experienced litigator who focuses on trust and estate disputes. Tyson's clients rely upon him to steer an efficient and effective path. He draws from more than a decade of litigation experience across a wide range of matters, as well as from his personal experience as a trustee of a family trust.

Many of the trust and estate disputes in which Tyson has been involved raise questions of fairness and emotions run high. Tyson is a zealous advocate who helps clients navigate the unfamiliar and occasionally rough waters of trust and estate litigation. He works to maximize each client's objectives by developing a customized litigation strategy, generally culminating in negotiated resolution, mediation, or trial.

Before joining Downey Brand, Tyson practiced in Boston, Massachusetts, where he advised individuals, small-to-midsized businesses, and multinational corporations.

Experience

- Represented client in contesting invalid third amendment to father's trust, on the basis of undue influence. Proved during examination of estate planner at trial that the amendment was also the product of fraud.
- Represented rice farming son in dispute with sister concerning future operations of family farm. Negotiated client's purchase of family farm after three day trial in Colusa County.
- Prevailed in three day trial in San Joaquin County Superior Court on behalf of trustees in matter involving modification of trust over objection of several beneficiaries.
- Represented co-trustee daughter in dispute with co-trustee step-mother. Completed successful early termination of trust and allocations of \$7 million in trust assets.
- Worked with long-lost heir to recover more than \$1.6 million in assets wrongfully held by successor trustee to uncle's trust.
- Represented siblings in Stanislaus County Superior Court against their stepmother who had attempted to

claim their deceased father's interest in approximately \$1.2 million worth of stocks. Obtained settlement in which clients received vast majority of stock.

- Represented client in Contra Costa County Superior Court action against deceased sister's estate after discovering that sister had taken thousands of dollars from parent's trust to further her gambling addiction. Met client's goals through settlement prior to active litigation.
- Resolved trust dispute filed against surviving spouse client by her step-children who alleged that deceased husband had mismanaged trust assets. The matter was settled at mediation with a cash payment and real property paid over to the surviving spouse.
- Represented group of siblings in Yolo County against aunt's domestic partner with claims based on financial elder abuse, fraud, and Family Code section 257. The matter resolved in a court-ordered settlement conference.
- Settled dispute among sisters in Sacramento County concerning administration of their mother's trust related to cash accounts and real property.
- Represented client in dispute with her sister concerning administration of mother's trust, which included real property in San Joaquin and Calaveras County, as well as mineral and gas leases in West Virginia.
- Represented healthcare company in dispute with spouse of deceased former employee concerning payment of decedent's wages.
- Represented beneficiary of an annuity in connection with claim by competing beneficiary.
- Defended trustee in Placer County Superior Court action filed by sibling-beneficiaries of parents' trust. Resolved action involving alleged fiduciary abuse with no out of pocket payment by trustee.
- Represented university in successfully claiming surplus proceeds of foreclosure sale against disinherited heirs where university was beneficiary under decedent's trust agreement.
- Represented life insurance company in suit filed by consumer alleging wrongful termination of life insurance policy. Resolved matter with no payment by client.
- Represented brother in contract dispute with his other siblings and nephews related to inheritance of an apple orchard. Negotiated resolution in client's favor whereby client received free and clear deed to land.

Professional & Community Service

- Leadership Sacramento, Sacramento Metro Chamber of Commerce, 2020
- City of Davis Recreation and Park Commission, Commissioner, 2017-2021
- Sunrise Rotary Club of Davis, 2017-present; Board of Directors, 2020-present; Community Service Chair, 2020-present
- Milton L. Schwartz – David F. Levi American Inn of Court, 2021-present
- Sacramento County Bar Association, Probate and Estate Planning Section; Executive Committee, 2016-2019
- Yolo County Bar Association

- California Lawyers Association, Trusts and Estates Section
- Sacramento Estate Planning Council, 2015-present
- Lab Instructor, Lawyering Process, U.C. Davis School of Law, 2018-present
- Social Venture Partners of Sacramento, Partner and Fast Pitch Committee, 2015-2019
- Syracuse University College of Law Alumni Association, Board of Directors, 2013-2018
- Harvard Club of Sacramento
- Davis AYSO Youth Soccer Coach, 2017-present
- Davis Little League Coach, 2021

Education

- J.D., *magna cum laude*, Syracuse University College of Law, 2008
- Graduate Certificate, Sports Business, New York University, 2005
- A.B., History, Harvard University, 2004

Honors & Rankings

- Best Lawyers in America[®], Litigation – Trusts and Estates, 2023
- *Sacramento Business Journal*, 40 Under 40, 2018
- *Sacramento Magazine*, 100 Notable Business Leaders, 2021
- *Sacramento Magazine*, Top Lawyer, Estate Planning & Probate, General Litigation, 2016-2021
- *Super Lawyers*, Northern California Rising Star, Estate & Trust Litigation, 2015-2022
- *Super Lawyers*, Massachusetts Rising Star, 2013-2014
- Order of the Coif
- Justinian Law Honor Society

Speaking Engagements / Events

- *Duct Tape & Bubble Gum: Practical Tools to Repair Broken Trusts and Charitable Gifts*, Philanthropic Advisors' Forum of Greater Sacramento, May 9th, 2019
- *Dementia and Other Capacity Concerns*, Placer County Bar Association, April 27, 2018
- *Heir Turbulence Ahead - Collecting Bequests Amidst Family Conduct*, Planned Giving Forum of Greater Sacramento, June 22, 2017

Publications

- *Transfer on Death Deeds Provide a New Estate Planning Tool*, Daily Journal, August 11, 2016
- *Automatic License Plate Recognition: An Exciting New Law Enforcement Tool with Potentially Scary Consequences*, Syracuse Journal of Science and Technology Law, March 13, 2008
- *For the Public's Use? Eminent Domain in Stadium Construction*, Sports Lawyers Journal, March 2008

Legal Alerts

- *Small Adjustments to Estate Plans Can Save Income Tax Without Triggering Estate Tax*, July 27, 2015

Blogs

- *Play It Again: No Contest Clauses Must Be Referenced In Each California Trust Amendment*, November 19, 2017
- *When Is a Will Valid in California?*, September 26, 2017
- *Take It or Leave It: The Perilous Decision of Whether to Violate a No Contest Clause*, August 21, 2017
- *Standing Up to Your Siblings: Who Can Bring a Financial Elder Abuse Claim?*, April 24, 2017
- *Just the FAQs: California Trust and Estate Litigation's Greatest Hits, Part 1*, March 20, 2017
- *California Trust Litigation 20,000 Leagues Under the Sea*, February 27, 2017
- *A Friend Request From The Beyond: California's New Post-Death Digital Assets Law*, January 10, 2017
- *Notice of Proposed Action May Quiet Back Seat Driving Beneficiaries*, December 6, 2016
- *It's Rigged: How Our California Trust and Estate Litigation Blog Was Dragged into Election 2016*, November 7, 2016
- *Red Alert: California Trust and Estate Litigation on an Ex Parte Basis*, September 12, 2016
- *Til Death Do Us Part: California's New Transfer on Death Deeds*, July 5, 2016
- *Where Credit Is Due - California Creditor Claims Against An Estate*, June 13, 2016
- *Stepmother Prevails on Accounting Issues at Court of Appeal*, May 2, 2016
- *California Trust Litigation - A Primer on Preparing For Trial*, April 4, 2016
- *Double Damages, Even In Death*, March 14, 2016
- *An Accountant and a Lawyer Walk Into a Bar...*, February 2, 2016
- *Fee Fi Fo Fum: Trustee Fees Can Be a Giant Issue in Trust Administration*, January 4, 2016
- *Court of Appeal Clips Sterling*, December 7, 2015



Sean G. McKissick Counsel

621 Capitol Mall | 18th Floor
Sacramento, CA 95814

916.520.5262 | Direct
smckissick@downeybrand.com

Practice Areas

Appellate & Writ Practice | Complex Business Litigation | Employment Litigation | Trust & Estate Litigation

Sean McKissick provides strong and effective legal assistance throughout all stages of trust and estate disputes. Sean has extensive experience across a wide variety of litigation areas and industries in addition to trust and estate work, including healthcare, real estate, civil rights, and white-collar criminal defense.

Sean has argued before federal and state court judges, arbitrators, and mediators throughout California. He relies on a strong attention to detail, a keen grasp of legal nuance, and a sharp understanding of the ins-and-outs of litigation strategy. Sean's clients know they can rely on him to aggressively take all steps necessary to secure the most favorable outcome available, whether that be a verdict in their favor or an appropriate settlement.

Sean is fluent in Spanish, and was featured on Univision in connection with his pro bono immigration work, in which he has represented clients from throughout the world, including Mexico, Guatemala, Honduras, Eritrea, and Japan.

Prior to joining Downey Brand, Sean practiced for over ten years in Los Angeles, California, where he represented a widely varied subset of clients from both the private and public sectors. While in law school, he worked as a research assistant at the UCLA School of Law for Professor Sharon Dolovich, where he researched legal ethics and civil rights issues in prisons and jails.

Experience

Trust and Estates

- Represented the largest synagogue in San Diego in litigation concerning the distribution of a wealthy donor's trust.
- Secured a favorable settlement in a dispute over the disposition of a family home.

Commercial Litigation

- Represented a luxury Beverly Hills hotel in claims of trade secret misappropriation and breaches of fiduciary duty brought against a competitor and a former employee.
- Defended former employees of wealth management firm that left to form their own business against breach of contract claims, ultimately securing a ruling voiding the employees' unlawful non-compete contracts.
- Represented the former employees of a successful tech start-up company in an action seeking the return of their promised stock options.
- Secured a favorable settlement for a skilled nursing facility against a vendor that engaged in negligence and breach of contract.

White Collar

- Represented an executive of a Japanese auto parts company in connection with a criminal investigation into antitrust allegations.
- Defended a major automotive parts distributor in connection with a felony complaint asserting alleged willful violations of state OSHA regulations. After a five-day preliminary hearing involving nearly a dozen fact and expert witnesses, criminal charges against the client were dismissed in their entirety.

Employment

- Advised clients on employment issues, including harassment and discrimination, FLSA claims, FMLA issues, non-compete agreements, and more.
- Obtained a successful arbitration ruling on behalf of a large hospital on contract and employment claims brought by a former resident.

Civil Rights

- Secured a favorable ruling from the Ninth Circuit Court of Appeals against the City of San Diego in a case concerning excessive force police shooting.
- Defended the County of Los Angeles in multiple suits alleging violations of Fourth Amendment rights.

Healthcare

- Defended two separate *qui tam* actions filed against a northwest hospital system involving allegations of Medicare fraud and abuse, as well as state and federal claims of unlawful retaliation, culminating in favorable settlements.
- Advised large hospital chain regarding potential Stark Law violations.
- Secured a favorable settlement in a dispute between a large medical group and former employees on breach of contract and unlawful solicitation claims.

Pro Bono

- Obtained a favorable settlement on behalf of twenty-three plaintiffs seeking redress against landlords for uninhabitable living conditions in a *pro bono* civil action.
- Represented multiple *pro bono* clients in asylum proceedings, including appeals before the Board of Immigration Appeals and the Ninth Circuit, securing awards of asylum, U-Visa status, and administrative closure.

Professional & Community Service

- Sacramento County Bar Association, Trust and Estates Section
- California Lawyers Association, Trust and Estates Section
- Board Member, J. Reuben Clark Law Society – Los Angeles Chapter, 2017-2021

Education

- J.D., University of California at Los Angeles School of Law, 2008
- B.A., *cum laude*, Brigham Young University, 2005

Honors & Rankings

- Recipient of the 2016 Outstanding Young Lawyer Award, J. Reuben Clark Law Society – Los Angeles Chapter

Blogs

- *RCFEs Can't Get Out of the Rain – California Court Finds Another Arbitration Agreement Unenforceable*, May 24, 2022
- *California Court Gives RCFEs More To Keep Them Up At Night*, February 2, 2022
- *Look Before Leaping Into an Anti-SLAPP Motion*, November 8, 2021
- *Fog Warning – Has One Bad Actor Made It Harder to Get Evidentiary Hearings?*, August 16, 2021
- *No Bad Faith Required – Trustee of Spendthrift Trust May Be Compelled to Pay Attorney Fees Under Family Code Section 2030*, May 17, 2021

Assessing and Avoiding Estate Planner Liability

Tyson E. Hubbard, Esq.
Sean G. McKissick, Esq.
Downey Brand LLP

1. Common Estate Planning Related Legal Claims

a. Competence!

i. Cal. Rule of Professional Conduct 1.1

ii. *Lewis v. State Bar* (1981) 28 Cal.3d 683

b. Legal Malpractice

i. Negligence

1. Duty

a. *Lucas v. Hamm* (1961) 56 Cal.2d 583

b. *Chang v. Lederman* (2009) 172 Cal.App.4th 67 – Drafting attorney owes no duty to beneficiary unless the drafted documents are executed and expressly confer benefits on the complaining beneficiary, but fail to deliver those benefits because of the attorney’s negligence.

i. *Garcia v. Borelli* (1982) 129 Cal.App.3rd 24

ii. *Osnorio v. Weingarten* (2004) 124 Cal.App.4th 304

c. 17 Will Contests, CEB, Section 17.54A – The duty of care does not extend to a duty to effectuate the alleged intent of a client, since deceased, to revise a bequest to something other than the bequest expressly stated in the instrument. To extend the duty of care to cover purported intended bequests would mean that malpractice claims alleging such intended bequests would routinely survive demurrer and involve speculative disputes over the decedent’s intent that would impose an undue burden on the profession.

d. *Moore v. Anderson Ziegler Disharoon Gallagher & Gray* (2003) 109 Cal.App.4th 1287 – No duty owed to beneficiaries under prior instrument to ascertain and

document a client's competence when the client makes amendments.

- e. *Boronian v. Clark* (2004) 123 Cal.App.4th 1012 – No duty of care owed to individuals who would have taken under an earlier will even where attorney created an amendment for dying testator who was taking morphine and subject to hallucinations.
- f. *Radovich v. Locke-Paddon* (1995) 35 Cal.App.4th 946 – No duty owed to the beneficiary of an unsigned will.

2. Breach

- a. “The same skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise under similar circumstances.”
- b. Specialists held to a higher standard of other specialists.
- c. *Heyer v. Flaig* (1969) 70 Cal.2d 223, disapproved of by *Laird v. Blacker* (1992) 2 Cal.4th 606

3. Damages

- a. *Hiemstra v Huston* (1970) 12 Cal.App.3d 1043 – No showing that the will did not contain what the testator had intended and, if the plaintiff was deprived of a substantial part of the estate, it was because the testator had changed his mind.
- b. *Garcia v. Borelli* (1982) 129 Cal.App.3d 24 – Settlement may affect the amount of the damages in the malpractice action, but generally does not bar it.

ii. Breach of Contract

- 1. *Heyer v. Flaig* (1969) 70 Cal.2d 223, disapproved of by *Laird v. Blacker* (1992) 2 Cal.4th 606 – Legal malpractice based on breach of contract asserted by third-party intended beneficiary of the contract.
- c. Statute of Limitations – Code of Civil Procedure Section 340.6, subd. (a) – “one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first.”

2. Less Common Estate Planner Legal Claims

a. Intentional Interference with Expected Inheritance

- i. *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039

b. Assisting Financial Elder Abuse

- i. Welfare and Institutions Code Section 15610(a)(2) – “Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.”

1. Wrongful use = “knew or should have known that this conduct was likely to be harmful to the elder or dependent adult.”

2. Taking = “elder or dependent adult is deprived of any property right, including by means of a . . . testamentary bequest, regardless of whether the property is held directly or by a representative of an elder or dependent adult.”

- ii. Statute of Limitations = four years from plaintiff’s discovery.

- iii. Example from CEB: Longtime estate planner named as successor trustee. Malicious third parties interfered in elder’s life and established trust amendments in their favor. Attorney named as successor trustee was aware that decedent was unable to provide for himself, and was aware of third parties’ malicious conduct, successor trustee attorney should have stepped in and may be liable for financial elder abuse for failure to act.

c. Tort of Another

- i. *Sindell v. Gibson, Dunn & Crutcher* (1997) 54 Cal.App.4th 1457

3. Professional Obligations

a. Conflicts of Interest

- i. Business and Professions Code Section 6068(e) – It is the duty of an attorney to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

1. Planning stage – informed consent.

2. Post-death administration.

3. Interplay with Evidence Code Section 952
 - ii. California Rules of Professional Conduct
 1. Rule 1.7(b)
 2. Rule 1.8.2
 3. Rule 1.9
 4. Rule 3.7
 - iii. *Fiduciary Trust Int'l v. Superior Court* (2013) 218 Cal.App.4th 465
 - b. Clients with Diminished Capacity
 - i. ABA Model Rule 1.14
 - ii. San Diego Bar Ass'n Ethics Opinion No. 1990-3 – An attorney drafting a testamentary document for a client “must be satisfied that the client is competent to make a will and is not acting as a result of fraud or undue influence.”
4. California Lawyers Association's Trust and Estates Ethics Guide.

DID ADLOPH WEBER RECEIVE A FAIR TRIAL?
LESSONS LEARNED FROM PLACER'S
MOST INFAMOUS TRIAL

FRIDAY, SEPTEMBER 9

3:15PM - 4:45PM

PRESENTED BY
HON. GAREN HORST
PLACER COUNTY SUPERIOR COURT

HON. GAREN HORST
Placer County Superior Court

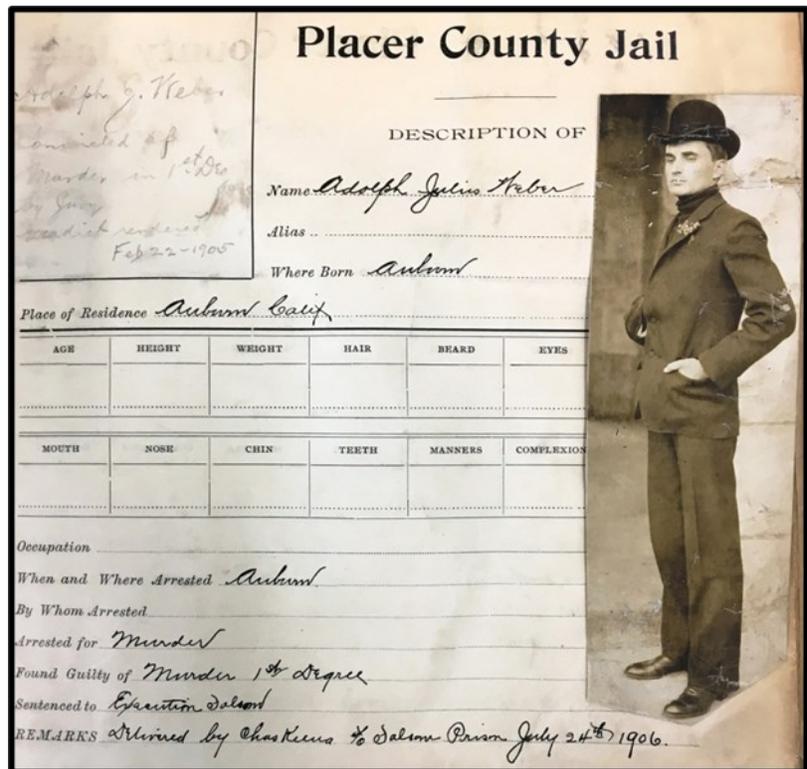
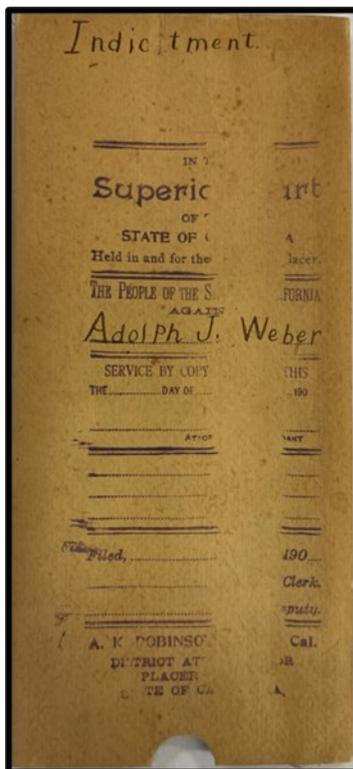
Judge Horst has served as a Superior Court Judge for Placer County since January of 2013. He has had a variety of assignments and currently presides over the Mental Health Court and Sex Crime Calendars at the Gibson Courthouse on Wednesdays. During the other days of the week, he sits at the Historic Courthouse in Auburn, handling a variety of matters to include trials and long cause proceedings. Judge Horst has written and spoken extensively about the history of the courthouse and its symbols of justice, and has created a draft of memoir entitled "Reflections on Justice from the Historic Courthouse." He currently is an instructor for the judicial branch (CJER) for their New Judge Orientation Program, and is a trial advocacy professor at Lincoln Law School. Since taking the bench, Judge Horst has been a member of the Kennedy Inn of Court in Sacramento, a group designed to promote civility, ethics and professionalism in the practice of law. He is excited to present the infamous Weber case to the Placer Bar as an "Inn of Court style" program that is designed to both share our rich legal history and facilitate our ongoing discussions about justice.

PLAYBILL

Placer County Bar Association
MCLE Conference

September 9, 2022

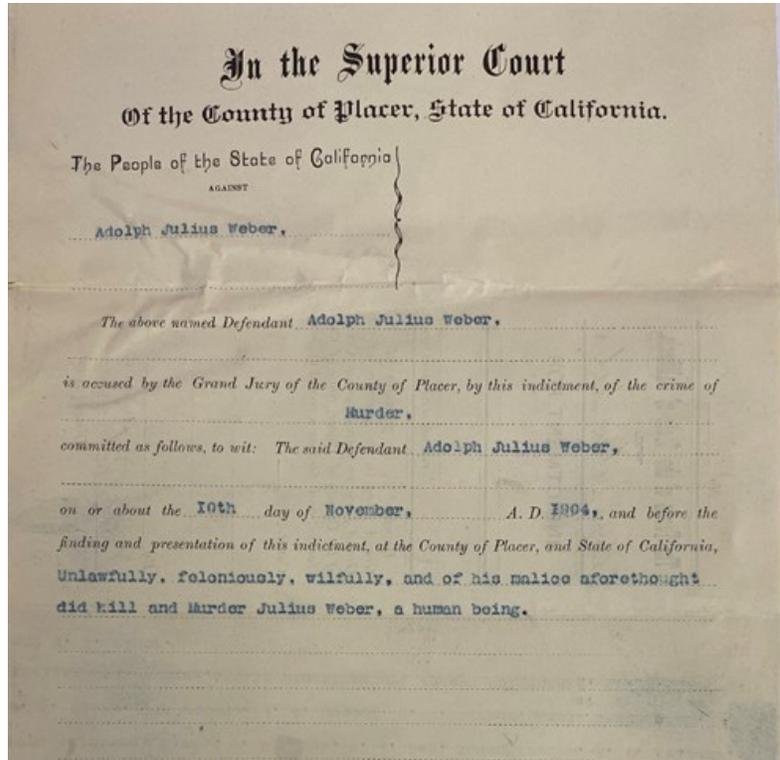
DID ADOLPH WEBER RECEIVE A FAIR TRIAL?



*LESSONS ON JUSTICE
FROM PLACER COUNTY'S
MOST INFAMOUS CASE*

INTRODUCTION

You are about to participate in a re-enactment of the 1905 Weber trial, which took place on in Department 4 of our own Historic Courthouse. All scenes and arguments of counsel are based on the historical record. The program will be presented in the “Inn of Court” format, with a series of acts interspersed with two discussion sessions. True to the mission of the Inns of Court, the program will focus on ethics and civility in the practice of law. During moderation, your participation is encouraged. We welcome without judgment your insight and opinions on the issues presented. If your comments relate to actual cases, please do not refer to any pending or impending cases or use actual names.



TRIAL PARTICIPANTS

Judge Prewett
District Attorney Robinson
Attorney General Webb
B.P. Tabor, Esq.
G. L. Johnson, Esq.
Sheriff Keena
Adolph Weber

Dan Wesp, DDA
Nick Tziavaras, APD
Catryna Strasser*
Kathi Finnerty, Esq.
Laura Strasser, Esq.
Rich Strasser, ret'd Deputy
David Tellman, DDA

Old Man Miner
(narrator/moderator)

Judge Garen Horst

* pending bar results

TRIAL SCHEDULE

ACT I The Trial Begins

Scene One THE TRIAL BEGINS
Scene Two THE SURPRISE WITNESS

MODERATION

ACT II The Trial Concludes

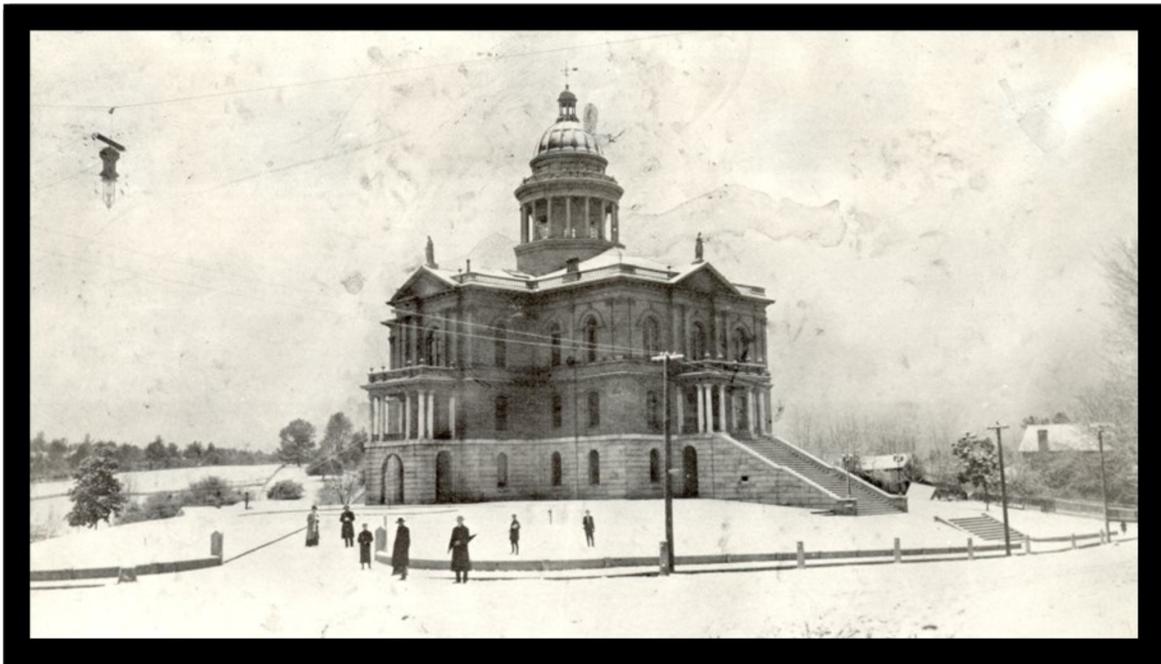
Scene One CLOSING ARGUMENTS
Scene Two THE VERDICT
Scene Three PRONOUNCEMENT OF SENTENCE

MODERATION

ACT III The Aftermath

Scene One HANGING AT FOLSOM
Scene Two JUDGE PREWETT'S LAMENT

CONCLUSION - THE REST OF THE STORY



TO THE CITIZENS OF AUBURN

A most atrocious crime has been committed in our midst. While I am accused of this crime and while many statements have been made to show me connected with it, such statements have been wrong in many cases, and when the proper time comes I can clear up all of the doubt and show that the case against me is due alone to misunderstanding and confusion. Many men were confused by the fire and their confusion made their recollections clouded.

I respectfully request that you suspend your judgment as to the author, until I have had a chance to offer my defense and speak for myself.

Public opinion has been unfairly turned against me.

To my friends — I assure you of my innocence.

To those who have prematurely judged against me, I point out that appearances are often time deceptive.

Trusting our judgment will do me no injustices, I am

Sincerely,

Adolph Weber

Acknowledgments

Thank you to the Placer County Museum for sharing their material in the Archives; Union Bank for the use of the actual historical artifacts for display; and to all the Auburn "extras" who attended the filming of our trial re-enactment in costume and served as our jurors, audience members or surprise witnesses. Additionally, the program drew heavily upon the work entitled "The Story and Trials of Adolph Weber," by Lewis Swindle, © 2002. A special acknowledgement is due to our Technical and Historical Advisor for the program, Nick Stockman, who also filmed and edited our courtroom scenes in Department Three of the Historic Courthouse. Finally, thank you to the Placer County Bar Association for sponsoring this conference and encouraging this program.

LESSONS ON JUSTICE FROM PLACER'S MOST INFAMOUS CASE
HANDOUT / RESOURCE MATERIALS

People v. Weber (1906) 149 Cal. 325

I. CIVILITY AND ADVOCACY – ARE THEY MUTUALLY EXCLUSIVE?

“In addition to the language required by Business and Professions Code section 6067, the oath to be taken by every person on admission to practice law is to conclude with the following: *As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.*” (California Rules of Court, 9.7 (Oath required when admitted to practice law).)

Attorney Ethics and Rules of Professional Responsibility

For Attorneys, see Attorney’s Oath (B&P 6067); Rule of Court 9.7 (Civility Oath); Duties of an Attorney (B&P 6068); Training on Implicit Bias (B&P 6070.5) Prohibited Discrimination, Harassment, Retaliation (Rule of Prof. Conduct 8.4.1)

(See *In re the Marriage of Anka & Yeager* (2019) 31 Cal.App.5th 1115, 1117 (zealous advocacy must be tempered by the professional and ethical constraints of the legal profession); *Martinez v. O’Hara* (2019) 32 Cal.App.5th 853 (succubustic comment demonstrated gender bias, attorney reported to Bar – *misconduct under B&P 6068 and RPC 8.4.1*.) *Briganti v. Chow* (2019) 42 Cal.App. 5th 504, 254 Cal.Rptr.3d 909, 915.) (“*objectifying or demeaning a member of the profession, especially when based on gender, race, sexual preference, gender identity, or other such characteristics, is uncivil and unacceptable*”) (citing L. Edmon & S. Jessner, Gender Equality is Part of the Civility Issue (Summer 2019) ABTL Report Los Angeles, http://www.abtl.org/report/la/abtl1a_summer2019.pdf)

Judicial Ethics Regarding Bias

“A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel, or others. This canon does not preclude legitimate advocacy when race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, political affiliation, or other similar factors are issues in the proceeding.” (Canon 3(B)(6); See also Judicial Standard 10.20(a) (Court Duty to Prevent Bias).)

“Civility in the Legal Profession: It’s Up to Us to Save It,” By J. Kevin Morrison, California Litigation, Volume 35, Number 1, 2022.

II. TRIAL BY AMBUSH – IS IT LEGAL AND ETHICAL?

“The attorney-general made an opening statement to the jury, at the conclusion of which the defense moved that the prosecution be required and directed by the court to state to the jury what the other facts referred to by the attorney-general were, and what they expected to prove, and on what a reliance for a conviction of the defendant was placed. The court denied the motion.” (Weber at 336.) “It does not accord with our ideas of justice, and has no tendency to promote its ends, to keep the most important witness against a prisoner in ambush until the moment when he is called upon to make his defense.” (Weber at 353, Dissenting Opinion of Chief Justice Beatty.)

“Our courts are not gambling halls but forums for the discovery of truth.” (People v. St. Martin (1970) 1 Cal.3d 524, 533.)

Opening Statements

(Compare People v Pangelina (1984) 153 Cal.App.3d 1 (The public defender waived an opening statement; defense counsel is not obliged to make an opening statement. Whether he (or she) does so or not rests upon (that lawyer’s) discretion. ‘The sole purpose of an opening statement is to outline facts upon which an acquittal will be sought. It is a matter of long-recognized trial tactics for a defense lawyer to withhold informing the prosecution of the facts upon which his defense is based by waiving an opening statement.)

HISTORY

Until the mid-20th century, the trial of a civil or criminal case was an exercise in ambush. Parties to litigation knew little about an opponent’s claims or defenses until aired in open court. A lawyer’s only means to know what witnesses would say was to somehow find them before trial and persuade them to talk about the case. Witnesses weren’t obliged to speak with counsel, and even when they did so, what they volunteered outside of court might change markedly when under oath on the stand. Too, at law, there was no right to see documentary evidence before trial.

John Henry Wigmore nicely summed up the situation in his seminal, *A Treatise on the System of Evidence in Trial at Common Law* (1904). Citing the Latin maxim, *nemo tenetur armare adversarium suum contra se* (“no one is bound to arm his adversary against himself”), Wigmore explained:

To require the disclosure to an adversary of the evidence that is to be produced would be repugnant to all sportsmanlike instincts. Rather permit you to preserve the secret of your tactics, to lock up your documents in the vault, to send your witness to board in some obscure village, and then, reserving your evidential resources until the final moment, to marshal them at the trial before your surprised and dismayed antagonist, and thus overwhelm him. Such was the spirit of the common law; and such in part it still is. It did not defend or condone trickery and deception; but it did regard the concealment

of one's evidential resources and the preservation of the opponent's defenseless ignorance as a fair and irreproachable accompaniment of the game of litigation.

Id. At Vol. III, §1845, p. 2402.

Our forebears at common law feared that disclosure of evidence would facilitate unscrupulous efforts to tamper with witnesses and promote the forging of false evidence. The element of surprise was thought to promote integrity of process.

Legal reformers hated "trial by ambush" and, in the late-1930's, they sought to eliminate surprise and chicanery in U.S. courts by letting litigants obtain information about an opponent's case before trial in a process dubbed "discovery." The reformer's goal was to streamline the trial process and enable litigants to better assess the merits of the dispute and settle their differences without need of a trial.

After three years of drafting and debate, the first Federal Rules of Civil Procedure went into effect on September 16, 1938. Though amended many times since, the tools of discovery contained in those nascent Rules endure to this day: Oral and written depositions (Rules 30 and 31); Interrogatories (Rule 33); Requests to inspect and copy documents and to inspect tangible and real property (Rule 34); Physical and mental examinations of persons (Rule 35); Requests for admissions (Rule 36); Subpoena of witnesses and records (Rule 45).

CURRENT LAW

While many judicial decisions refer to "trial by ambush" in passing, and often as a truth that needs no explanation, but only exclamation, a few cases provide guidance on when a court is likely to pay heed to the warning against such tactics.

Shakespear v. Wal-Mart Stores, Inc., No. 2:12-cv-01064-MMD, 2013 U.S. Dist. LEXIS 173471, 2013 WL 6498898, at *4 (D. Nev. Dec. 10, 2013) ("[A]lthough there is a public policy to hear cases on their merits, there is also a public policy against trial by ambush.") Plaintiff failed to disclose future medical damages and potential witnesses in her Initial Disclosures and discovery responses; therefore, the motion to amend pre-trial order regarding likely witnesses at trial was denied. The Court explained: As the Ninth Circuit has repeatedly noted, any injustice resulting from exclusion in such situations comes from the party's own failure to properly present his case. (See, e.g., *Delta Sys., Inc. v. TRW*, 874 F.2d 815 (9th Cir. 1989); *U.S. v. Lummi Indian Tribe*, 841 F.2d 317, 320 (9th Cir. 1988); *Colvin*, 549 F.2d at 1340.)

Modern instruments of discovery serve a useful purpose, as noted in *Hickman v. Taylor*, 329 U.S. 495. They together with pretrial procedures make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent. (*Id.* at p. 501.)

Dethloff v. Krump Construction Inc. (2012) 3rd. District Ct. of Appeal (Opinion by Raye, P.J.) 2012 Cal. Unpub. Lexis 8154, 2012 WL 5395732. In a classic case of bait and switch, after opening statements in the trial of this construction dispute regarding a condominium project in Mammoth Lakes, the parties announced they had reached a

stipulation “to resolve this matter.” Notwithstanding this stipulation, plaintiff’s counsel asserted moments later that the defendant was entitled to no damages because it had failed to prove compliance with the licensing requirements of the state Contractors’ State Licensing Board. The trial court rejected plaintiff’s argument and entered judgment for the defendant. Plaintiff moved to vacate the judgment arguing that the stipulation was not for entry of judgment, but rather “only a stipulation of proof as to damages” and because defendant had failed to prove it was a duly licensed contractor, it cannot recover any damages.” The trial court stated “I disagree with you that it’s unfair. What’s unfair is to proceed as you have with trial by ambush, noting that plaintiff failed to raise the issue in summary judgment, pre-trial motions or any other pre-trial matter, and made no mention of the licensing issue in opening statements.”

The appellate court held that the record contained substantial evidence that could lead a reasonable person to construe the parties’ agreement as a stipulation for judgment, nor was there any indication prior to plaintiff’s motion a suggestion from either party that the stipulation was as to damages only. (@ p.11). In so doing, the appellate court noted that the trial court relied, in part, upon extrinsic evidence of the parties’ negotiations; i.e. a single sheet of hotel stationary penned by plaintiff’s counsel “We want to go home, you win.”

In Re Hood (2007) 4th App. District Ct. (San Diego County) 2007 Cal. App. Unpub, Lexis 3696, 2007 WL 1346990. A marital dissolution action in which the trial judge actually said “that’s a fairly large cow pasture, though, isn’t it?” regarding an exhibit which was not attached to a mandatory settlement conference statement (as required by local rules) pertaining to separate property reimbursements and *Epstein* credits. The court stated that the local rules were intended to promote settlement, and that all documents intended to be presented at trial had to be attached to the settlement conference statement to prevent trial by ambush. The witness was, however, not precluded from using the unattached records to refresh his recollection at trial. Because the unattached exhibits were not part of the appellate record, the appellate court was left to presume the trial court’s judgment was correct.

Trial By Ambush or Avalanche – the Discovery Debacle. Journal of Dispute Resolution (1987) by Prof. Walter E. Oberer (Utah School of Law, Harvard Law graduate). Although this article has aged 35 years, it provides substantial insight into the question of whether “trial by ambush” was preferable to “trial by avalanche,” the latter meaning an avalanche of paper discovery and depositions that cost much and produce little. Professor Oberer articulates that the Discovery Reform (federal rules in 1938, and state laws (e.g. California), 1959), were based upon “The primal assumption ... that lawyers could be put in charge of the discovery, with little judicial supervision, and thereby produce positive societal results” (pg. 4), which instead resulted in “what has now become a snowballing torrent of discovery, in both federal and state courts, yielding an avalanche of ‘evidence’ and even more non-evidence” paid for by the pound...” (pg. 5). “In other words, the discovery reforms of 1938 *et. seq.* have changed dramatically, in many ways unforeseen, the entire system of American justice” - in ways that “fail on any cost-benefit analysis.” (pg. 7).

Professor Oberer then asks “What to do about the foregoing dilemma? Leave it to the “goats” to preserve the cabbage patch?” and laments that the truth of the current system of litigation is

that it is “*out of control*” (emphasis original). (Pg. 9). He concludes that the “game” of “trial” has simply been displaced by a new game of “pretrial” – longer, more expensive, more invasive and abrasive, and even more subject to gamesmanship because of less clear rules and no effective umpire.

Davis v. Superior Court (1984) 36 Cal.3d 291, 299 “In enacting the discovery statutes the Legislature ‘intended to take the “game” element out of trial preparation’ by assisting the parties in obtaining the facts and evidence necessary to expeditions resolution of their dispute.” A party who fails to name a known witness “deprives his adversary of that information by a willfully false response” and “subjects the adversary to unfair surprise at trial. He deprives his adversary of the opportunity of preparation which could disclose whether the witness will tell the truth and whether a claim based upon the witness’s testimony is a sham, false or fraudulent.” (*Thoren v. Johnston & Washer* (1972) 29 Cal.App.3d 270, 274).

CRIMINAL LAW

People v. Obioha (2019) Cal. App. Unpub. Lexis 1616; 2019 WL 1070112 (Los Angeles Co. Sup. Ct.) The victim was fatally shot in the face while walking along Sunset Blvd. with her boyfriend. The next morning two children found the shotgun, registered to the Defendant, lying on the tidal rocks at a nearby beach. Further investigation revealed that Defendant had done some consulting work for the victim, filed a claim for unpaid wages with the state Labor Commission, and had his romantic advances rebuffed by the victim. The jury found the Defendant guilty of murder in the first degree, with financial gain as a special circumstance.

On appeal Defendant argued that the prosecution “ambushed” him at trial by introducing expert testimony not previously disclosed, namely medical examiner Poukens’ opinion that a “triangular shape” he observed in an enlarged photo of a wound on the victim’s face was “consistent” with plastic, which was contrary to a promise defense counsel made to the jury in opening statements regarding the ammunition allegedly used in the murder. A few days into the trial, the prosecution called Poukens’ to testify. The prosecution allegedly told defense counsel that morning that Poukens’ “reversed (his) opinion about identifying plastic was located on one ... of the victim’s wounds.” Defense counsel failed to object to this testimony, nor did he request a jury instruction on untimely disclosure of evidence.

Penal Code section 1054.1 obliges the prosecution to disclose to the defense “[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations.. which the prosecutor intends to offer in evidence at trial” “if it is in the possession of the prosecuting attorney or Investigating agencies.” Penal Code section 1054.7 compels immediate disclosure the material becomes known to, or comes into the possession of a party within 30 days of trial.” Discovery thus “is an ongoing responsibility, which extends throughout the duration of trial and even after conviction.” (*People v. Kasim* (1997) 56 Cal.App.4th 1383). “The rationale behind California’s discovery statute is that neither side should be allowed to engage in or be subjected to trial by ambush.” (*People v. Bell* (2004) 118 Cal.App.4th 249.)

The Court held that because the experts for both sides testified that each saw something that “could be” plastic in their examinations, defendant's right to fair trial was not violated.

Izzazaga v. Superior Court (1991) 54 Cal.3d 356. Addressing petitioner's argument, we begin with the observation that the prosecution's right to discover defendant's witnesses under section 1054.3 is triggered by the intent of the defense to call that witness. Thus, the disclosure by the defense of its witnesses under section 1054.3 signals to the prosecution that the defense “intends” to call those witnesses at trial. It follows that the prosecution must necessarily “intend” to call any of its witnesses who will be used in refutation of the defense witnesses if called. A prosecutor cannot “sandbag” the defense by compelling disclosure of witnesses the defense intends to call, and then in effect redefining the meaning of “intends” when it comes time to disclose rebuttal witnesses. The same definition applies to both the prosecution and the defense and thereby assures reciprocity. A disclosure of witnesses under section 1054.3 thus triggers a defendant's right to discover rebuttal witnesses under section 1054.1)

People v. Tillis (1998) 18 Cal. 4th 284, 956 P. 2d 409. The question on appeal in this criminal attempted murder and “puppy” theft conviction from San Joaquin County, was whether the prosecutor was obligated to disclose that he intended to question defendant's expert (Pittel) about his having been arrested for “snorting Cocaine in his Porsche” during a lunch break in a trial in which he was testifying as an expert about the effects of drug usage by defendants. Defense counsel interposed no objection, but during recess expressed his upset at not having been given notice the prosecutor planned to ask Pittel about his arrest. In reviewing the purposes of Proposition 115 (1990) which declared discovery to be “reciprocal” in criminal cases, the appellate court held that “the record does not demonstrate that the prosecutor failed to disclose any discoverable material, and the undisclosed impeachment information fell outside the scope of the discovery statute (section 1054.1), therefore no discovery violation was present.

III. HOW FAR CAN AND SHOULD WE GO IN CLOSING ARGUMENT?

“We believe, gentlemen, and I say so not without a feeling of pity, not without a feeling of sadness, not without a feeling of pathos, but with a feeling that the evidence in this case as it stands tonight recorded in the notes of this trial, points unerringly, points accurately, beyond the possibility of mistake, to this defendant as the murder of Mary Weber. Objection was made to this language.” (Weber at 340-341.) The court upheld the trial court's overruling the objection: “It is of course improper for a prosecuting officer to assert his personal belief or personal conviction as to the guilt of an accused, if that belief or conviction is predicated upon anything other than the evidence in the case. But, upon the other hand, such prosecuting officer has the indisputable right to urge that the evidence convinces his mind of the accused guilt. Indeed, it would be mere stultification if it were contended that the prosecuting attorney could argue to the jury that the evidence should convince their minds, although it did not convince his. A prosecuting officer, therefore, has the right to state his views, his beliefs, his conviction as to what the evidence establishes.” (Weber at 341.)

Derogatory Words: *People v. Krebs* (2019) 8 Cal.5th 265, 341 (for a discussion on derogatory words describing the other party, argumentative attacks on counsel, impugning the integrity of counsel, assertions of personal belief and vouching, references to community vengeance and outrage)

Commenting on the demeanor of a non-testifying party: *People v. Boyette* (2002) 29 Cal.4th 381, 434: Comment on a defendant's courtroom demeanor is improper unless the comment is simply that the jury should ignore a defendant's demeanor. "In criminal trials of guilt, prosecutorial references to a non-testifying defendant's demeanor or behavior in the courtroom have been held improper on three grounds: (1) Demeanor evidence is cognizable and relevant only as it bears on the credibility of a witness. (2) The prosecutorial comment infringes on the defendant's right not to testify. (3) Consideration of the defendant's behavior or demeanor while off the stand violates the rule that criminal conduct cannot be inferred from bad character." (citing *People v. Heishman*, (1988) 45 Cal.3d 147, 197.)

Vouching: Improper vouching for the strength of the attorney's case involves an attempt to bolster a witness by reference to facts outside the record. Additionally, it is misconduct for prosecutors to vouch for the strength of their case by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office. A prosecutor's reference to his or her own experience, comparing a defendant's case negatively to others the prosecutor knows about or has tried, is improper. *People v. Huggins*, (2006) 38 Cal.4th 175, 206-207.

Example: "have a tremendous respect for some of these doctors as well. When I was a defense attorney, I used some of them. As a prosecutor, I'm certainly pleased with the opinions that they're going to give."--Improper vouching. *People v. Turner* (2004) 34 Cal.4th 406, 431-432.

For Waiver: See *People v. Covarrubias* (2016) 1 Cal.5th 838, 894 (failure to object to misconduct and request admonishment generally waives issue on appeal).

IV. DOES PUBLIC PRESSURE (STILL) IMPACT CASES IN LEGAL SYSTEM?

"The murder of the Weber family was one of those atrocious crimes which always arouse an intense desire to discover the perpetrator, and bring him to justice. Such a state of feeling pervading a whole community increases the danger that one upon whom suspicion first happens to fall may be convicted upon evidence which, in cases of a less aggravated character would not be deemed thoroughly satisfactory proof of guilt. This fact makes it peculiarly the duty of the courts in such a case to enforce with scrupulous care every right which the law accords to persons accused of crime – rights accorded not for the purpose of screening the guilty, though capable at times of being perverted to that end, but solely in order to guard, as far as may be consistent with the practical administration justice, against the danger of convicting the innocent." (Weber at 351, Dissenting Opinion of Chief Justice Beatty.)

Change of Venue: As a general rule, the trial of a felony case is to be held in the county where the offense was committed. (Penal Code § 777; *People v. Simon* (2001) 25 Cal.4th 1082, 1093 94.) Notwithstanding this general rule, “[a] trial court must order a change of venue for trial of a criminal case to another county on motion of the defendant ‘when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be held in the county.’ (Penal Code § 1033, subd. (a).)” (*People v. Hayes* (1999) 21 Cal.4th 1211, 1250.) “The trial court must resolve whether, on the peculiar facts of the individual case, there is a reasonable likelihood that the jurors chosen for defendant’s trial have formed such fixed opinions as a result of pretrial publicity that they cannot make the determinations required of them with impartiality. Defendant, as the moving party, bears the burden of proof.” (*People v. Sanders* (1995) 11 Cal.4th 475, 505-506; *People v. Bonin* (1988) 46 Cal.3d 659, 673.)

Controlling courtroom visual pressures: *Estelle v. Williams* (1976) 425 U.S. 501, 504: “Courts have, with few exceptions, determined that an accused should not be compelled to go to trial in prison or jail clothing because of the impairment of the presumption so basic to the adversary system.” See also: *Norris v. Risley* (1990, 9th Cir) 918 F.2d 828, 831: “Just as the compelled wearing of prison garb during trial can create an impermissible influence on the jury throughout trial, the buttons’ message (which read “Women Against Rape”), which implied that Norris raped the complaining witness, constituted a continuing reminder that various spectators believed Norris’s guilt before it was proven, eroding the presumption of innocence.”

See also: *People v. Cummings* (1993) 4 Cal.4th 1233, 1298-1299: In a death penalty trial where the defendant was accused of murdering a Los Angeles police officer, the defendant asked the court to prohibit any spectators from wearing any uniform or any badges. The trial court attempted to balance the spectators’ First Amendment rights with the rights of the defendant to receive a fair trial by suggesting that, when possible, the officers wear civilian clothes. The California Supreme Court upheld the denial of the defendant’s requested motion, stating: “The trial court sought to balance the rights of those officers whose duty assignments precluded attendance in civilian clothes against the possibility that seeing large numbers of uniformed officers among the spectators would somehow influence the jury. The concerns expressed by [Defendant] were not sufficient to establish that excluding all uniformed officers was essential to a fair trial...”

V. HOW DO NOTORIOUS CASES SHAPE THE LAW?

“On November 10, 1904, an atrocious murder occurred in California. A youth named Weber murdered his whole family for the purpose of succeeding to the property . . . The people of the state were greatly incensed that he should be allowed to take the property, and the press heaped reproached upon a system of law which would permit such injustice . . . Popular indignation led to the adoption in 1905 (of Civil Code section 1409.” (*Estates of Ladd* (1979) 91 Cal.App.3d 219, 223 (citations omitted.)

Other Examples

Three strikes law - This law came about after several high profile murders committed by ex-felons raised concern that violent offenders were being released from prison only to commit new, often serious and violent crimes in the community. It was originally enacted in 1994, and found at PC 1170.12 and PC 667.

Megan's Law - This law was named after Megan Kanka, a 7 year old girl who was raped and killed by a known child molester who had moved across the street from the family without their knowledge. The law was enacted in 1996 and is found at PC 290.46. It among other things requires the Department of Justice to notify the public about certain registered sex offenders.

Marsy's Law - This law, also known as the Victims' Rights Act of 2008, named after Marsy Nicholas, a senior at UC Santa Barbara, when she was stalked and murdered by her ex-boyfriend in 1983. Her killer was tried and convicted and ultimately died in prison. Her family's experience with the criminal justice system, including attending multiple parole board hearings, led to their advocacy for a law change. The law amended the California Constitution to provide for victim's rights, and the Penal Code pertaining to Parole Hearings. (Cal. Const. Article I, Section 28(b); PC 3041.4, 3043.)

Laura's Law - The law is named after Laura Wilcox, killed in 2001, while working for Nevada County Behavioral Health. She was killed by a former patient of the county's outpatient mental health clinic. The law provides for community based AOT treatment to individuals who meet the criteria. The law became effective in 2003 and commences at W&I 5345.

OJ Simpson Case - Violence Against Women Act in 1994)

ISSUES AS THEY PERTAIN TO FAMILY LAW

I. CIVILITY AND ADVOCACY – ARE THEY MUTUALLY EXCLUSIVE?

A. Civility and Advocacy

- Sometimes FL lawyers do more harm than good
- Lawyers can inflame instead of helping parties to reach a fair resolution
- Can result in lifelong harm to spouses and children – “Love your kids more than you hate your spouse.”
- The more conflict, the more the attorneys get paid, but not necessarily best for parties and their families. Remember, not every issue requires court intervention. Compromise is part of human nature and compromise is inherent in family law cases.
- Family Code section 271 imposes a minimum level of professionalism and cooperation to effect the policy of favoring settlement of family law litigation –and a reduction of the attendant costs. Litigants who flout that policy by engaging in conduct that increases litigation costs are subject to imposition of attorney fees and costs as a section 271 sanction. Lack of civility by a party’s attorney is an appropriate basis for sanctions as well. (*IRMO Davenport* (2011) 194 Cal.App.4th 1507, 1524) In the *Davenport* case, the court was not impressed by a new attorney to a firm who was taught to “litigate with unbridled aggression” and awarded sanctions to the opposing party for the conduct of that attorney.
- Balance zealous advocacy with ensuring that one party’s deep pockets do not overrun the other party in divorce.

B. Bias in Family Law Cases

- The court shall not prefer a parent as custodian because of that parent’s sex. [FC 3040(a)(1)(c)]
- *IRMO Moschetta* (1994) 25 Cal.App.4th 1218, 1232 – “[C]ourts must eschew `preconceptions about the parties because of their gender’ in the process of decision making.”
- What constitutes judicial bias: “Bias is defined as a mental predilection or prejudice; a leaning of the mind; a predisposition to decide a cause or issue in a certain way, which does not leave the mind perfectly open to conviction.” [Citation.] Bias or prejudice consists of a “mental attitude or disposition of the judge towards a party to the litigation,...” [Citation.] In order for a judge to be disqualified under [Code Civ. Proc. section 170 (5) now Code Civ. Proc. §170.1], the prejudice must be against a particular party.” *IRMO Lemen* (1980) 113 Cal.App.3d 769, 789.
- The job of third parties, such as child custody evaluators, involves impartiality and neutrality, as does that of a judge. When child custody evaluators fail to do so they should be disqualified. *Leslie O. v. Super. Ct. (Thomas O.)* (2014) 231 Cal.App.4th 1191. [See also *IRMO Adams & Jack A.* (2012) 209 Cal.App.4th 1543 – addressed the issue of removal of experts for bias.]
- Cal. Rules of Court, rule 5.220(h)(1)(j)(1) – In performing an evaluation, the child custody evaluator must maintain objectivity, provide and gather balanced information for both parties, and control for bias.

- “Lawyers [are] an example of a profession largely trained in win or lose, succeed or fail.’ Dr. Brown is referring to litigation bias – a bias toward adversarial processes and approaches, which are based upon a win/lose paradigm.” *The Amplification of Bias in Family Law and It’s Impact* Journal of the American Academy of Matrimonial Lawyers.
- Attorney biases can be amplified by their clients’ biases, which can then impact the choices they make in the case, such as hiring an expert that takes on the same bias.

II. TRIAL BY AMBUSH – IS IT LEGAL AND ETHICAL?

- In family law cases, discovery may be conducted informally, or it can be conducted formally under the CCP. Informal discovery allows the parties to facilitate a good-faith exchange of information to minimize the court involvement and avoid lengthy litigation.
- A lot is put into play to prevent trial by ambush in family matters. *IRMO Siller* (1986) 187 Cal.App.3d 36 – court awarded \$100,000 in pendent lite attorneys’ fees for an attempt by the corporation belonging to one spouse to block discovery. *IRMO Chakko* (2004) 115 Cal.App.4th 104 – issue sanction declaring father’s income to be specific amount per month based on loan application proper because of his refusal to comply with discovery requests. *IRMO Michaely* (2007) 150 Cal.App.4th 802 – factual findings, imposed as sanctions on husband for evasive and obstreperous conduct during discovery, were proper, and resulting award of 100% of community property to wife was justified.

III. HOW FAR CAN AND SHOULD WE GO IN CLOSING ARUGMENT?

- Summarization of evidence presented during trial and how it connects to the law – but it’s an argument, not just a summation.
- Want to make the judge feel good about finding for your client.
- Make arguments concerning facts and evidence, arguments concerning law, and arguments concerning relief (not about what client “wants” or expressing personal opinions.)
- Model Rule of Professional Conduct 3.4e – “A lawyer shall not...allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness...”
- Do not argue facts outside the record, misstate the law, embellish the evidence, refer to evidence not admitted, or make personal attacks on opposing counsel or witness. It doesn’t look pretty on anyone.

IV. DOES PUBLIC PRESSURE (STILL) IMPACT CASES IN LEGAL SYSTEM?

- Perceived biases by fathers who feel mothers always prevail in custody cases.

- Perceived biases by higher income earners that they will automatically have to pay support.
- Perceived biases that compromise means a “loss” and the other party “won” resulting in adversarial and contentious proceedings vs. amicable settlement-based proceedings.
- The portrayal in the media that family law lawyers are monsters destroying the life of the spouse. [*The Family Law Education Reform Project: Final Report*, 44 Fam. Ct. Rev. 524, 541 (2006.)]
- Input, opinions, stories, advice, etc. from friends and family who have been through a divorce or know someone who went through a divorce who project their experience as being applicable in all cases and instead unintentionally end up escalating the conflict for the person to whom they are aligned. [*When Divorcing, Beware of Meddlers!* Huffington Post (July 26, 2016).]

V. HOW DO NOTORIOUS CASES SHAPE THE LAW?

- **Frankie Valli** - *IRMO Valli* (2014) 58 Cal.4th 1396 - resolved the question of whether an insurance policy purchased during the marriage with community property can be considered a spouse’s separate property in divorce proceedings if he/she is named as the owner of the policy. According to the California Supreme Court, the answer is “no”.
- **Angelina Jolie and Brad Pitt** – *Angelina Jolie v. Sup Ct of Los Angeles* (2021) – disqualified the judge who presided over the divorce and custody case due to a failure to disclose certain involvements with Mr. Pitt’s attorney.
- **Billionaire Ron Burkle** had legislation enacted during his divorce case to keep his finances private, but the court struck down the law as unconstitutional. *IRMO Burkle* (2006) 135 Cal.App.4th 1045, invalidating Cal. Fam. Code section 2024.6.

While Johnny Depp and Amber Heard finalized their divorce in 2017, who wants to bet that the drama that has continued from the defamation trial will find its way to the Virginia Supreme Court some day!

149 Cal. 325, 86 P. 671

THE PEOPLE, Respondent,
v.
ADOLPH JULIUS WEBER, Appellant.

Supreme Court of California.
Crim. No. 1281.
June 21, 1906.

CRIMINAL LAW—MURDER IN FIRST DEGREE—SUPPORT OF VERDICT.

Upon review of the evidence, it is *held*, that, though it is circumstantial and conflicting, it is sufficient to support the verdict of the jury, finding the appellant guilty of murder in the first degree.

ID.—IMPANELMENT OF JURY—SICK JUROR—SPECIAL VENIRE — RULING UPON DEFENDANT’S MOTION — PEREMPTORY CHALLENGES.

Where, immediately after twelve jurors were accepted and sworn, one juror was excused for sickness, and a special venire was summoned to complete the panel, the court properly sustained defendant’s motion that the other jurors sworn be not excused, and properly overruled part of it, that each side be allowed the number of peremptory challenges remaining, as being premature, with privilege to renew it; and where a twelfth juror was accepted and sworn without any peremptory challenge, no question arises as to the number of

peremptory challenges remaining unexercised.

ID.—OPENING STATEMENT—MOTION OF DEFENDANT.

A motion of the defendant, after an opening statement for the prosecution, to require it to be made more full as to what it was expected to prove, was properly denied. The purpose of the opening statement is merely to outline the testimony to be offered to enable the jury more clearly to sift and digest it; and the prosecution may open its case by evidence without any preliminary statement.

ID.—TESTIMONY OF PHYSICIAN PERFORMING AUTOPSY—ENTRANCE AND EXIT OF BULLET.

Conceding that the place of entrance and exit of a bullet found in the body of the deceased was not matter of expert evidence, yet, when the jury had no opportunity to see the body, the physician who performed the autopsy thereupon was properly allowed to give direct testimony to the physical fact which had come under his observation, and to illustrate by a diagram the place of such entrance and exit seen by him.

ID.—SIZE OF BULLET-WOUND—HARMLESS RULING.

The refusal to strike out the testimony of the physician, that he believed the bullet-wound to have been produced by a 32-caliber

bullet, was harmless, when the bullet which inflicted the wound was recovered and was proved without dispute to have been a 32-caliber pistol-bullet.

ID.—IDENTIFICATION OF DEFENDANT AS PURCHASER OF PISTOL — CORROBORATION—CLOTHES WORN AT TIME.

Where it was proved that defendant was in San Francisco at the time when he was identified by a witness as having purchased from him the 32-caliber pistol offered in evidence, and who described the clothes worn by him at that time, the prosecution was properly allowed to prove by other witnesses, in corroboration of such witness, the style of clothes which the defendant wore when in that city about that time.

ID.—EVIDENCE OF MOTIVE—VALUE OF PROPERTY OF DECEASED FATHER—INSURANCE.

Where the evidence tended to show that defendant had murdered his family and set fire to the house, and that he had lived in the family and was of age, and was inferentially familiar with his father's property, it was proper to allow the prosecution, upon the question of motive, to prove the value of his deceased father's property and the amount of insurance upon the house.

ID.—LEADING QUESTIONS — DISCRETION — ANSWERS NOT INJURIOUS.

Leading questions to a witness for the

prosecution are within the sound discretion of the court; and the defendant could not have been harmed by them where the answer was in no sense injurious.

ID.—HEARSAY—COMPLAINT OF MOTHER — IMMATERIAL ERROR.

Though it was error not to strike out hearsay evidence of complaint by defendant's mother about his manners, made prior to the homicide, in his presence, without evidence as to his conduct at that time; yet the error is not so material as to require a reversal.

ID.—UNNATURAL CONDUCT OF DEFENDANT—QUESTION FOR JURY.

Evidence was admissible to show unnatural conduct and statements of the defendant on the day after the tragedy, as tending to indicate guilt. The weight of such evidence was a question for the jury.

ID.—ADMISSION OF DEFENDANT TO OFFICERS—CONFLICT WITH TESTIMONY TO ALIBI—PRELIMINARY PROOF.

Evidence of admissions of the defendant made to the sheriff and district attorney on the day after the homicide, not involving any confession of guilt, but merely showing his want of recollection of the route taken by him from the house after the fire, and thus conflicting with his positive testimony that he took a circuitous route, to show an *alibi*, was properly received without requiring preliminary proof of the voluntariness of the admissions.

ID.—CROSS-EXAMINATION OF
DEFENDANT—PURPOSE OF
TESTIMONY.

It was within the scope of legitimate cross-examination of the defendant's testimony as to the route taken by him to ask him if he had not so fixed it for the purpose of meeting the evidence of other witnesses who had seen him at certain places, as indicating that his recollection as to his route had been stimulated by the necessities of the case.

ID.—ARGUMENT FOR
PROSECUTION—STATEMENT OF
BELIEF FROM EVIDENCE.

A prosecuting officer has the right in his argument to state his views, beliefs, and convictions from the evidence; and it was not error to overrule an objection of the defendant to a statement by the attorney-general in his argument as to his belief that the evidence pointed unerringly to the defendant as the murderer of his mother.

ID.—ARRANGEMENT OF BULLETS
RECEIVED IN EVIDENCE.

The attorney-general was properly permitted to arrange the bullets taken from the bodies of defendant's deceased mother and sister, and other bullets fired from the pistol which was in evidence, some by the prosecution and some by the defense, in such order as he saw fit for the purposes of his argument, the jury being properly informed by the court that they might arrange them in any other

order which they saw fit.

ID.—ATTACK UPON REPUTATION OF
WITNESS—CROSS-EXAMINATION OF
REBUTTING WITNESS—IMPROPER
OBJECT.

Where the reputation of the pawnbroker as a witness, who had testified to selling the pistol to the defendant, was attacked by the defense, and a witness had testified in rebuttal to his good reputation, and had stated on cross-examination that he did not know that the license of the pawnbroker had been revoked, further questions on that subject, the manifest object of which was to introduce evidentiary matter in the form of questions, to the detriment of the witness assailed, were properly disallowed.

ID.—HYPOTHETICAL AND
SPECULATIVE QUESTION.

A further question in the same line on cross-examination of the rebutting witness, whether "if any of these matters had been brought to your mind, would it change your opinion?" was properly disallowed as being hypothetical and speculative, as well as a veiled attempt to present the excluded evidentiary matter.

ID.—STRIKING OUT TESTIMONY OF
EXPERT AS TO BULLETS.

Where an expert had testified that the bullets taken from the bodies of defendant's deceased mother and sister had, in his opinion, been fired from the pistol in evidence, basing it upon similarity of bullets

fired by himself from the same pistol, and the court had stricken out his testimony as to the bullets on the ground that the question was one for the jury, and the whole testimony of the expert was treated as stricken out, the fact that in reciting the exhibits referred to, the exhibit of the bullet taken from the body of the sister was omitted, could not have resulted in injury to the defendant.

ID.—EVIDENCE OF BULLETS FIRED BY EXPERT.

Evidence was properly admitted of the bullets fired by the expert from the pistol in evidence, and an objection that they were not fired “under the same conditions as those existing at the time of the homicide” was properly overruled, where it was shown that the pistol was in the same condition, except as to exterior blood-marks upon its surface, as when found concealed in the Weber barn. The similarity of the bullets fired from it to those found in the bodies was pertinent and important evidence, as tending to fix the identity of the weapon from which the fatal shots were fired.

ID.—INSTRUCTIONS AS TO REASONABLE DOUBT.

The court properly refused requested instructions as to reasonable doubt which were elsewhere embodied in the charge, and an instruction that if the jury were satisfied beyond a reasonable doubt of the guilt of the defendant they should find him guilty, is not inconsistent with a further instruction that the evidence of defendant’s guilt was

circumstantial, and that each material circumstance must be proved to their satisfaction beyond a reasonable doubt, or they must acquit.

ID.—CONSTRUCTION OF INSTRUCTIONS.

The instructions given must be taken together as a whole, and where it appears that, on reading them, the jury were fairly and impartially charged, no single instance of striking out the concluding language of a requested instruction would warrant a reversal.

ID.—INSTRUCTION AS TO PRESUMPTION OF INNOCENCE—MODIFICATION ELSEWHERE GIVEN.

Where the court gave a requested instruction as to the presumption of innocence of the defendant, which accompanies him throughout the trial and in the jury-room, and which will avail to acquit him unless overcome by sufficient proof of guilt, the modification thereof by omitting the matter of necessary proof beyond a reasonable doubt, which was in itself unobjectionable, was not injurious, where the court had elsewhere instructed the jury that unless they were “satisfied beyond a reasonable doubt that the presumption of innocence which the law gives him is overthrown, it is their duty to render a verdict of not guilty.”

ID.—MODIFICATION OF ERRONEOUS INSTRUCTION.

Where an erroneous instruction might have been wholly rejected, the modification thereof to eliminate objectionable matter was proper.

ID.—INSTRUCTION AS TO EVIDENCE STRICKEN OUT.

It was not error to refuse to give a requested instruction that the evidence of certain named witnesses had been stricken out, where the court had given an instruction as to all evidence stricken out; and the naming of the particular witnesses, the list of which was incomplete, would have served to confuse the jury.

ID.—ABSTRACT INSTRUCTION—POSSESSION OF ARTICLES.

A mere abstract instruction, “that the mere possession of any article, whether it can or cannot be used in the perpetration of crime, is not of itself sufficient to convict the defendant, but is a mere circumstance which may or may not tend to prove the charge against the defendant,” was properly refused.

ID.—MODIFICATION OF REQUEST—“INDEPENDENT JUDGMENT” OF JURORS.

A requested instruction that “defendant is entitled to the independent judgment of every juryman,” was properly modified so as to make it read that “each side” is so entitled.

ID.—INSTRUCTION AS TO “ALIBI.”

Where the court properly defined an “alibi,” it cannot be urged that the court did not more fully instruct the jury on that question, where the defendant, whose duty it was to request further instruction if desired, made no such request.

ID.—NEW TRIAL—CHANGE OF THEORY OF PROSECUTION AS TO MANNER OF CRIME.

The defendant was not entitled to a new trial because the prosecution offered at the argument on the trial a different theory as to the manner of the crime from that offered on the preliminary examination, where no deception is shown to have been practiced by the prosecution, and where it is not shown that upon a new trial any new evidence would have controverted the theory argued at the trial. The prosecution was not bound to offer any theory as to the manner of the crime, and might properly argue that it was committed in any manner which the evidence showed reasonably possible.

ID.—NEWLY DISCOVERED EVIDENCE—DISCRETION.

Held, that affidavits of newly discovered evidence tending to impeach the testimony of the pawnbroker as to the identity of the pistol sold by him to defendant, one of which, if believed to be true, would have justified a new trial, but which was meager in detail and open to grave suspicion from

the statements which it contained as well as from the absence of statements it should contain, were addressed to the discretion of the court, and that it cannot be said that it abused its discretion in distrusting the affidavits and in denying the new trial for the alleged newly discovered evidence. [Beatty, C. J., dissenting.]

APPEAL from a judgment of the Superior Court of Placer County and from an order denying a new trial. J. E. Prewett, Judge.

The facts are stated in the opinion of the court.

*329 Grove L. Johnson, Ben P. Tabor, F. P. Tuttle, and Samuel J. Pullen, for Appellant. The evidence was circumstantial and insufficient for conviction. The court erred in instructions on reasonable doubt, which were more open to criticism than those held incorrect by this court. (*People v. Chin Heong*, 86 Cal. 332, 24 Pac. 1021; *People v. Kernaghan*, 72 Cal. 609, 14 Pac. 566; *People v. Paulsell*, 115 Cal. 6, 46 Pac. 734; *People v. Bemmerly*, 87 Cal. 177, 25 Pac. 266; *People v. Ah Sing*, 51 Cal. 572; *People v. Lenon*, 72 Cal. 625, 21 Pac. 967.) The court erred in modifying requested instructions. (*People v. Lachanais*, 32 Cal. 433; *People v. Teshara*, 134 Cal. 542, 66 Pac. 798; *People v. Clark*, 145 Cal. 727, 79 Pac. 434; *People v. Chadwick*, 143 Cal. 116, 76 Pac. 884; *People v. Dolan*, 96 Cal. 315, 31 Pac. 107; *People v. De Graaff*, 127 Cal. 676, 60 Pac. 429; *People v. Winthrop*, 118 Cal. 85-92, 50 Pac. 390; *State v. Hickam*, 95 Mo. 322, 6 Am. St. Rep. 54, 8 S. W. 252; *People v. Phipps*, 39 Cal. 334; *People v. Williams*, 17 Cal. 142.) Defendant was

entitled to a new trial on the first ground stated (*Bluitt v. Miller*, 131 Cal. 149, 63 Pac. 157), and for newly discovered evidence on the showing *330 made. No counter-affidavits were filed by the prosecution, and the newly discovered evidence could not have been reasonably introduced at the trial. (*People v. Sing Yow*, 145 Cal. 1, 78 Pac. 235; *People v. Demasters*, 109 Cal. 607, 42 Pac. 236.) The court should unhesitatingly have set aside the verdict upon a showing of a reasonable doubt of the guilt of the defendant. (*McCoy v. People*, 175 Ill. 224, 51 N. E. 777; *Gilman v. People*, 178 Ill. 19, 52 N. E. 967; *Flanagan v. People*, 214 Ill. 170, 73 N. E. 347.)

U. S. Webb, Attorney-General, A. K. Robinson, District Attorney of Placer County, and George W. Hamilton, for Respondent.

The instructions on reasonable doubt are supported by the following cases: *People v. Cronin*, 34 Cal. 112; *People v. Durrant*, 116 Cal. 179, 49 Pac. 75; *People v. Vereneseneckockockhoff*, 129 Cal. 497, 58 Pac. 156, 62 Pac. 111. A court is not bound to repeat itself at request of counsel. (*People v. Cochran*, 61 Cal. 550; *People v. Chaves*, 122 Cal. 140, *People v. Armstrong*, 114 Cal. 573, 46 Pac. 611; *People v. Mendenhall*, 135 Cal. 344, 67 Pac. 325; *People v. Brittain*, 118 Cal. 411, 50 Pac. 664; *People v. Sing Yow*, 145 Cal. 10, 78 Pac. 235; *Olive v. State*, 11 Neb. 30, 31, 7 N. W. 444.) The court properly instructed on the law as to *alibi*, and if defendant wished further instruction thereon he should have requested it. (*People v. McNutt*, 93 Cal. 658, 29 Pac. 243; *People v. Matthai*, 135 Cal. 445, 67 Pac. 694; *People*

v. *Olivera*, 127 Cal. 381, 382, 59 Pac. 772; *People v. Balkwell*, 143 Cal. 264, 76 Pac. 1017.) The charge must be taken as a whole, and each paragraph need not contain all the conditions and limitations expressed in others. (*People v. Armstrong*, 114 Cal. 573, 46 Pac. 611; *People v. Mendenhall*, 135 Cal. 346, 67 Pac. 325.) The court properly ruled on the questions as to a sick juror and the matter of peremptory challenges. (*People v. Brady*, 72 Cal. 490, 491, 14 Pac. 202; *People v. Van Horn*, 119 Cal. 332, 51 Pac. 538.) The court properly ruled upon the question of opening statement. (*People v. Stoll*, 143 Cal. 691, 77 Pac. 818; *People v. Ellsworth*, 92 Cal. 595, 28 Pac. 604; *People v. Sing Yow*, 145 Cal. 9, 78 Pac. 235.) The physician properly testified as to the location of the wounds observed by him on the autopsy. (*People v. Phelan*, 123 Cal. 560, 56 Pac. 424.)***331** Counsel may properly state in argument what they believe the evidence shows. (*People v. Romero*, 143 Cal. 460, 77 Pac. 163.) The verdict is supported by the evidence, and no question of law arises upon its sufficiency. (*People v. Fitzgerald*, 138 Cal. 39, 70 Pac. 1014; *People v. Maroney*, 109 Cal. 279, 41 Pac. 1097; *People v. Gonzales*, 143 Cal. 606, 77 Pac. 448; *People v. Donnelly*, 143 Cal. 398, 77 Pac. 177.) No preliminary proof was required of admissions not directly involving a confession of guilt. (*People v. Jan John*, 144 Cal. 286, 77 Pac. 950; *People v. Ammerman*, 118 Cal. 23, 50 Pac. 15; *People v. Parton*, 49 Cal. 632; *People v. Leroy*, 65 Cal. 613, 4 Pac. 649; *People v. Hickman*, 113 Cal. 86, 45 Pac. 175; *People v. Ashmead*, 118 Cal. 509, 50 Pac. 681.) The motion for a new trial was properly denied. The affidavit of Harrington does not contradict that of Carr in a material matter, and the affidavit of

Beard shows evidence of falsity on its face justifying the court in distrusting it. (*People v. Clarke*, 130 Cal. 647, 63 Pac. 138; *People v. Ah Lee Doon*, 97 Cal. 178, 179, 31 Pac. 933; *People v. Freeman*, 92 Cal. 367, 28 Pac. 261; *Tibbet v. Sue*, 125 Cal. 544, 58 Pac. 160; *People v. Howard*, 74 Cal. 547, 16 Pac. 394; *People v. Sutton*, 73 Cal. 243, 15 Pac. 86; *People v. Gonzales*, 143 Cal. 605, 606, 77 Pac. 448; *People v. Rushing*, 130 Cal. 449-454, 80 Am. St. Rep. 141, 62 Pac. 742; *Oberlander v. Fixen & Co.*, 129 Cal. 690, 62 Pac. 254; *People v. Sing Yow*, 145 Cal. 2, 78 Pac. 235.)

HENSHAW, J.

On November 10, 1904, Julius Weber with his family resided in Auburn, Placer County. His family consisted of his wife, Mary Weber; his daughter, Bertha Weber, aged eighteen; a son, Earl Weber, aged nine; and a second son, Adolph Julius Weber, aged twenty, the defendant herein. The home was a two-story frame building situated within its own grounds, some little distance away from the house of any neighbor. At about six o'clock of the evening of November 10th, the family was seen alive in the house by passers-by. At 7:35 of the same evening the house was discovered to be on fire, and at 7:42 the fire-alarm bell was rung. The first people to arrive saw no living person within or about the buildings. A number of firemen and other citizens were soon upon the ground. A front room upon the ground floor was entered by them through the window. This room contained***332** a piano, and is designated "the piano-room." it was full of thick, heavy smoke, but no fire was

detected. From this room three bodies were carried,—Mary Weber, Bertha Weber, and Earl Weber. Mary Weber and Bertha Weber were both dead, and had been frightfully burned after death. The little boy was not burned at all. He was alive, though unconscious, when removed from the room to the yard, but died almost immediately after. He was in his night-clothes. They were moist with blood. An autopsy disclosed that Mary Weber and Bertha Weber came to their death by gunshot wounds. Mary Weber was shot twice, Bertha Weber once. In each case the wounds were almost immediately fatal; neither could have survived the wounds more than five minutes. The bullets were recovered, and were pistol-bullets of 32 caliber. The burns were inflicted upon the bodies after death. The little boy had not been shot. His death was caused by blows upon the head, inflicted with some blunt instrument and subsequent suffocation. The house burned to the ground. The following day the body of Julius Weber was found in the bathroom of the dwelling. It had been subjected to great heat and was frightfully burned. An autopsy disclosed that the cause of his death was a bullet-wound inflicted by a bullet of like caliber to those which killed the others. Upon November 22, 1904, there was found in the basement of the Weber barn, about two hundred and fifty feet from the dwelling, a revolver described as an “Iver-Johnson 32 caliber revolver, old style.” When found, there was dry blood upon it and one or two light-colored hairs, and the pistol contained the shells of five discharged cartridges. The defendant was in a clothing store in Auburn about five minutes to seven on the evening of the tragedy. He there purchased a pair of trousers. He took off his old trousers in the

store. They were rolled in a bundle by himself, and afterwards more compactly by the storekeeper, who wrapped them in a paper and returned them to the defendant. The defendant’s manner at this time was not such as to excite attention. He comported himself as usual. Prior to that he had been seen on Brewery Lane, going from his house to Auburn at about 6:30 P. M. He was seen in the washroom of the American Hotel at 6:40 or 6:43 P. M., where he washed his hands, and hurriedly left the place. He was seen on the street going towards Cohn’s store, where he purchased the trousers at about *333 6:45. He was on the streets of Auburn after this time until the alarm of fire, and his appearance and conduct during that time were natural. Upon hearing the alarm, he ran to the Weber house in company with a friend, carrying the bundle which contained his old trousers. These trousers he used to break in a window to gain access to the house. He did enter the house, and testifies that he assisted in removing the body of his little brother. His testimony as to this was contradicted. The bundle containing the trousers was burned in the house. Upon November 11th he was examined by the district attorney and the sheriff as to his knowledge of the fire and the homicides, and his answers were reduced to writing. On the evening of the same day he testified as a witness at the coroner’s inquest. Upon the following day he was arrested and charged with the murder of his family. Upon preliminary examination he was held for murder. An information was filed against him by the district attorney upon November 29th, charging him with the murder of Mary Weber, his mother. Upon this charge he was brought to trial in January, 1905. The trial consumed about a month, the jury returning

a verdict of guilty of murder in the first degree. His motion for a new trial was denied, and he was sentenced to be hung. From that judgment and from the order denying his motion for a new trial he prosecutes this appeal.

The prosecution contended, and to this their evidence was addressed, that the defendant had killed his parents, sister, and brother in the manner indicated; that his father was killed in the bathroom, the mother and daughter in the piano-room, the little boy beaten while in his night-clothes, and brought to the piano-room; that the murderer then saturated the clothing of Mrs. Weber and the daughter with inflammable liquid and set fire to it; that he likewise set fire to the house; then, hiding the pistol in the barn, hurried to Auburn to establish an *alibi*; that the heavy, black smoke from the piano-room came from the burning liquid and burning flesh, and the room being inclosed, the oxygen was soon exhausted and the flames thus smothered, in support of which it was shown that when the burned bodies were carried to the open air the fire revived and sparks were seen upon the clothing. The people's contention was, further, that defendant hurried to the washroom of the American Hotel to remove the *334 blood and other traces of crime; that the trousers which he wore were blood-stained, which necessitated the purchase of a new pair; and that he deliberately threw the old pair into the burning building in order that this evidence of his crime might be destroyed. Stress also is laid upon the asserted unnatural conduct of the defendant during and after the fire; that he did not approach the bodies of his mother and sister after they had been taken from the house, nor inquire

about them.

It was shown that Julius Weber was worth about fifty thousand dollars. Upon the death of the other members of the family this defendant would succeed to property of this value. Herein the prosecution imputed the motive for the crimes.

Upon leaving the fire, the defendant went to the home of a friend, and, on account of his excited condition, a doctor was called. The doctor dressed a cut upon the young man's hand, which probably he had received in forcing a window of the burning house. The defendant wanted to know if his mother were alive. The doctor replied that his mother was in the care of friends with a physician in attendance, and that he could not see her, nor could he see any member of the family that night. The defendant said: "I want to know if my mother is alive. I know she is dead. They told me she is alive, but I know she is dead." The doctor gave him a composing draft, and the young man said that if he was permitted to go out for a time he would come back and remain quietly all night. To this the doctor consented, and the defendant went out with his friend, and, at his own suggestion, visited an ice-cream parlor, where they had an ice-cream soda. After that they called at the American Hotel to visit some young ladies, the defendant making the suggestion, saying, "Let's go see the girls in the hotel." The foregoing is instanced merely as an example of the unnatural conduct which it is insisted by the prosecution the defendant displayed after the frightful tragedy. Further, the prosecution produced a pawnbroker of San Francisco, who identified the Iver-Johnson pistol as one which had been owned by him, and which in

turn he had sold to defendant, positively identifying the defendant and describing with some particularity the clothing which he wore at the time of the purchase. All of the evidence was wholly circumstantial, and the defense contends that it was likewise *335 wholly insufficient to uphold a judgment of conviction. This is based upon the inconsistency and irreconcilability of the evidence. Thus, it is said that the defendant must have left his home before 6:30 P. M., since he was seen upon Brewery Lane walking to Auburn at that hour, and was afterwards, and up to the time of the alarm of fire, seen so frequently in the town of Auburn as to render a surreptitious return to the house impossible. Yet, that Bertha Weber was heard by a disinterested witness playing upon the piano at 6:40 or 6:45 P. M., and another disinterested witness heard the scream of a woman from the house between 6:40 and 7 P. M., and that the fire was first discovered in the house at about 6:30 or 6:45. From this it is argued that as Bertha Weber was heard playing the piano somewhere between 6:30 and 6:45, her brother, who was at that time absent from the house, could not have been the murderer; and, moreover, that it would have been impossible for him to shoot three people, all adults, haul the bodies of two of them into the piano-room, where there was no fire, and set fire to them, go upstairs and beat his little brother upon the head and carry his body down to the piano-room in the length of time established by the evidence. But to this it must be answered that the witnesses who fixed the time do not pretend to do so with positiveness and exactness. They fix it as "about" such an hour, and, even if it be conceded that an irreconcilable conflict in the evidence arises, it must be noted that the

testimony of the piano-playing and of the woman's scream was offered by the defense, and it was the province of the jury to weigh and decide and to reconcile the testimony if they could, and, if the conflict was irreconcilable, to affix their own value to the contradictory evidence. And it must be added that when allowance is thus made for inaccuracies as to time, there is nothing in the whole case to show that the defendant could not have committed these horrible deeds, with all their attendant circumstances, and still have made his appearance upon the streets of Auburn at the time indicated. Upon this subject, therefore, it must be concluded that the evidence is sufficient to justify the verdict.

To the rulings of the court in the impanelment of the jury, and upon the admission and rejection of evidence, appellant's counsel reserved very numerous exceptions. The same is true of the court's rulings in giving, in refusing to give, and *336 in modifying instructions. No one of these rulings has failed to receive the careful investigation which the gravity of the case warrants, and we pass to a consideration of those which call for particular mention and discussion.

After twelve jurors had been sworn to try the cause, but before the information had been read or the plea of the defendant stated, or the opening statement of the prosecution made, one of the twelve was excused because of illness. A special venire was issued and a twelfth juror accepted and sworn, without any challenge interposed. At the time of the final completion of the jury, the defendant had nine peremptory challenges unused. Upon the discharge of

the sick juror, defendant moved the court that the remaining eleven jurors be not discharged, and that the trial be proceeded with by calling from the box the name of another juror, and that each side be allowed the number of peremptory challenges remaining after deducting from the original number the number already used. The court assented to the suggestion, but reserved its ruling concerning the number of peremptory challenges to which each side would be entitled, denying the motion as premature, with leave to renew it at any time. In this state of the case no question arises as to the number of peremptory challenges, since neither side had exhausted the number to which it was clearly entitled under the law, and since neither side exercised, or attempted to exercise, any challenge upon the juror last called to the box. The ruling of the court in this matter was correct, and is supported by *People v. Brady*, 72 Cal. 491, [14 Pac. 202]; *People v. Van Horn*, 119 Cal. 332, [51 Pac. 538].

The attorney-general made an opening statement to the jury, at the conclusion of which the defense moved that the prosecution be required and directed by the court to state to the jury what the other facts referred to by the attorney-general were, and what they expected to prove, and on what a reliance for a conviction of the defendant was placed. The court denied the motion. It is asserted that Penal Code section 1093, subdivision 2, is mandatory, that the prosecution must open the case, and that in so doing it must state what it expects to prove. Such, however, is not the meaning of the law. A prosecution may open its case by the introduction of evidence without any preliminary or opening statement. *337 The

purpose of such statement is merely to outline the testimony about to be offered, to the end that the jury may more clearly sift and digest it. (*People v. Stoll*, 143 Cal. 691, [77 Pac. 818]; *People v. Ellsworth*, 92 Cal. 595, [28 Pac. 604].)

The physician who performed the autopsy upon the body of Mary Weber was permitted to testify as to the place of entrance and of exit of the bullet found in her body. It is said that special skill will not entitle a witness to give an opinion, where the jury is capable of forming its own conclusions from facts susceptible of proof in the common form. This is undoubtedly true, and it may be conceded that the observation even of the unprofessional eye could determine which was the point of entrance and which the point of exit, and if the body had been exhibited to the jury they could have formed their own conclusions from their own observations. But they had not this opportunity, and the physician was merely illustrating upon a diagram and testifying to a matter which had come under his own observation, so that even if it be conceded that the question did not call for expert evidence, the answer was none the less admissible as being direct testimony to a physical fact which the witness had observed and the jury had no opportunity of seeing.

The same witness was allowed to answer a question as to the size of the wounds on the body referred to as bullet-wounds, and answered, "I believe them to have been produced by a 32-caliber bullet." A motion to strike out the answer was denied. It is sufficient here to say that as the bullet which inflicted the wound was recovered from the

body, and was proved without dispute to have been a 32-caliber pistol-bullet, the answer could not have been injurious.

It was shown by the prosecution that the defendant was in San Francisco during the months of June, July, August, and September, of 1904. The pawnbroker, Henry Carr, had identified the defendant as purchasing from him the pistol introduced in evidence in August, 1904, and this witness described the attire of the defendant at the time of the purchase. Through the testimony of the witnesses Mrs. Muston, Mrs. Hilliker, and others, the prosecution showed the style of clothes which the defendant wore in San Francisco during those months. The effort was directed to establishing that the *338 clothes which the defendant actually wore during that time were such clothes as Henry Carr described the defendant as wearing at the time of the purchase of the pistol. This evidence was admissible in corroboration of Carr's identification.

Proof of the value of the property belonging to Julius Weber was objected to upon the ground that it was not shown that the defendant, a mere youth, knew the value of the property of his father, or the amount of insurance upon it, and unless he did so know, the testimony had no pertinency upon the question of motive. But, in the absence of such a direct showing, it was established that the young man, nearly twenty-one years of age, had been living with his family upon the property, and was continuously surrounded by evidence of his father's possessions, and it would be no strained, but a natural inference, for the jury to say that he had at least some knowledge of the matter.

Touching the conduct of the defendant upon the morning after the fire, a witness was asked and permitted to answer the following questions: "Did he, during any of that time [about three minutes], say anything about his mother being dead? Did he speak about any of the members of his family being dead? During these three minutes that you were in his presence, did he tell you that any members of his family were dead?" The only objections to these questions are that they are leading. But even leading questions are permissible within the sound discretion of the court. The answers were in no sense injurious, the witness replying, "He said something, or Adrian Wells said something to him; I did n't understand, and he said, 'I don't see why they could not get out of the house.' "

Mrs. Snowden was allowed to testify that Mrs. Weber said to her in the presence and hearing of defendant: "Dolphy is so mean to me I am almost afraid to ask him to do anything for me; he does aggravate me so." Defendant moved to strike out this statement, and the motion was denied. It should have been granted. It is not every statement made in the presence and hearing of a person which is admissible in evidence against him. Nor is the statement, so far as its contents are concerned, admissible as evidence at all. It is merely the conduct of the person in connection with the declaration, his failure to act as it might reasonably be expected *339 that an innocent person would act, which is the evidence, and the declaration is received merely to illustrate the person's conduct under the particular circumstances. (Jones on Evidence, sec. 291; *People v. Teshara*, 134 Cal. 544, [66 Pac. 798]; *People v.*

Philbon, 138 Cal. 530, [71 Pac. 650].)

Nothing is disclosed as to the conduct of the defendant at the time the statement was made, so that it stands upon the record as a naked hearsay declaration of the mother of the defendant. But even so, it is of such trifling character as not to justify a reversal of the cause.

Many questions were asked of different witnesses concerning the actions and statements of the defendant upon the day after the tragedy. They were all offered in proof of the alleged unnatural and thus guilty conduct of the accused. It was pertinent to show what the defendant did or did not do under those trying circumstances. It was permissible to argue that he did or did not act as an innocent person would have acted. The weight of all this testimony was for the jury, but it was not error to admit it.

Objection is made to the introduction of the statement made by defendant to the district attorney and to the sheriff upon the day after the tragedy. It is said that it appears that it was not a voluntary statement, but one made under duress. A reading of the statement, however, discloses that it contained no admission or confession of guilt, and it is only as to the latter class of statements that the rule requiring preliminary proof of their free and voluntary making has application. So, in *People v. Jan John*, 144 Cal. 286, [77 Pac. 950], it is said: "But this rule applies only to confession of guilt, and does not forbid proof of other admissions of the defendant, though these, taken in connection with other proofs, may tend to prove him guilty." (See, also, *People v. Ammerman*, 118 Cal. 32, [50 Pac. 15]; *People v. Hickman*, 113 Cal. 86, [45 Pac. 173].)

In the statement which the defendant made to the district attorney and sheriff upon the day after the homicide, and also in the testimony which he gave before the coroner's jury, he described the course which he took in leaving his father's house and going into town. This course carried him directly across Brewery Lane, and, by a roundabout and circuitous way, to a point on College Lane where three routes were open to him *340 to go to Cohn's store. In both of those statements he declared that he did not know, could not recall, what route he had taken from College Lane to Cohn's store. This circuitous route, if actually taken by the defendant, would have consumed some fifteen or twenty minutes of time, and would have rendered it improbable that he could have been at his home at the time the murders were committed. Another route was open to him, much shorter and more direct, from his house to Cohn's store. This was down Brewery Lane. This latter route would have carried him past the American Hotel, where it was in evidence that he was seen washing his hands and hurriedly departing, in front of Crosby's livery stable, which he was seen passing, coming from the direction of the American Hotel and so to Cohn's store. From College Lane no one of the three routes readily accessible to defendant would have carried him past these places where the witnesses saw him. Upon the trial he heard the testimony of these witnesses, and when in turn he took the stand he described with minute circumstance the route which he had taken from College Lane. That route involved a divergence from the direct course to Cohn's store, and the witness testified that he did diverge in his course and walk down Sacramento Street, upon which was the

American Hotel and Crosby's stable; that he passed these places upon the opposite side of the street, crossed over and came back to Cohn's store, passing in front of the American Hotel, though not stopping there. Upon cross-examination the witness was asked if he had not fixed his route for the sole and single purpose of meeting the testimony of those who had seen him at the American Hotel and Crosby's stable. This question was, in the condition of the case as shown, within the limits of legitimate cross-examination, since it was at least within the scope of fair argument before the jury to urge that the defendant's recollection as to his route had been stimulated by the necessities of his case.

In the course of his argument to the jury, the attorney-general said: "We believe, gentlemen, and I say so not without a feeling of pity, not without a feeling of sadness, not without a feeling of pathos, but with a feeling that the evidence in this case as it stands to-night recorded in the notes of this trial, points unerringly, points accurately, beyond the possibility of mistake, to this defendant as the murderer of Mary Weber." *341 Objection was made to this language. It was urged upon the trial court that it was improper for a prosecuting officer to express his belief in the matter of the guilt or innocence of an accused, and that he could with propriety argue only upon the facts in evidence. To this objection the court ruled in the following language: "The court does not feel it incumbent upon itself to determine the sufficiency of the point as a legal proposition, because the observation of the attorney-general was that he believes that the evidence points to that conclusion. The objection is overruled." It is of course

improper for a prosecuting officer to assert his personal belief or personal conviction as to the guilt of an accused, if that belief or conviction is predicated upon anything other than the evidence in the case. But, upon the other hand, such prosecuting officer has the indisputable right to urge that the evidence convinces his mind of the accused's guilt. Indeed, it would be mere stultification if it were contended that the prosecuting attorney could argue to the jury that the evidence should convince their minds, although it did not convince his. A prosecuting officer, therefore, has the right to state his views, his beliefs, his conviction as to what the evidence establishes. (*People v. Romero*, 143 Cal. 460, [77 Pac. 163].) Nor can we perceive the slightest impropriety nor just cause of exception in the remarks which the court made in ruling upon this matter.

The bullets taken from the body of Mary Weber and of Bertha Weber, as to which evidence had been introduced that they had been fired from the Iver-Johnson pistol also in evidence, were with certain other bullets fired from the same pistol, some by the prosecution and some by the defense, all arranged by the attorney-general in a certain order and so exhibited to the jury, the bullets themselves, of course, having been duly admitted in evidence. Objection was made to the exhibition of the bullets to the jury as arranged. It is said that this should not have been permitted; that the jurors could take the bullets and examine them as they chose, not having one bullet placed in juxtaposition with other bullets. The objection was overruled. It cannot be perceived wherein lay the error in permitting the attorney-general to place these exhibits in any order or in any sequence to point out

similarities or dissimilarities, or for any other legitimate purpose connected*342 with his argument. Such, in effect, was the ruling of the trial court. To that ruling it was added that the jury might and doubtless would at their convenience rearrange them in any other order which they saw fit.

The reputation of Henry Carr, the pawnbroker who testified that he had sold the pistol to the defendant, having been attacked by the defense, affirmative evidence to meet it was offered by the prosecution in rebuttal. The witness Abrahams, having testified that Carr's reputation was good, upon cross-examination, without objection, was asked and answered the following questions: "Q. Have you ever heard discussed the fact as to what business he carried on?—A. No sir.—Q. Have you ever been told that his license to carry on business has been revoked?—A. I am not aware of the fact." And then followed this language: "Q. Have you ever been told that he had a lengthy examination before the board of police commissioners and that his license was revoked?" To this objection was made and sustained. It is of course legitimate cross-examination of a character witness to ask whether he has ever heard of the person whose reputation is under investigation having been accused of committing acts inconsistent with the character which he has attributed to him. (*People v. Gordon*, 103 Cal. 568, [37 Pac. 534]; *People v. Moran*, 144 Cal. 48, [77 Pac. 777].) In this case the witness had been asked, and had answered, that he had not heard that Carr's license to carry on business in San Francisco had been revoked. It is nowhere contended by the astute counsel for the appellant, either in the

record, which is full upon the question, nor in their briefs, that the first answer was evasive, and that therefore they had the right to pursue the inquiry further. It is not to be believed that if counsel had considered the answer evasive or had considered it other than as a direct answer they would not have insisted upon their right to ask the second question upon this ground. They did not do so in the trial court, they do not do so in this court, and the only fair inference to be derived from this state of the record and of the briefs is that this answer was accepted as positive and direct both by court and by counsel. So accepting it, the ruling of the court upon the subsequent question was perfectly proper, and the remarks of the court in pronouncing its rulings were equally unobjectionable. It is apparent that the succeeding *343 question would have elicited another negative answer, and that the purport of the question was not to obtain the witness's answer, but to get the substance of the inquiry before the jury as an evidentiary fact, to the detriment of the witness Carr. This obvious purport of the question justified the court's ruling in excluding it.

The court's ruling excluding the subsequent question of the witness was likewise proper. That question was: "If any of those matters had been brought to your mind would it change your opinion?" The question itself was hypothetical and speculative, and, moreover, was but another veiled attempt to present to the jury the excluded matter.

Howard Carr, an expert in small arms, had been permitted to testify that the bullet taken from the body of Mary Weber (exhibit G) and the bullet taken from the body of Bertha

Weber (exhibit H) had both been fired from the Iver-Johnson pistol (exhibit Q). Upon the next day, in doubt of the soundness of its ruling, in view of testimony subsequently given by Carr that his opinion was that the bullets had been fired from that pistol because he had compared the markings on the bullets taken from the bodies with the markings on the bullets which he had fired from the pistol, the court concluded to strike out the testimony in these words: "In other words, I hold that the comparison of the two bullets on the one hand with the two bullets on the other is not a matter of expert testimony, but one within the ordinary capacities of the average juror or citizen. Now this being so, I wish to strike out the statement of the expert, that in his opinion the two bullets taken from the bodies were fired from this pistol, leaving that as a question for the jury to determine by an inspection of the bullets themselves. Accordingly, Mr. Reporter, near the top of page 529 note this question: 'Just holding this bullet, plaintiff's exhibit G, I now ask you if you are able to say whether or not that bullet was fired from the pistol, plaintiff's exhibit Q, which you now hold in your hand, the answer being: A. I should say it was. Q. You are so able to state? A. Yes sir. Q. Was it fired from that pistol that you hold? A. I say, yes, it was fired from this pistol.' Those questions and answers are stricken out, or rather the answers are stricken out." The record discloses that defendant made no specific motion based upon this ruling of the *344 court to strike out also the testimony as to exhibit H, nor did he call the court's attention to the omission to strike it out, but throughout all subsequent proceedings the matter was treated as though the testimony to both exhibits G and H had in fact been

stricken out. The court had by its rulings stricken out all of this evidence. When it undertook to designate specifically the evidence, by oversight, it failed to note the evidence touching exhibit H. The original ruling, however, covered the matter: the evidence was subsequently treated as eliminated from the case, and no injury could have resulted to defendant.

It is insisted that it was error to admit in evidence two bullets which the expert testified he had fired from the Iver-Johnson pistol, upon the ground that they were not fired "under the same conditions as those existing at the time of the homicide." The objection is untenable. It was shown that the pistol was in the same condition, except as to exterior blood-marks upon the surface when Carr fired the bullets from it, as it was when found in the Weber barn, and it is very apparent that, as tending to fix the identity of the weapon from which the fatal shots were fired, the similarity or dissimilarity of the bullets which Carr fired to those which were found in the body was pertinent and important evidence.

We have thus considered the alleged errors of the rulings of the court in the trial of the cause. Those which have not been specifically noted have not been overlooked. They have been omitted only because they belong to one or another of the classes and kinds of questions of which particular discussion has been had, and a more detailed analysis of them therefore becomes unnecessary.

In the rulings of the court upon the instructions some twenty-eight errors are asserted. It would extend this consideration

without profit to set forth all of these instructions at length. It must suffice in most instances to state the result of the examination which has been made of them. First, as to reasonable doubt. Upon this question the court instructed with elaborate fullness and care, avoiding any novel language of its own, and abiding by the definitions well tested and long approved by this court. Certain proposed instructions upon reasonable doubt, as well as upon other subjects, the court refused to give, as having elsewhere been embodied in its *345 charge. Complaint is made of this in many instances, but the complaint is not well founded. Complaint is also made of the court's action in certain instances in striking out the concluding language of defendant's proposed instruction, that if the jury shall find so and so, they "should find the defendant not guilty," or "should acquit him." It is true that the court did this in certain instances, but in many others it presented the instructions without even this modification. No single individual instance of this would warrant the reversal of a cause otherwise fairly tried. Only by taking the instructions as a whole would a court be enabled to say whether or not the defendant had received fair treatment in this regard, and so reading the instructions in this case the conclusion is irresistible that the jury was fairly and impartially charged.

The court had instructed the jury that if they should, from a consideration of all the evidence in the case, be satisfied of the defendant's guilt beyond a reasonable doubt, it would be their duty to find him guilty. It also instructed the jury that the evidence of defendant's guilt was circumstantial, and that each material circumstance must be

proven to their satisfaction, beyond a reasonable doubt, or they should acquit. It is urged that these instructions are in conflict, the one nullifying the other. But this conflict and nullification we are unable to perceive.

The court instructed the jury: "The defendant's plea on this trial is "not guilty." Upon that plea a presumption of his innocence arises. That presumption accompanies him throughout the trial. It goes with you in your retirement to consider your verdict. It will avail to acquit the defendant, unless it be overcome by sufficient proof of guilt. You must examine the evidence by the light of that presumption." This instruction was proposed by the defendant and was given by the court. The complaint is made that the court in giving it modified it by striking out an accompanying statement to the effect that unless upon their examination they found the evidence sufficiently strong to overcome the presumption of innocence, and to satisfy the jury of defendant's guilt beyond all reasonable doubt, he was entitled to an acquittal at their hands. The portion stricken out was unobjectionable, and might well have been given, but the substance had been given *346 so frequently in other instructions that it was no abuse of the discretion of the court to refuse to give it upon the ground that it was mere repetition. In this regard it is to be noted that the court had already specifically charged the jury that unless they "are satisfied from all of the evidence in the case, beyond a reasonable doubt, that the presumption of innocence of the defendant which the law gives him is overthrown, it is their duty to render a verdict of not guilty."

The court's modification of instruction No. 7 was not objectionable. It would have been justified in refusing to give the instruction as a whole. Instead of so doing, it eliminated certain portions of the instruction as being argumentative, and other portions as having already been covered by the charge, and gave the remainder.

It was not error to refuse to give an instruction to the effect that the evidence of certain named witnesses had been stricken out, and, therefore, must not be considered. The court had given an instruction covering this matter as to the testimony of all witnesses which had been stricken out. The naming of these particular witnesses could but have served to confuse the jury, since from the list were omitted the names of other witnesses whose testimony was likewise stricken out.

The court refused to give an instruction as follows: "I instruct you that the mere possession of any article, whether it can or cannot be used in the perpetration of crime, is not of itself sufficient to convict the defendant, but is merely a circumstance, which may or may not tend to prove the charge against the defendant." We cannot perceive wherein the refusal to give this instruction was error at all, much less prejudicial error, for, as was said in *People v. Buckley*, 143 Cal. 375, 390, [77 Pac. 169], under like circumstances, "It may be that as mere abstract propositions of law they are correct, but as mere abstract propositions of law they apparently bear no direct relation to the particular charge contained in the information." The defendant, it was shown, possessed numerous articles. Some of these, like the clothing which he wore, were not

used in the perpetration of any crime. The common knowledge of the jurors would tell them that as to any article the mere possession is insufficient to convict. If the defendant had a desire to have specific instruction to the effect that mere proof of ownership of the pistol, even if *347 it were shown that the fatal shots were fired from the pistol, was not in and of itself alone sufficient evidence to warrant a conviction, he should have requested such an instruction. But the instruction as proposed, going to the possession of "any article, whether it can or cannot be used in the perpetration of a crime" was of academic significance merely.

Defendant asked that the jury be told that he was entitled to the independent judgment of every jurymen. The court gave the instruction, modifying it so as to read that "each side is entitled to the independent judgment," etc. This assuredly was not error.

The court, at the request of the prosecution, instructed the jury that "An *alibi* simply means that the accused was at another place at the time of the commission of the crime, and, therefore, could not have committed it." It is not contended that this instruction is erroneous in point of law, but it is urged that the court should have instructed the jury more fully upon the subject. But had the counsel for the defendant so desired, it was their duty to have requested such instruction. (*People v. McNutt*, 93 Cal. 658, [29 Pac. 243]; *People v. Oliveria*, 127 Cal. 381, [59 Pac. 772]; *People v. Balkwell*, 143 Cal. 264, [76 Pac. 1017].)

Upon his motion for a new trial defendant urged two propositions: First, that at the

preliminary examination the prosecuting attorney advanced the theory that Mary Weber and Bertha Weber were shot, then burned, and their bodies then dragged into the front room, where they were found; that nothing occurred upon the trial of the cause, nor in the opening argument of the prosecution before the jury, to lead defendant to believe that this theory had in any wise been changed or abandoned; that only upon the final argument of the attorney-general was it disclosed that the people were contending that Mary Weber and Bertha Weber were shot in the room where the bodies were found, and their clothes were there saturated with some inflammable liquid and ignited. The contention of appellant is that this conduct upon the part of the prosecution was unfair, and, moreover, that the theory advanced by the attorney-general came at so late a time as to preclude the defense from offering evidence to countervail against it. But to this it must be answered that no deception was practiced by the prosecution; that it was *348 not incumbent upon the prosecution to offer any particular theory as to the manner in which the crime was committed, and that, upon the other hand, it was perfectly proper to argue that the crime was committed in any manner which the evidence showed reasonably possible. Furthermore, as to the nature of the circumstantial evidence the defendant was advised. It is not made to appear by the affidavits that upon a new trial any new evidence would have successfully controverted the attorney-general's theory.

But the point upon which principal stress is laid is that a new trial should have been granted because of newly discovered evidence impeaching the testimony of the

witness Henry Carr. Carr, it will be remembered, had testified that he had sold this particular revolver, Iver-Johnson old style No. 19,554. Upon cross-examination he testified that he remembered it and identified it because it was a peculiar make, and that it was the only one of that make that he had ever owned since he had been in business. J. G. Applegate makes affidavit, giving his place of residence and occupation; that he was in the company of Edward Harrington on the 29th of July, 1904, (which is the month Carr fixes as the month of the purchase of the pistol by defendant); that they visited Henry Carr's place of business, and Harrington there bought, with a lot of cartridges, an Iver-Johnson pistol, old style, and that he believes Harrington has the pistol still in his possession. Edward Harrington makes affidavit, giving his address and occupation, that he did on the 29th of July buy from Henry Carr, at his pawnbroker-shop in San Francisco, an old-style Iver-Johnson pistol. Accepting these affidavits as being absolutely true, they serve to contradict the witness, not upon the principal fact of his testimony, but merely as to one of the reasons which he gave for his identification of the weapon. To that extent, and no more, they serve to discredit the witness. But it cannot be said that the trial court abused its discretion in refusing to reopen the case because of this impeaching testimony.

But of more consequence, however, is the affidavit of one Nathan C. Beard. Beard's affidavit is that he purchased a pistol on a railroad train from a man who was not known to him other than by the name of "the Sailor." That upon the 4th of July, 1904, wishing to celebrate, he took the pistol out

*349 of his valise, and with several companions took it to the beach and fired it several times. Being surprised at the way it shot, he examined it carefully to see what make it was, and found it to be an Iver-Johnson, old model, 32-caliber short, No. 19,554. “We spoke then of the number and wondered if that many pistols of that make had been made. When the testimony of Henry Carr was published in the newspaper I saw that he swore that he had sold this pistol to Adolph Weber. After I heard of this I wrote to Weber’s attorneys and told them what I knew of this pistol. I kept this pistol in my possession until the 30th day of September, 1904, when I sold it to a man who was employed in a repair shop in Oakland, California, for a dollar and a half. On the 24th day of March, 1905, at the request of the attorneys for Weber, I came to Auburn and ... there carefully examined the pistol which had been introduced in evidence in the murder case against Weber. ... I recognized in this pistol so marked and shown to me as aforesaid, the pistol which I bought from the sailor and which I sold to the man in Oakland on the 30th day of September, 1904.” As to this affidavit the brief of the people states that “if the trial court had been convinced of the truth of this affidavit, a new trial would have resulted. More than this, it is probable that if the trial court had not been fully satisfied that the statements in this affidavit were absolutely false, a new trial would have been granted.” Considering that this affidavit was prepared by counsel eminent in the law on behalf of a client convicted of the most horrible crime of matricide, it is certain that the affidavit contains everything pertinent to the case which the affiant was willing to have appear. Yet, this affidavit is open to grave suspicion

as well from the statements which it contains as from the absence of statements which it should contain. Affiant knows nothing of the sailor from whom he bought the pistol; he went to the beach with several companions, who were all surprised at the way in which the pistol shot, yet the name of no one of these companions is given; he sold it to a man employed in a repair shop in Oakland, but neither the name of the man nor of the shop is stated. Yet, while he cannot remember the sailor’s name, nor state the names of his companions, nor the name of the man to whom he sold the pistol, nor the shop in which he worked, he is not *350 only able to remember that the pistol in question was an Iver-Johnson, old model, 32 caliber short, but that its number was 19,554. He can remember also the very day of the month — September 30, 1904—upon which he sold the pistol. He swears that he wrote to Weber’s attorneys and told them what he knew. No corroboration even of this is offered by the attorney. But a circumstance of even greater suspicion is that his affidavit failed absolutely to give any evidence of his location or whereabouts. It is to be remembered that a wise discretion is vested in the trial court in determining the weight to be given to the statements contained in affidavits upon motion for new trial. This discretion is to be exercised in determining the diligence shown, the truth of the matters stated, and the materiality and probability of the effect of them, if believed to be true. Moreover, it is to be remembered that a trial court is justified in regarding with distrust affidavits of newly discovered evidence in motions for new trial. (*People v. Howard*, 4 Cal. 547, [16 Pac. 394]; *People v. Sutton*, 73 Cal. 243, [15 Pac. 86]; *People v. Freeman*, 92 Cal. 359, [28 Pac. 261];

People v. Gonzales, 143 Cal. 605, [77 Pac. 448]; *Oberlander v. Fixen*, 129 Cal. 690, [62 Pac. 254]; *People v. Rushing*, 130 Cal. 449, [80 Am. St. Rep. 141, 62 Pac. 742]; *People v. Warren*, 130 Cal. 683, [63 Pac. 86]; *People v. Buckley*, 143 Cal. 375, [77 Pac. 169]; *People v. Sing Yow*, 145 Cal. 1, [78 Pac. 235].) Potent as this affidavit might have been, if believed, it may not be said that the trial court did not exercise a sound discretion in discrediting it, and so in denying the motion in support of which it was brought forward.

We have thus disposed of all the legal questions which in our view demand detailed consideration. That the verdict was the result of passion and prejudice upon the part of the jury cannot be affirmed from the record before us. The community in which the defendant and his family resided was doubtless shocked at the atrocity of the crime, and was doubtless intensely interested in the arrest and conviction of the perpetrator. But when the hand of the law fell upon the son as the criminal, the very horror of the charge must have caused a suspension of judgment in the mind of every right thinking person. It was almost unbelievable that a son and brother could have done so foul a deed, and that the trial *351 was had in such a condition of arrested public judgment seems to be borne out by the fact that defendant scarcely exhausted one half of the peremptory challenges allowed him by law before obtaining a jury of his fellow-citizens before whom he was put upon his trial. There is for this court naught to do but to affirm the judgment and order appealed from, and it is so ordered.

Cooper, J., Angelotti, J., Sloss, J., Shaw, J., and Lorigan, J., concurred.

NOTE.—Justice McFarland being unable to act, Justice Cooper, one of the justices of the district court of appeal for the first appellate district, participates herein *pro tempore*, pursuant to section 4 of article VI of the constitution.

BEATTY, C. J., dissenting.

The murder of the Weber family was one of those atrocious crimes which always arouse an intense desire to discover the perpetrator and bring him to justice. Such a state of feeling pervading a whole community increases the danger that one upon whom suspicion first happens to fall may be convicted upon evidence which in cases of less aggravated character would not be deemed thoroughly satisfactory proof of guilt. This fact makes it peculiarly the duty of the courts in such a case to enforce with scrupulous care every right which the law accords to persons accused of crime—rights accorded not for the purpose of screening the guilty—though capable at times of being perverted to that end—but solely in order to guard, as far as may be consistent with the practical administration of justice, against the danger of convicting the innocent. I cannot persuade myself that on the trial this defendant's rights were duly preserved.

The evidence against him was wholly circumstantial, and aside from the testimony of the witness Henry Carr (who swore that during the month of August preceding the murder he had sold to the defendant at his

shop in San Francisco the identical pistol which was found in the Weber barn twelve days after the murder) was utterly inconclusive. It showed, it is true, that the defendant had an opportunity to commit the murders and set fire to the house before he left the premises*352 at about 6:30 P. M. on November 10th. But it showed also that there was ample time for some other person to have entered the house, to have committed the murders and kindled the fire between the time of his departure and the first signs of the fire. It showed also that he had a possible motive for the murder of the whole family in his supposed desire to succeed to his father's whole estate, and there was proof of one or two circumstances justifying a suspicion of his guilt. But altogether this evidence was insufficient to make out the case against him beyond a reasonable doubt. With the addition of Carr's testimony, however, if true, the proof was complete. The only defense, therefore, which he could make was to meet the testimony of Carr either by direct rebuttal or by impeachment of his character. Deprived of a fair opportunity to do this, he was in effect deprived of his whole defense. In view of the capital importance of this item of evidence, I think the interests of justice demanded that he should have been given the fullest and fairest opportunity to meet it. He was, on the contrary, studiously and purposely deprived of such opportunity. Extraordinary precautions were taken prior to the trial to keep from him all knowledge of this witness and of the testimony he was expected to give, and in opening the case, in a speech an hour and a quarter in length, counsel for the prosecution made no allusion to this essential link in their chain of evidence, so that the first knowledge the

defendant had of the name or existence of Henry Carr, or of his residence or business, was derived from his testimony as a witness in the midst of the trial. This course of procedure is justified upon the ground that there is no law which obliges the prosecution in a criminal case to make an opening statement to the jury, or, if one is made, to disclose any more of the case than they deem sufficient. It is true that there is no violation of the letter of any law in concealing from the prisoner and his counsel the name and the expected testimony of a witness who has not testified before a grand jury, but there is a violation of the spirit and policy of our law which has always required the names of all witnesses examined before a grand jury to be indorsed upon the indictment, and which since prosecutions by information have been authorized requires the testimony produced before the committing magistrate to be reduced to writing and filed as a public record. The policy*353 of these laws is evident, and they are in the interests of justice. It does not accord with our ideas of justice, and has no tendency to promote its ends, to keep the most important witness against a prisoner in ambush until the moment when he is called upon to make his defense. If a witness that is to be called to support a criminal charge bears a good reputation, and can be depended on to tell the truth when placed upon the stand, there is no occasion to keep him in hiding, and if, on the other hand, he is a person of doubtful antecedents, engaged in unlawful business in an unsavory locality, there is all the more reason that the accused should not be deprived of any legitimate means of exhibiting him in his true character before the jury which is to weigh his testimony.

The argument upon which the course of the prosecution in this particular is defended is in substance this: We knew that the defendant was guilty, and if he had been informed of what we expected to prove by Henry Carr, he was capable of resorting to any illegitimate means of preventing or rebutting his testimony, which means, I suppose, that he would have suborned him to keep away from the trial, or would have suborned witnesses to impeach or contradict him. This is an argument which begs the whole question which it is the sole purpose of a trial to determine; the question, that is to say, whether the defendant is guilty. It assumes his guilt in advance as a justification for depriving him of a fair opportunity to show that the evidence against him is false or untrustworthy, and it ignores the fundamental principle upon which our entire system of criminal procedure is based,—viz. that the defendant in every criminal action is presumed to be innocent until he is proved to be guilty.

But, after all, it cannot be said that in the matters so far considered there is any ground for reversing the judgment and order of the superior court. The prosecution did not transgress the letter of any law, and there was no ruling of the court in this connection which can be pronounced erroneous. The preceding discussion, however, will be seen to have a material bearing upon an erroneous ruling made during the cross-examination of a witness called to sustain the reputation of Henry Carr at a later stage of the proceedings.

The cross-examination of Henry Carr showed that he kept a second-hand store on

Dupont Street, San Francisco, between *354 Pine and California; that under the pretext of buying articles and agreeing to sell them back to the vendor at an advance, he was really doing a pawnbroker's business without a license; that among other articles in which he dealt were blackjacks and brass knuckles. Several witnesses, including a former police judge and officers of the police, testified that his reputation for truth, honesty, and integrity was bad, and that they would not believe him under oath. The defendant also offered to prove by a certified copy of the proceedings of the police commissioners of San Francisco that the license of the defendant to deal in second-hand goods had been revoked after a hearing of charges of receiving stolen goods and soliciting a thief to steal. This evidence was excluded on an objection by the prosecution. The objection, of course, was valid upon technical grounds, but there is no doubt that the evidence of the police commissioners themselves, if they had been placed upon the stand, would have been admissible as to his reputation. The defense also offered to prove by a certified copy of a San Francisco ordinance that the selling or keeping for sale of blackjacks and brass knuckles (the weapons of thugs and assassins) was a misdemeanor. This evidence was also excluded on objection by the prosecution, and the ruling was erroneous. The offer was not to prove specific instances of misconduct on the part of Carr, which would have been inadmissible, but only to show that the business which he had admitted that he was carrying on both by his direct and cross-examination was a contraband and disreputable business. It was clearly competent and relevant to the question of his

character.

A more important error was committed by the court in ruling upon an objection to a question asked the witness Abrahams, who had testified to the good reputation of Carr.

The cross-examination of this witness developed the fact that his favorable testimony was based solely upon reports that Carr was in the habit of making prompt payments to the wholesale dealers who supplied him with goods.

The following questions, answers, rulings, and exceptions then ensued:

Q. Have you ever heard discussed the fact as to what business he carried on?

A. No sir.

*355 Q. Have you ever been told that his license to carry on business has been revoked?

A. I am not aware of that fact.

Q. Have you ever been told that he had a lengthy examination before the board of police commissioners and that his license was revoked?

The prosecution objected to the question as being wholly irrelevant, immaterial, and incompetent.

The Court: The court is certainly of the opinion that the questions are asked for the purpose of the question, not the answers. I don't think you can change the mind of the court upon it. These matters the court ruled

out as being grossly immaterial, and the court cannot help but hold and rule that they are asked for the purpose of questions and not the answers, and the court must sustain the objection.

"The defendant excepted to the remarks of the court and to the ruling of the court."

This ruling was clearly erroneous, and the error was aggravated by the unmerited rebuke administered to counsel in sustaining the objection. I entirely dissent from the view of this question taken in the opinion of the court. The witness had not answered the first question asked him, in what is conceded to have been a proper line of cross-examination. He had evaded it. He was not asked whether he *knew* that Carr's license had been revoked, but whether he had heard the matter discussed. His answer that he was not aware of the fact might have been literally true, although he had heard the matter discussed. Counsel then, as he had a perfect right to do, asked him the same question in a more specific form, and had a right to an answer.

It is a peculiarity of the rule of evidence relating to the impeachment of witnesses that you cannot prove by direct evidence specific instances of improper or criminal conduct for the purpose of discrediting them, but if a witness is called to rebut evidence of bad reputation, he may be asked on cross-examination if he has not heard of such specific instances of misconduct. The cases cited in the opinion of the court sustain this proposition, and it is sustained by abundant authority elsewhere. The first branch of the rule was invoked successfully against the defendant when he offered to

prove by the record of the board of police commissioners that they had *356 revoked Carr's license after an investigation of charges of receiving stolen goods, etc. But when he endeavored in a perfectly legitimate manner to avail himself of the other branch of the rule—not only was his right to do so denied him, but his counsel was censured by the court in the presence of the jury, in language clearly implying that he was seeking in bad faith to get before the jury matters which they were forbidden to consider. Suppose that, instead of sustaining the objection of the district attorney, with a plain intimation that nothing more would be heard from the defense, the court had overruled the objection and compelled the witness to give direct answer to the question, and suppose, as is not improbable, that he had admitted having heard of the action of the police commissioners—of what value would the testimony of this witness have been? Instead of rebutting he would have confirmed the evidence offered on the part of the defense.

It may be said that this was a small matter not of sufficient importance to justify an order for a new trial—but in my estimation it was not a small matter. Carr was the most

important witness for the state, and if it can be supposed that uncontradicted proof of his bad reputation for honesty and integrity would have induced one or more jurors to reject his testimony the defendant would not have been convicted of a most horrible and unnatural crime, and sentenced to an ignominious death. Evidently the prosecution did not consider it a trifling matter, and neither they nor the court had any reason to suppose the question was asked in bad faith. If they expected it to be answered in the negative, the answer could have been given in far less time than it took to interpose the objection, and that would have ended the matter to their advantage.

There are other minor errors disclosed by the record which I do not care to discuss. It is enough to say that the defendant was denied his substantial rights in respect to the testimony of a witness of doubtful reputation, upon the vital point in the case.

For these errors the judgment and order of the superior court should be reversed.

Rehearing denied.

IMPLICIT BIAS:
DISRUPTING IMPLICIT BIAS AND
BUILDING AN INCLUSIVE MIND SET

SATURDAY, SEPTEMBER 10

8:30AM - 9:30AM

PRESENTED BY

ALANA MATHEWS ARCURIO, ESQ.

ADJUNCT PROF. MCGEORGE SCHOOL OF LAW

ALANA MATHEWS ARCURIO

Elk Grove, CA 95758 ♦ 530.405.9335♦ Alana.Arcurio@gmail.com

PROFESSIONAL SUMMARY

Equity Champion- Bias Disrupter. Accomplished legal professional with extensive litigation, public policy and instructional experience. Areas of expertise include diversity, equity, inclusion and belonging, criminal justice reform, environmental justice, climate equity, public participation and community collaboration.

PROFESSIONAL EXPERIENCE

Director of Policy, Membership, and Training 01/2021- Present

Prosecutors Alliance California (PAC)- Sacramento, CA

Executive leadership role in this first-of-its-kind law enforcement association for prosecutors committed to criminal justice reform. Responsible for developing and managing strategic plans for diverse and equitable recruitment, retention, training and supportive resources for membership, including curriculum development and presentations on diversity, equity and inclusion and bias. Additional duties include coordination and oversight of organizational diversity initiatives, research projects, and special events.

Chief Consultant, 04/2019 to 01/2021

California State Assembly – Sacramento, CA

Appointed by the Speaker to senior level position coordinating informational and oversight hearings related to climate change policy to ensure equitable implementation for California's diverse communities. I worked collaboratively with other policy committees, local governments, industry representatives and advocacy organizations on various comprehensive, and equitable climate change legislation and policy. Accomplishments include establishing annual oversight hearing for reporting; preparing and securing budget requests to address implementation of equity programs; preparing high level communications including internal memoranda, official correspondences, press releases and legislative analyses; building and coordinate coalitions on state and federal level.

Adjunct Professor, 01/2020 to Present

University Of The Pacific, McGeorge School Of Law – Sacramento, CA

- *The Legal Profession* required first year course addressing legal identity, ethics and career development
- *Racial Equity and Justice* practicum which focuses on addressing racial bias in various sectors
- *Implicit Bias and the Law* which focuses on systemic biases in various areas of the law including employment, criminal, civil/tort, environment, and housing.

Public Adviser, 06/2013 to 04/2019

California Energy Commission – Sacramento, CA

Appointed by Governor Brown to executive leadership role directing public outreach and engagement for the agency. Led implementation of key energy equity legislation, established multi-agency Disadvantaged Communities Advisory Group, and developed the agency's diversity initiative.

Senior Attorney, 01/2012 to 06/2013

California Energy Commission – Sacramento, CA

Developed framework for newly authorized enforcement division for regulatory violations, compliance and resolution, including financial penalty authority, structure and process. Drafted complex legal and policy documents, including legislation, orders, decisions, briefs, and regulations with a particular focus on creating an agency wide enforcement policy.

Deputy District Attorney IV, 05/2004 to 01/2012

Sacramento County District Attorneys Office – Sacramento, CA

Prosecuted 50+ misdemeanor and felony trials to verdict; managed criminal caseloads for driving under the influence, assault, vehicle theft, hit and run, child annoyance, sexual battery, indecent exposure, consumer fraud, burglary, robbery, attempted murder, and various narcotic related offenses.

SELECT PROFESSIONAL PRESENTATIONS

Presenter- "Equitable and Adaptive Leadership" Yosemite Policy Makers Conference (March 2022)

Presenter -"Disrupting Bias Bias and Building an Inclusive Mindset" - McGeorge School of Law Faculty Training (February 2022)

Facilitator -"Disrupting Bias in Interviews"- Sacramento County Bar Association (January 2021)

Facilitator- "Understanding and Implementing the Racial Justice Act"- City and County of San Francisco (April 2021)

Keynote- Civic Spark Fellows Closing Ceremony- Local Government Commission (March 2021)

Presenter- Leading Consciously: The Science of Unconscious (Implicit) Bias- California State Association of Counties (September 2020)

Panelist - Access to Power: Energy Equity in California -The Atlantic (September 2016)

EDUCATION

LL.M: Governmental Affairs And Public Policy, 05/2004
University of The Pacific, McGeorge School of Law - Sacramento, CA

J.D.: Governmental Affairs Certificate 05/2003
University of The Pacific, McGeorge School of Law - Sacramento, CA

B.A.: Philosophy, 05/1995
Spelman College - Atlanta, GA

LEADERSHIP AND SERVICE

- CA NAACP, Criminal Justice Committee Adviser (2021- Present)
- State Bar of California Judicial Nomination & Evaluation Commission, Vice Chair (2019-2021)
- Sacramento County Bar Association, Nominations Chair (2017-2021);
- Girls Scouts Heart of Central California, Board Member (2012-Present), Vice Chair (2019-2020)
- Florin Law Academy, Advisory Board Chair (2011-2020)
- Wiley Manuel Bar Association, President (2012) Vice President (2006, 2011)
- Volunteers in Parole, Advisory Committee Chair (2005-2006), Mentor 2002-2006

HONORS AND AWARDS

- Sacramento Bee ChangeMaker Award(2022)
- American Leadership Forum Fellow (2020)
- Attorney of the Year, Wiley Manuel Bar Association (2018)
- Comstock's Magazine - 10 Change Leaders to Watch (2015)
- Exceptional Woman of Color Award (2012)
- National Bar Association- 40 Under 40 Nations Best Advocate Award (2011)
- Sacramento Business Journal 40 Under 40 Community Leaders Award (2011)

Disrupting Implicit Bias and Building an Inclusive Mindset



Alana Mathews
Equity Champion, Bias Disrupter

1

Introduction & Ice Breaker

- Recognizing bias
- Review of bias interrupters
- Understanding an inclusive mindset
- Small group activity
- Q&A



2

Bias Overview

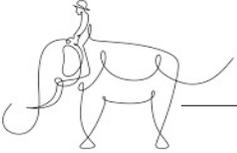
CORRESPONDENCE BIAS
PRIMACY EFFECT (or “ANCHORING BIAS”)
REGENCY EFFECT STATUS QUO BIAS
CONFIRMATION BIAS
AFFINITY/IN GROUP BIAS

3



How Bias Affects Our Work Environment

4



Interrupting Bias

1. _____

2. _____

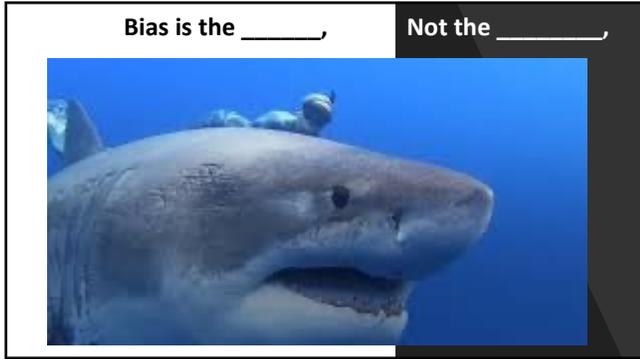
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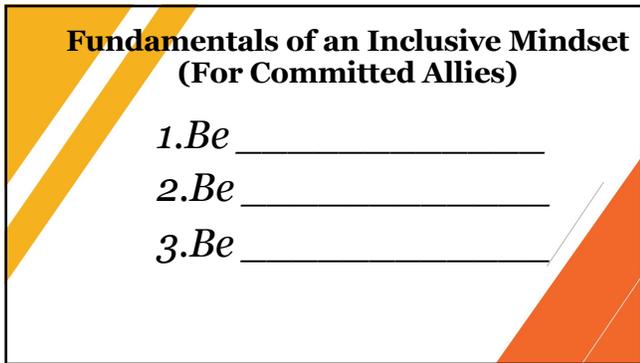


Cultivating an Inclusive Mindset

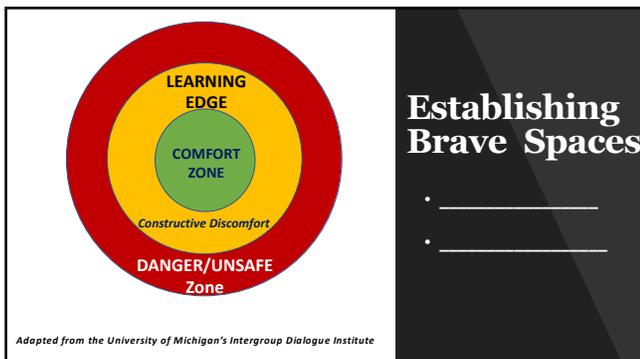
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11

CIVIL LAW - NEGOTIATING MEDICAL LIENS

SATURDAY, SEPTEMBER 10

9:45AM - 11:15AM

PRESENTED BY

DANIEL WILCOXEN

WILLCOXEN & CALLAHAM

Daniel E. Wilcoxon

Wilcoxon Callaham, LLP

Senior Partner

Location: Sacramento, California

Phone: 916-442-2777

Fax: 916-442-4118

Email: [Daniel E. Wilcoxon](mailto:Daniel.E.Wilcoxon)



DANIEL E. WILCOXEN received his JD, cum laude, from U.O.P. McGeorge School of Law in 1972, and was admitted to the California State Bar in 1972. Mr. Wilcoxon practiced with the defense firm of Rust & Armenis for the first 7 years of his law career before leaving to open his own practice in 1979 where he began his emphasis in representing injured plaintiffs. He is the founding and senior partner in the law firm of Wilcoxon Callaham, LLP. The firm handles many types of cases: all types of personal injury cases, product liability, medical malpractice, business cases, discrimination and wrongful termination employment cases. Mr. Wilcoxon also handles the day-to-day management of the firm's 10 lawyers and 17 staff members. Over the years, Mr. Wilcoxon has obtained over 80 multi-million-dollar verdicts and settlements.

Mr. Wilcoxon has been a member of ABOTA since 1993 and currently holds the rank of Advocate. He was President of the Sacramento Valley Chapter in 2008, was the Trial Lawyer of the Year in 2010, and is also currently a member of the National Board of Directors of ABOTA. He is a member of the American Association for Justice (formerly ATLA) and was named a Certified Specialist in Civil Trial Advocacy by the National Board of Trial Advocacy. He is a founding member and is a certified diplomat in Medical Malpractice, of the American Board of Professional Liability Attorneys, and a member of Consumer Attorneys of California (CAOC). He was the 1989 President of the McGeorge School of Law Alumni Association. He is a past President and current Board of Directors member of the Capitol City Trial Lawyers Association where he was recognized as Advocate of the Year in both 1996 and 2002 and won the Joe Ramsey Civility Award in 2014.

Mr. Wilcoxon is a pioneer in the area of lien law and has had much success in getting liens waived and reduced. He spends many hours teaching attorneys how to deal with medical insurance providers, Medi-Cal, Medicare and ERISA liens. He has spoken at numerous seminars for the Consumer Attorneys of California (CAOC), the Capitol City Trial Lawyers Association (CCTLA) and ABOTA. He has also successfully handled an ERISA lien case before the U.S. Supreme Court, three lien cases before the 9th Circuit Court of Appeal, and three lien cases before the Third District Court of Appeal.

Mr. Wilcoxon has been a long-time instructor for University of California Continuing Education of the Bar (CEB), a faculty member of the University of San Francisco Law School in their intensive advocacy program, he instructs at many seminars and lectures for CAOC and CCTLA, and several other Trial Lawyer Associations, including San Francisco, San

Diego, San Luis Obispo and San Joaquin. He has also participated as an instructor in the ABOTA Masters in Trial Program for many programs. He serves as an arbitrator and Judge Pro Tem in Sacramento, Placer and El Dorado Superior Courts. He is an experienced mediator and is a member of the American Arbitration Association, and the Sacramento Valley Chapter of the Association of Attorney-Mediators.

Mr. Wilcoxon is “AV” rated by Martindale-Hubbell, and his firm is listed among the preeminent lawyers in the country. He has been named as a “Super Lawyer” for the past 17 years, one of the Top 100 Lawyers in California for the past 5 years, and one of the top 25 attorneys in Sacramento.

AREAS OF PRACTICE

Catastrophic Loss

Personal Injury

Wrongful Death

Legal Malpractice

Medical Malpractice

Product Liability

Insurance Bad Faith

Lien Law

Business Torts

Burn Injuries

Public Entity Conduct

CERTIFIED LEGAL SPECIALTIES

Certified Civil Trial Advocacy Specialist, National Board of Trial Advocacy

Certified Medical Malpractice Specialist, American Board of Professional Liability Attorneys

BAR ADMISSIONS

U.S. Supreme Court

U.S. District Court Central District

U.S. District Court Eastern District

U.S. District Court Southern District

U.S. District Court Northern District

U.S. District Court of Appeals 9th Circuit

U.S. Court of Appeals 10th Circuit

California State Bar

CLASSES/SEMINARS

ABOTA Masters In Trial, 1995-Present

Instructor, California Continuing Education of the Bar, 1984 - Present

Instructor, Consumer Attorneys of California (CAOC), 1980 - Present

Instructor, University of California Continuing Education of the Bar (CEB), 1980 - Present

Faculty Member, University of San Francisco Law School, 1986 - Present

HONORS AND AWARDS

Super Lawyers

Top 100: 2016 Northern California Super Lawyers

Top 25: 2016 Sacramento Super Lawyers

Top 100: 2015 Northern California Super Lawyers

Top 25: 2015 Sacramento Super Lawyers

Top 100: 2014 Northern California Super Lawyers

Top 25: 2014 Sacramento Super Lawyers

Top 100: 2013 Northern California Super Lawyers

Top 25: 2013 Sacramento Super Lawyers

America's Top 100 Attorneys – Lifetime Achievement Award

The National Lawyers Top 100 Civil Plaintiff Lawyers - 2018

American Institute of Personal Injury Attorneys – 10 Best Attorneys 2017-2018 Award

Best Lawyers in America – U.S. News & World Report Recognized since 2008

Northern California Best Lawyers - 2018

Top 25 - Products Liability Trial Attorneys, 2017

Best Law Firms in California – U.S. News & World Report, 2016

Largest Litigation Law Firms - Sacramento Business Journal, 2015

American Board of Professional Liability Attorneys – Certified Medical Malpractice Specialist for 30 Years

Top 100 Trial Lawyers of California for 5 Years - American Trial Lawyers Association

Best Lawyers Lawyer of the Year – U.S. News & World Report, 2014

Joe Ramsey Professionalism Award - Capital City Trial Lawyers Association, 2014

AV Preeminent rated for over 30 years, Martindale-Hubbell, 2015

Trial Lawyer of the Year, ABOTA Sacramento Valley Chapter, 2010

Advocate of the Year, CCTLA, 1996 and 2002

2018 Appointed to McGeorge School of Law Dean's Cabinet

PROFESSIONAL ASSOCIATIONS AND MEMBERSHIPS

American Board of Professional Liability Attorneys, Founding Member

American Association for Justice (formerly ATLA), Member

American Board of Trial Advocates (ABOTA) local and national, Advocate

American Board of Trial Advocates (ABOTA) National Board Member
American Board of Trial Advocates (ABOTA) local, Chapter President, 2008
Capitol City Trial Lawyers Association (CCTLA), Board Member since 1986
Capitol City Trial Lawyers Association (CCTLA), President, 1990
Consumer Attorneys of California (CAOC), Member, 1979 - Present
American Arbitration Association, Panel Member
Association of Attorney Mediators, Sacramento Valley Chapter, Panel Member
McGeorge School of Law, Alumni Association, President, 1989

PAST EMPLOYMENT POSITIONS

Rust & Armenis, Defense Attorney

PRO BONO ACTIVITIES

Sacramento Superior Court, Arbiter and judge pro tem
Placer Superior Court, Arbiter and judge pro tem
El Dorado Superior Court, Arbiter and judge pro tem

**MEDI-CAL LIENS UPDATE
JULY 2022**

**DANIEL E WILCOXEN
WILCOXEN CALLAHAM, LLP**

2114 K STREET

SACRAMENTO, CALIFORNIA 95816

TELEPHONE: (916) 442-2777

FACSIMILE: (916) 442-4118

www.wilcoxenlaw.com

Email: dan@wilcoxenlaw.com

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INTRODUCTION

Lienholders can and do seriously complicate the practice of plaintiff and defense personal injury law. Lien holders have expertise in "frightening" attorneys into acting as their collection agents on behalf of insurance companies, ERISA plans, governmental agencies and medical care providers, claiming lien rights, subrogation rights, balance billing, and reimbursement claims using various theories of whatever will work, regardless of their true legal rights.

This is a very confusing area of law. Lien claims interfere with the resolution of a case and potentially subject the plaintiff's attorney and/or defense attorney to claims of legal malpractice, an ethical violation, and expose the attorney and/or client to litigation by the lien claimant and their client.

I SELECTION OF CASES

A. Initial Evaluation

When you are determining whether to accept a case, **one of the first items that you should look into is what medical benefits were used to pay medical bills and what lien claims may exist.** If the medical plan documents require lien payments without regard to the made-whole rule, Common Fund Doctrine, or if the amount was paid by a federal, county, or state agency, an ERISA **self-funded** plan, or the lien is greater than the policy limits afforded in the action, **inquiry about the lien resolution must be made at once, before you proceed with the case.** In many cases, **especially ERISA cases**, you may have to try to negotiate an agreement to **reduce the lien** to a certain percentage of the recovery **prior to commencing a lawsuit.** Since most lien holders have no right to bring an action (excepting governmental programs and worker's compensation cases), lien holders, including governmental entities, will **almost** always agree to a significant compromise, under the threat that **no action** will be brought if the lien is not reduced, but this must be done early in the case. **It is almost always too late to seriously reduce a lien if you wait until the time of mediation, settlement conference or trial to try to negotiate a significant reduction.**

B. Federal Caselaw and Associated California Decisions

Because of the 2013 U.S. Supreme Court ERISA case of ***U.S. Airways v. McCutchen***, 133 S.Ct. 1537 (569 U.S. 88), prior negotiation with the lien holder is **imperative**. Equity may (except in ERISA cases) impact the repayment provisions of the insurance policies. ***Progressive West v. Yolo Superior Court*** (2005) 135 Cal.App.4th 263, a **must read**, discusses the made-whole rule and the common fund theory. **The most important case** discussing equitable theories of reduction of a lien is the U.S. Supreme Court decision of ***Arkansas Dept. Health Services v. Ahlborn*** 126 S.Ct. 1752 (5/1/06), cited in the amended CA Welfare & Institutions Code §14124.76 regarding Medi-Cal liens. Further, the 2010 11th Circuit Court of Appeal case of ***Bradley v. Sebelius*** 621 F.3d 1330, is a **must read** to understand the equitable arguments that fell on deaf ears at the U.S. Supreme Court in ***U.S. Airways v. McCutchen***, supra.

Lien recovery claimants and their subrogation clauses are not uniform in nature. Some of the clauses demand, and some case law requires, 100% payment of a lien, without reduction for attorneys' fees or costs, and without regard to the amounts recovered or whether the plaintiff is made whole. As will be discussed below, the federal District Court case of ***A.C. Houston Lumber Co. v. William Berg and Berg Injury Lawyers***, (Case No. 2:08-CV-02374-JAM-GGH reversed by the Ninth Circuit but not published) and the dissenting justices in the Supreme Court case of ***U.S. Airways v. McCutchen*** held that 100% of the lien was owed. In ***A.C. Houston***, the trial court held that the law firm was responsible for the lien by taking the law firm's fees. Other situations allow for lien reductions for the payment of attorneys' fees and costs under the Common Fund Doctrine or a complete cancellation of the liens under the "made-whole" rule. Of importance is that California law prohibits the assignment of a personal injury claim. (***Fireman's Fund v. McDonald*** (1994) 30 Cal.App.4th 1373, 1381.) See also ***Baum v. Duckor*** (1999) 72 Cal.App.4th 54, 64. Thus, an insurer cannot bring an action against a third party in its own name, with the exception of uninsured motorist claims (Insurance Code §1 1580.2(g)). As discussed below, some governmental entities have a right to bring a direct action against a responsible defendant. This right is very rarely used and such entities almost always rely on the plaintiff's attorney deal with the liens.

The United States Supreme Court in ***U.S. Airways v. McCutchen*** (133 S.Ct.1537), and the Ninth Circuit in ***John Noecker v. So. Cal. Lumber Industry Welfare Fund*** cited as 2013 U.S. App. Lexis 6841, decided April 4, 2013 (which is not appropriate for publication and not precedent except as provided by Ninth Circuit Rule 36-3--cases described herein below) approved draconian lien recovery clauses and/or denial of benefits allegedly on the basis that it reduces the cost of healthcare for everyone. The ***U.S. Air*** decision disallowed all equitable ERISA case defenses that had been recognized by many circuit courts. Justices Thomas, Roberts, Alito and Scalia, wanted to allow even more draconian measures to collect liens. These dissenting justices in ***U.S. Airways*** contended that 100% of the lien was owed.

Additionally, in **A.C. Houston** the trial court held that the law firm was responsible for the lien by taking the law firm's fees (reversed by the Ninth Circuit but not published Amicus Brief by Donald De Camara and Daniel Wilcoxon). Other situations allow for lien reductions for the payment of attorneys' fees and costs under the Common Fund Doctrine or a complete cancellation of the liens under the "made- whole" rule.

II

LIENS FOR CARE PROVIDED TO CALIFORNIA STATE RESIDENTS

The main governmental agencies that provide medical benefits to injured plaintiffs in California are Medi-Cal, Medicare, Medical Care Recovery Act (military, Tri-Care, CHAMPUS, V.A. benefits), local County Indigent Medical Service agencies, California Children's Services programs and Victims of Violent Crimes. All of these entities can and do claim medical liens from plaintiffs who receive medical benefits from a responsible, negligent injury causing defendant, and some of these entities have lien rights against the Attorney.

Medi-Cal (California's federal Medicaid program) covers more than 14 million low income Californians, out of a total population of 40 million. Thus, Medi-Cal liens are, without question, the single largest source of liens that attorneys must deal with in resolving medical liens.

A. Medicaid / Medi-Cal

Welfare & Institutions Code §14124.73(a) entitled "Notice of Action" states in pertinent part:

"If either the beneficiary or the director brings an action or claim against such third person or carrier, the beneficiary or the director shall within 30 days of filing the action give to the other written notice by personal service or registered mail of the action or claim, and of the name of the court or state or local agency in which the action or claim is brought. Proof of such notice shall be filed in such action or claim..." [Emphasis added.] **This is a mandatory obligation.**

1. Allocation of Proceeds

Other than as described in **Ahlborn, supra** and **Wos v. EMA**, 133 S. Ct. 1391 (2013) and Welfare & Institutions Code §14124.76, the basic Medi-Cal lien repayment formulas are found in W&I §§14124.72, 14124.76, 14124.78 and 14124.785. See discussion in **Ahlborn, supra**. These repayment provisions discuss possible reduction scenarios. In the case of a recovery that is larger than the lien (W&I §14124.72), the State allows a reduction of 25% plus their pro-rata share of costs (based on the entirety of the lien amount). Thus, assuming \$100,000 lien with \$500,000 recovery, with net proceeds to the client of \$300,000, and assuming \$33,333 in costs and \$166,666 in fees, the \$100,000 lien would be reduced by 25%,

to \$75,000. Thereafter, the lien would further be reduced by dividing the gross \$100,000 lien by the gross recovery of \$500,000, resulting in 20%, times the \$33,333 costs, yielding another reduction of \$6,666.66, which would reduce the \$75,000 lien to a total of \$68,333.33.

Another scenario, W&I §14124.78, holds the plaintiff is never required to pay more than 50% of the net proceeds, after reductions for attorney's fees and costs. Therefore, assuming a \$100,000 recovery with net proceeds (after attorneys' fees and costs) of \$60,000 to the plaintiff, a \$100,000 lien would be satisfied by a payment of one-half of the net \$60,000. Therefore, plaintiff would receive \$30,000 and Medi-Cal would receive \$30,000. It is imperative that all formulas be considered to determine which formula provides a greater recovery to the plaintiff. (See W&I §14124.785.)

Aside from the statutory requirement to do so, as a practical matter, **Medi-Cal should be notified of the existence of the lawsuit early on** (within 30 days of filing an action per W&I §14124.73) so that information regarding lien amounts will be directed to the plaintiff's attorney during the pendency of the action. This precludes the need to obtain immediate notification of the lien amounts late in the case which may, and generally does, cause difficulty in the resolution of the case. Further, recently Medi-Cal has been refusing to disclose the amount of its lien until the entire case is over. This is done so Medi-Cal knows exactly how much the plaintiff is receiving, helping DHCS to negotiate from a stronger position. Notifying them early gives more strength to equitable arguments to reduce the lien pursuant to W&I 14124.76.

Medi-Cal liens are generally far less than the amounts actually billed to the plaintiff. The reason the liens are less than normal billing rates is that Medi-Cal directly contracts with doctors at a greatly reduced rate and with hospitals on a daily flat rate basis. Therefore, although the bills for treatment of an injured plaintiff may amount to many thousands of dollars per day while hospitalized, the flat rate contract between Medi-Cal and the hospital is far lower. Thus, when a plaintiff's billing statements are ordered from the hospital, assuming a \$6,000 a day cost shows up on the hospital's bill, Medi-Cal only pays a contracted rate of probably 20-30% of the billed amount. (This became very important after the California's Supreme Court's ruling in **Howell v. Hamilton Meats** (2011) 52 Cal.4th 541 and **Corenbaum v. Lampkin** (2013) 215 Cal.App.4th 1308 - see discussion below.)

Welfare & Institutions Code §14124.791 (prior to being held unconstitutional by **Olszewski v. Scripps Health** (2003) 30 Cal.4th 798) attempted to allow health care entities or physicians providing medical services to reimburse Medi-Cal for amounts paid by Medi-Cal, allowing the provider to seek 100% recovery on the gross amounts (not the Medi-Cal amount) billed to the injured plaintiff. The California Supreme Court **Olszewski** case discussed balance billing under Welfare & Institutions Code §§14124.74 and 14124.791, holding that **there is a federal ban on balance billing, and §§14124.791 and 14124.74 conflict with and are preempted by federal law.**

However, even today some doctors and hospitals are trying to balance bill. (These statutes were amended after *Olszewski*.) The *Olszewski* Court stated, at page 826:

"We therefore conclude that federal law preempts sections 14124.791 and 14124.74 ... These provider lien statutes are therefore unconstitutional, and the California statute limiting provider recovery from Medicaid beneficiaries in accordance with federal Medicaid law controls. This statute prohibits providers from attempting to obtain payment for their services directly from Medicaid beneficiaries. Because defendant's lien against plaintiff constitutes such an attempt, it is invalid, unenforceable, and uncollectible."

It should be noted further that *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635 is discussed in depth in *Olszewski*. *Olszewski* held, as did *Hanif and Howell v. Hamilton Meats, supra*, that a Medi-Cal beneficiary recovering against a third-party tortfeasor is limited to collecting the amounts paid by Medi-Cal as opposed to the amounts billed for those services. Thus, if a hospital charged a bill of \$200,000 for care and treatment rendered to an injured party and Medi-Cal only paid \$50,000, plaintiff, at trial, is limited to recovering the amount paid by Medi-Cal of \$50,000 as opposed to the billings of \$200,000.

The California Supreme Court's case of *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541 is the seminal case on the issue of reduction by the Court of the amount of the billed medical expenses if covered by insurance. *Howell* determined there is no damage or economic loss for the amount billed. Only the amounts paid are recoverable. Thus, the **billed amounts** are not recoverable.

A later California Second District Court of Appeals case, *Corenbaum v. Lamkin* (2013) 215 Cal.App.4th 1308, required the Court to consider *Howell v. Hamilton Meats* for future meds.

The court found that the evidence of the full amount billed for past medical services is not relevant to the determination of damages for past or future medical expenses, and that the amount billed for past medical services cannot support an expert opinion on the reasonable value of future medical services. Further, the Court found that evidence of the full amount billed is not relevant to the amount of injury or non-economic damages. Also see *Ochoa v. Dorado* (2014) 228 Cal.App. 4th 120. *Ochoa* held treating physicians can testify as to the reasonable value of medical expenses if they have such knowledge. See also *Uspenskaya v. Meline* (2015) 241 Cal.App.4th 996, re full value of Med Fin lien may be used as evidence of the value of meds.

The somewhat surprising case which, if followed by other courts in other types of cases, may be devastating to plaintiff's counsel regarding the recovery of future medical, was decided in April of 2017, and is entitled *Cuevas v. Contra Costa*

County (2017) 11 Cal.App.5 163. This case involved a minor sustaining brain injury at birth wherein he was awarded \$9,577,000, as the present cash value of his future medical and rehabilitation care expenses. The defendant appealed the damages verdict, asserting that the trial court erred in excluding evidence that health insurance benefits could be provided under the Affordable Care Act in the future. The court agreed that the trial court erred in ruling that evidence of future ACA benefits was inadmissible. This case is a must read, discussing **Howell v. Hamilton Meats, Corenbaum v. Lampkin**, and discussed in great detail the legislative history and intent of MICRA Civil Code Section 3333.1 involving medical malpractice cases. The only saving grace for all the other plaintiffs' cases regarding future meds is that it appears that this case may be limited to medical malpractice cases since it rests in great detail on the legislative history and intent of the MICRA statutes. However, it may represent a trend for all cases in the future. Since it is unclear in **Howell** as to whether or not the amount paid is and/or the reasonable value of services, whichever is less, only refers to past medical care, **Cuevas** holds that the amount paid is also the rule for future meds and allows the defense to prove that the amounts paid in the future will be subject to the same types of reductions that apply in contractual reductions of the billed amount for past medical bills. It also allowed the introduction of the Affordable Care Act (ACA), which dramatically would reduce future meds. In discussing the ACA, the court stated:

"It is noteworthy that this case was briefed before the 2016 presidential election, the aftermath of which did place the ACA's continued viability into question. However, in spite of recent efforts to abolish or substantially alter the ACA, as of the writing of this opinion, the ACA remains essentially intact."

The court further, citing one of defendant's experts, stated:

"Dawson opined that the ACA is reasonably certain to continue well into the future and that plaintiff will be able to acquire comprehensive health insurance notwithstanding his disability. Going on the Court stated defendant presented evidence sufficient to support the continued viability of the ACA as well as its application to plaintiff's circumstances. Accordingly, we conclude that the trial court's decision to exclude evidence of future insurance benefits that might be available under the ACA on the basis that the ACA is unlikely to continue, was an abuse of discretion." (Emphasis added.)

However, the case of **Bermudez v. Ciolek** (2015) 237 Cal.App.4th 1311, found that charges incurred by the uninsured plaintiff (no health insurance), with testimony supporting the reasonableness of the medical bill, were admissible and supported \$414,255 of the total charges of \$450,000 ±. In that the court required proof that the bills were fair and reasonable, and with testimony from a medical witness that some of the charges were too high, the Court reduced the bills from approximately \$450,000 to \$414,255. Further, the court reiterated the reasonable value of the medical services provided is the lesser of the amount paid or incurred, whichever is less. Also

see ***Pebley v. Santa Clara Organics*** (2018) 22 Cal.App.5 1266, a 2nd District case. This is a very important case, holding that Mr. Pebley, who was insured with Kaiser, and elected to go out of coverage and treat on a lien with a doctor of his choice, was entitled to do so, and used the full billed amounts as if he was an uninsured plaintiff treating on a lien. The defendant claimed that the insured plaintiff used a lien form of medical treatment which effectively allows the plaintiff and his or her attorneys to sidestep the insurance company and impacts ***Howell, Corenbaum*** and Obamacare. Defendant maintained that treating on a lien basis increased the "settlement value" of personal injury cases. Regardless of their claim, the court allowed the full billed amounts, as long as the treating physician testified that their bills were reasonable under the circumstances, and they were aware of the cost of medical care in their community. This was allowed based on the concept that the defendant had no right to claim the plaintiff was not mitigating his damages because Plaintiff had a right to determine who his treating physicians should be, despite being insured. The court stated:

"A tortfeasor cannot force a plaintiff to use his or her insurance to obtain medical treatment for injuries caused by the tortfeasor. That choice belongs to the plaintiff. If the plaintiff elects to be treated through an insurance carrier the plaintiff's recovery typically will be limited to the amounts paid by the carrier for the services provided. (Citation) But, whereas here, the plaintiff chooses to be treated outside the available insurance plan, the plaintiff is in the same position as an uninsured plaintiff and should be classified as such under the law."

2. Medi-Cal Reduction Via Federal Preemption Of The Medicaid Program

The important United States Supreme Court cases of ***Arkansas Dept. Of Health Services v. Alborn***, 126 S.Ct. 1752 (5/1/06) and ***Wos v. EMA***, 133 S.Ct. 1391 (3/20/13), dramatically impacted all State Medicaid programs and the State of California's Medi-Cal program's rights to recover liens. The importance of the ***Ahlborn*** case in Medi-Cal cases (and in other types of lien cases as well) cannot be overstated. ***Ahlborn*** created a new rule of proportionality holding that Medi-Cal recipients cannot be forced to pay back more than the amounts **they recovered for past medical expenses.**

Welfare & Institutions Code §14124.76(a), amended after the *Ahlborn* case on August 24, 2007, is a very important statute regarding Medi-Cal liens. It states in pertinent part:

"Recovery of the director's lien from an injured beneficiary's action or claim is limited to that portion of a settlement, judgment, or award that represents payment for medical expenses, or medical care, provided on behalf of the beneficiary. All reasonable efforts shall be made to obtain the director's advance agreement to a determination as to what portion of a settlement, judgment, or award represents payment for medical expenses, or medical care, provided on behalf of the beneficiary. Absent the

director's advance agreement as to what portion of a settlement, judgment, or award represents payment for medical expenses, or medical care, provided on behalf of the beneficiary, the matter shall be submitted to a court for decision. Either the director or the beneficiary may seek resolution of the dispute by filing a motion, which shall be subject to regular law and motion procedures. In determining what portion of a settlement, judgment, or award represents payment for medical expenses, or medical care, provided on behalf of the beneficiary and as to what the appropriate reimbursement amount to the director should be, the court shall be guided by the United States Supreme Court decision in **Arkansas Department of Health and Human Services v. Ahlborn** (2006) 126 S. Ct. 1752 and other relevant statutory and case law." [Emphasis added.]

Sections (b), (c) and (d) describe the procedures under Welfare & Institutions Code §14124.76 to obtain court approval to reduce the lien.

Despite the United States Supreme Court **Ahlborn** case, and Welfare & Institutions Code §14124.76, the Attorney General and the Department of Health Services have continued to assert the position that the **Ahlborn** case and W&I §14124.76 are inapplicable in cases where there has been a settlement, or even where there had been a judgment determining a percentage of fault.

Despite the holdings in my case of **Lopez v. Daimler Chrysler** (2009) 179 Cal.App.4th 1373, the case of **Bolanos v. Superior Court** (2008) 169 Cal.App.4th 744, and **Lima v. Vious** (2009) 174 Cal.App.4th 242, (must reads), Medi-Cal does not like these rulings and they will try to prevent their application in the reduction of a Medi-Cal lien pursuant to this theory. In the **Lopez supra** case, a \$547,000 lien was reduced to \$63,000 under the **Ahlborn** theory. Also see **Branson v. Sharp Healthcare, Inc.** (2011) 193 Cal.App.4th 1467. W&I §14124.785 (amended in 2017) mandates the use of the one of three reduction statutes that reduces the lien to **the lowest number** (must read).

The U.S. Supreme Court case of **Wos v. E. M.A.**, 133 S.Ct. 1391 (2013), held that 42 U.S.C. §1396p(a)(l) preempted the North Carolina Medicaid recovery payback scheme, disallowing the application of said law requiring a simple one-third recovery of Plaintiffs recovery.

W&I §14124.76 allows the plaintiff's attorney to have experts determine the value of the case as we always do, and use expert declarations to set forth the total value of the case to divide the value of the case into the total recovery to determine a fraction which is then multiplied by the lien amount to determine the total lien owed. By way of example: Assume a lien of \$250,000, a recovery of \$1,000,000, and expert

declarations showing the case value of \$5,750,000. The following would occur:

Recovery of	\$1,000,000	
÷ Value of	\$5,750,000	=.174%
Lien of \$250,000 x .174		=\$43,782.60

Thus, the lien would be reduced to \$43,782.60. **See, Lopez v. Damiler Chrysler, supra.**

3. Future Medical Expenses

The June 6, 2022 United States Supreme Court case of **Gallardo, et al v. Marstiller, Secretary of the Florida Agency For Health Care Administration**, will impact the effect of **Ahlborn**. The case arises out of a catastrophic accident injuring 13-year-old Gianinna Gallardo when she was struck by a truck as she stepped off of her Florida school bus. Florida's Medicaid paid \$862,688.77 for Gallardo's initial medical expenses. Despite the fact that Gallardo's injuries were catastrophic and she now is in a persistent vegetative state as a result of her injuries, the case was settled for \$800,000 with an express statement by the Court that past medical expenses, pursuant to the **Ahlborn** theory, were only \$35,367.52. This figure was determined by calculations pursuant to the **Ahlborn** theory that the case was worth in excess of \$20 Million. A settlement for \$800,000 under the **Ahlborn** theory (and California Welfare & Institutions Code Section 14124.76(a) that this constituted a recovery of four percent (4%) of the true value of the case ($\$800,000 \div \$20,000,000 = .04$). In that only 4% was recovered according to plaintiffs calculations, the \$862,688.77 paid by Florida's Medicaid agency could be reduced to approximately \$35,367.52 ($.04 \times \$862,680 = \pm \$34,507.52$).

Florida's statutory formula for lien recovery provided that the lien be reduced by 25% and, thereafter, Florida could only recover 50% of the net to the plaintiff. 50% of the net to the plaintiff after reduction of 25% entitled Florida Medicaid to receive \$300,000 (37.5% of the gross, (almost identical to California Welfare & Institutions Code Section 14124.78)). With conflicting decisions from the lower courts. the United States Supreme Court took the case and the Supreme Court's opinion, written by Justice Thomas, in a 7-2 opinion, held that Florida's law allowed for recovery of. not only past medical expenses expended, but their statutory scheme allows for a lien to attach on future medical care. (See discussion herein below re **Aguilera v. Loma Linda Univ. Medical Center** (2005) 235 Cal.App.4th 821). Also discussed herein below is the California Second Appellate District case of **Daniel C v. White Memorial Medical Center, et al.**, decided on May 26, 2022.

In **Gallardo**, Justice Thomas basically found that because the federal statutory language allowed for a recovery of medical expenses, and there was no limitation solely allowing for past medical expenses, thus both past and future medical

expenses could be collected by Medicaid collection statutes. The **Arkansas Dept. Of Health Services v. Ahlborn** case (supra) specifically stated past medical expenses could be collected and did not list future medical expenses. Also see the case of **Daniel C. v. White Memorial Hospital** also allowing for only past medical expenses to be recovered.

Thus, the **Gallardo** case will certainly cause future arguments by the Department of Health Care Services (DHCS), seeking to expand their claims to include future medical care.

In Justice Thomas' opinion (Slip Opinion page 5) he stated:

"The Eleventh Circuit explained that the relevant Medicaid Act provisions 'd[o] not in any way prohibit [a State] from seeking reimbursement from settlement monies for medical care allocated to future care."

Thus, it would appear that DHCS will attempt to make a determination that, despite the fact that the future care has not yet taken place, if an **Ahlborn** motion is made suggesting that the value of the case is enormous, as described in the **Gallardo** case to be \$20 Million, had Gallardo recovered, for instance, \$10 Million of the \$20 Million proposed value of the case, the lien could have attached to the \$10 Million. Pursuant to the Florida statute that they could have recovered 37% of the \$10 Million as opposed to the \$300,000 they claim. Obviously, there is a potential for the plaintiff's attorney to pay much higher liens in the future. However, California's Health & Welfare Code §14124.78 establishes that the plaintiff cannot be forced to pay greater than 50% of the net to the client, after costs and attorney's fees. Thus, California's statutory scheme is akin to the Florida statute since, if one assumes the 25% reduction for attorney's fees and thereafter takes 50% of the remainder, that would be the same percentage (37.5%) as the Florida statute.

The **Daniel C.** case, decided on May 26, 2022, was a medical malpractice wrongful birth case, wherein the defendant, Dr. Shaw, observed in an ultrasound serious birth defects but did not notify the parents of Daniel C. that he would be totally disabled after he was born. By failing to disclose the defects to the parents, the mother did not seek an abortion and in fact delivered. Daniel was totally disabled and it was contended through declarations and expert support that Daniel's future damages exceeded \$13 Million, and thus his \$1.25 Million settlement against the treating OB/GYN was only 9% of his total damages ($\$1,250,000 \div \$13,400,000 = 9.3\%$). This was supported by the expert economist that calculated the present value of Daniel's future needs to be \$13.4 Million. Experts from California DHCS testified by way of declaration that it was "reasonably probable" that Medi-Cal would pay for most of the medical services and medical items enumerated in the life care plan, which included, physician services, durable medical equipment and medical supplies, shower chairs, wheelchairs, orthotic and prosthetic appliances, diagnostic testing, inpatient hospital services, in-home supportive vocational and nursing services.

When the settlement was placed on the record on July 6, 2020, DHCS provided a revised final lien letter stating that it had paid \$358,061 and sought to recover \$229,696 (reduced W&I §14124.72) for hospital services. Daniel's attorneys, using the **Ahlborn** formula of W&I §14124.76(a) responded that Daniel had only received 9% of his true case value which would reduce the medical lien to \$32,517 ($.09 \times \$358,061 = \pm \$33,401$). DHCS asserted that the total value of the Medi-Cal beneficiary's claim would include both past and future medical expenses in that Daniel was eligible for the full scope of Medi-Cal coverage into the future and that "Daniel is likely to remain eligible for this coverage throughout his life". DHCS contended it was entitled to recover the full amount of its Medi-Cal lien. DHCS further contended that Daniel could not claim future medical expenses, since Medi-Cal would be providing all of the future medical care. Further, DHCS contended that the future medical care which DHCS would provide could not be used to create the \$13 Million future damages since Medi-Cal would be paying them and plaintiff could not use Medi-Cal's payments in the future to reduce Medi-Cal's present claimed lien. Medi-Cal relied upon a similar case, **Aguilera v. Loma Linda Univ. Medical Center** (2015) 235 Cal.App.4th 821 which discussed that the plaintiff in a negligence action settled for \$950,000 whereas Medi-Cal had a lien for roughly \$200,000. The plaintiff filed a motion to determine the DHCS lien, claiming that the full value of the claim was nearly \$15 Million and that her settlement was only 6% of the total damages. Plaintiff claimed approximately \$200,000 existed for past medical costs, \$1.5 Million for future medical costs, and \$11 Million for future attendant care. Using these figures and the **Ahlborn** (W&I §14124.76(a)) theory that DHCS should be limited to a lien of approximately \$10,000. DHCS disagreed, stating that it would be paying the plaintiffs future medical and attendant care and thus those expenses should be excluded from the calculations, i.e., reducing the total value of the case by \$11 Million and increasing the percentage of the lien amount to be paid by plaintiff.

The Court of Appeal in the **Aguilera** case agreed in theory with the DHCS contention that future health care expenses that would be paid by Medi-Cal should be excluded from the **Ahlborn** formula, however, the court explained that excluding such expenses is contingent upon the Department submitting sufficient evidence that it will in fact pay plaintiffs expenses as long as she qualifies for the benefits that she is presently receiving. (**Aguilera**, supra at pg. 831-832.) The appellate court stated that, based on the evidence provided, the trial court, on remand, must make a determination whether it is reasonably probable the Department will pay Aguilera's future health care expenses. If the trial court made such a finding, it was directed to exclude those expenses from its **Ahlborn** calculation. (**Aguilera**, supra at pg. 833.) The court cautioned, however, that the predictions about the future are inherently uncertain and it said DHCS should not be tasked with establishing the plaintiffs future Medi-Cal eligibility with "absolute certainty". It further explained plaintiff's future healthcare needs are uncertain and necessarily based on reasoned assumptions and estimates from health care professionals. In **Daniel C.**, the court agreed with **Daniel C.** that the trial court failed to equitably allocate the settlement and found that the

lower court on remand "must determine which portion of the settlement is attributable to past medical expenses against which DHCS is entitled to collect its lien and other damages which it is not." The appellate court went on to state: "In this case, plaintiffs agree with the department that the past medical expenses were \$358,118" and that automatically they would receive a 25% reduction and pro rata share of cost reduction.

As can be seen in this May 26, 2022 opinion, the California court found that there must be a determination between what past medical expenses were and what the future medical expenses would be, and limit future expenses based on the provability by DHCS as to how much they would pay.

When compared to the June 6, 2022, Supreme Court **Gallardo** case, that case specifically held that a State could collect for all medical expenses, both past and future, as Florida did, under the present law, as described herein above, the plaintiff would still recover at least 50% of the net, after attorney's fees (see Welfare & Institutions Code §14124.78). Thus, California's law is very similar to Florida's law. However, 50% of the net to the plaintiff being the amount that would be paid to Medi-Cal substantially increases the amount of a lien in such a case. It is therefore presumed that the plaintiff's damages would increase dramatically if plaintiff was entitled to prove that the future meds were going to be paid by DHCS.

It is anticipated that the California appellate courts will read and consider the **Gallardo** case and modify its opinions to be consistent with **Gallardo**.

I believe it is extremely important for everyone to read the **Daniel C.** case in that it has a long historic description of what has transpired with liens over the last 15 years.

B. Special Needs Trusts And Medi-Cal

A Special Needs Trust is used to ensure that Medi-Cal and other needs-based benefits continue to be paid into the future. However, it should be noted that upon the death of the beneficiary of the Special Needs Trust, Medi-Cal has a right to 100% of the amounts paid to the beneficiary during the pendency of the Special Needs Trust, without reduction by *Ahlborn* or any other theory, unless the Beneficiary of the Trust is disabled. See **Herting v. California Department of Health Care Services**, (2015) 235 Cal.App.4th 607.

Additionally, it should be noted that in the event you create a Special Needs Trust on behalf of your client, all public entity liens must be paid prior to the creation of the Trust, based on Probate Code §3604(d). The amount paid pursuant to Probate Code §3604(d) is subject to the reductions available under the Welfare & Institutions Code, including W&I §§14124.72, 14124.76 and 14124.78.

C. If Handled Appropriately, Medicaid, Medicare, And Erisa Plans Cannot Recover Anything In A Wrongful Death Case

Of major import in Medicare, Medicaid (Medi-Cal) and ERISA cases is the case of *Fitch v. Select Products Company* (2005) 36 Cal.4th 812, stating:

" - May a Medi-Cal lien for costs incurred in treating a decedent's final illness be asserted against a recovery in a wrongful death action when that recovery does not and could not include those medical expenses? The answer is 'no.'" *Fitch, Id., at 816.* [Emphasis added.] (See also *Bradley v. Sebelius* (2010) 621 F.3d 331.)

III

MEDICAL CARE RECOVER ACT (MCRA) 24 U.S.C. §2651

With the new changes to the Veteran's Administration, it is anticipated that more veterans and current governmental employees will be covered under the Medical Care Recovery Act. These are patients covered under Veteran's Administration benefits, Tri-Care, CHAMPUS, and potentially other federally funded medical care recovery benefits. In such cases, the United States has an independent right of action to recover the reasonable value of the benefits furnished to an eligible past or present government employee from payments by a responsible third party.

The entities liable for these payments is generally an insurer of a third person liable for some tort liability injuring the covered person.

It is an open question as to whether or not UM benefits would apply to the government's right to collect under this statutory scheme in that Insurance Code § 1580.2 provides that UM coverage is not applicable in any instance where it would inure to the benefit of the United States. Although it may be claimed that the federal governmental statutes would preempt this state law, I do not believe that would be the case based on the fact that the savings clause of the United States Constitution, as discussed in *FMC Corporation v. Holliday* (1990) 498 U.S. 52, reserves the right to control insurance to the State.

Section 2651A may "... require the injured ... person ... to assign his claim to the U.S., pertains to Tri-Care payments and requires the beneficiary to provide information regarding coverage by third party payor as a condition precedent to receiving Tri-Care coverage."

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Presentation of the claim is provided on Form DD2527 to be signed by the claimant or his attorney based upon 32 C.F.R. §199.12.

After the form is filled out, a response to the DO2527 by the government includes an agreement to protect the government's interest, containing language which if signed by the plaintiff's attorney, agrees to waive his fees and a common fund credit for the recovery. Don't sign it.

The client should not sign such a document but, in fact, should demand that a lien be provided to the plaintiff to be used in the underlying litigation, thereby establishing the government's right to payment (not subject to the Howell doctrine based on federal law) which can later be reduced by agreement.

As Don De Camara has written in the past, in the case of *Allen v. U.S.* 668 F.Supp. 1242 (1987), the Court found:

"I am persuaded that Section 2652(c) requires that the injured party be made whole before the government may be reimbursed under the act."

The Made Whole Doctrine holds that no part of any lien may be collected in the event the Plaintiff was not made whole in the underlying action. This is why in all contracts creating liens there is a waiver of the Made Whole Doctrine in the verbage establishing the lien.

**IV
NECESSITY OF LIENHOLDER NAME ON CHECK**

Many of us have experienced the pressure and delays caused by carriers demanding that any alleged lien holders name be placed on the check. The case of *Karpinski v. Smitty's Bar* (2016) 246 Cal.App.4th 456, dealt with this issue, **and is a must read**. Plaintiff won a motion to enforce a settlement agreement pursuant to CCP §664.6, ordering Smitty's to take the name of the lien holders off the check. On appeal, Smitty contended the trial court erred in granting the motion because satisfaction of two outstanding statutory medical liens involving California Victims of Crime and Medicare constituted a condition precedent to payment of the settlement proceeds, and that Karpinski had failed to satisfy the liens. The case involved Government Code §13963, providing that "(a) the California Victims of Violent Crime Board shall be subrogated to the rights of the recipient to the extent of any compensation granted by the Board. Subrogation rights shall be against ... any person liable for the losses suffered ... (d) no judgment, award or settlement in any action or claim by a recipient where the Board has an interest shall be satisfied without first giving the Board notice and a reasonable opportunity to perfect and satisfy the lien."

With regard to Medicare, "Medicare also has a right of action to recover its payments from, inter alia, a beneficiary or attorney 'that has received a primary payment (42 C.F.R. 411.24(g)) if the beneficiary or other party receives a primary payment, the beneficiary or other party must reimburse Medicare within 60 days.'" (42 C.F.R. 411.24(h).) Nonetheless, the Appellate Court stated in *Karpinski*, supra, on page 11 of the slip opinion:

"Generally putting an agency's name on a check as a co-payee is neither authorized nor required under federal or state law, and quite obviously, is not an efficient way to resolve personal injury lawsuits. While an insurer has a responsibility to assure that government agency liens are taken into account, such responsibility is generally discharged by obtaining a written commitment by the plaintiff, either in a release document or in an independent document to be responsible for all such liens." (Citations) [Emphasis added.]

The court went on to say that if Karpinski failed to honor his obligation under the indemnity provisions of the settlement agreement then Smitty's could require him to indemnify the insurance carrier.

IV FEE AGREEMENTS

Language should be included all of your fee contracts concerning the resolution of liens. My firm's contract contains the following language, which can give you a start on what you want to put in your contract:

"Attorney is not obligated to litigate and/or contest any claims with respect to any lien issues arising from Client's medical care received before or during the representation of Client. Any appeal, lien litigation or negotiations shall be subject to this written agreement between Client and Attorney, allowing an additional fee of 25% of all claimed lien amounts which are reduced by Attorney's efforts."

CONCLUSION

Obviously, there are various other types of liens claimed by various types of entities, including public entities, under-insured motorist, etc. The time allotted for this program does not allow for a discussion of said other types of liens.

Attached hereto please find Exhibits I through 6. These exhibits may assist you in attempts to reduce liens pursuant to the *Ahlborn* case and other law as set forth therein.

ATTACHMENT 1

WILCOXEN CALLAHAM, LLP

ATTORNEYS AT LAW

DANIEL E. WILCOXEN †‡
WILLIAM C. CALLAHAM †‡*
E. S. (TED) DEACON
MICHELLE C. JENNI †‡

‡ AMERICAN BOARD OF
PROFESSIONAL LIABILITY
ATTORNEYS

† AMERICAN BOARD OF TRIAL
ADVOCATES

2114 K STREET
SACRAMENTO, CALIFORNIA 95816
TELEPHONE: (916) 442-2777
FACSIMILE: (916) 442-4118
www.wilcoxenlaw.com

WILLIAM M. LYONS ‡
WALTER H. LOVING III †‡
DREW M. WIDDERS
MARTHA A. TAYLOR
BLAIR H. WIDDERS
CHRISTOPHER G. ROMERO
NICHOLE A. DICKENSON

* CERTIFIED SPECIALIST IN
CIVIL TRIAL ADVOCACY BY
THE NATIONAL BOARD OF
TRIAL ADVOCACY

Department of Health Care Services
Recovery Section, MS 4720
P.O. Box 997425
Sacramento, CA 95899-7425

Re: Our Client: Mr. Bryan Smith
DHCS #: _____
Injury Date: _____

To Whom It May Concern:

Enclosed is a copy of your December 20, 2016 letter requesting \$16,442.98 Medi-Cal reimbursement after 25% reduction pursuant to Welfare and Institutions ("W&I") Code §14124.72 for services to Mr. Smith. However, your letter did not include the reduction for DHCS' share of litigation costs required by Welfare and Institutions ("W&I") Code section §14124.72(d).

Enclosed is a spreadsheet showing our litigation costs of \$17,183.30. Using the W&I Code §14124.72(d) cost sharing methodology, \$21,923.97 in total Medi-Cal services, divided by the gross recovery of \$100,000.00 = 22% of \$17,183.30 in costs, or \$3,780.33. Thus, the amount Mr. Smith would be required to reimburse DHCS under W&I §14124.72 is \$21,923.97 less 25% = \$16,442.98 - \$3,780.33 = \$12,662.65.

As you know, Mr. Smith's suffered a fracture of his right calcaneus (crushed heel fracture) in the August 14, 2015 accident, more specifically a comminuted and rotated fracture of his right talus in combination with a comminuted fracture of his medial malleolus. This is a severe injury, the more so for a young man age twenty-three.

Since the accident and his initial surgery, Mr. Smith has had continued pain and difficulty walking. On October 18, 2016, Mr. Smith was evaluated by orthopedist Michael King, M.D. Dr. King's report is enclosed. Dr King recommended Mr. Smith undergo a second surgery to lengthen his Achilles tendon in order to bring his tibiotalar joint back to a neutral position so that he may walk normally again and without pain.

Given the severity of Mr. Smith's injury and his young age, it is my opinion that the value of Mr. Smith's case is approximately \$250,000.00. Although some may say less and some more, I base this value on my extensive experience evaluating and litigating personal injury cases.

Mr. Smith's Complaint sought recovery for loss of earnings, future earnings impairment, past and future pain and suffering, as well as past and future medical expenses. Mr. Smith's \$100,000.00 policy limits settlement was compensation for all of these items of damages. Pursuant to W&I Code §14124.76(a), DHCS is entitled to recover only that portion of the \$100,000.00 that represents payment for past medical expenses.

To avoid submitting to the Court the question of what portion of the \$100,000.00 represents payment for past medical expenses, we propose that we follow the proportionality formula as set forth in the U.S. Supreme Court case of *Arkansas Department of Health and Human Services v. Ahlborn* (2006) 547 U.S. 268 ("Ahlborn") and W&I §14124.76(a), thereby avoiding litigation expenses for our firm and DHCS.

Applying the Ahlborn formula: Mr. Smith recovered the policy limits of \$100,000.00 from the at-fault driver. Because Mr. Smith has recovered only 40% of the value of his case (40% of \$250,000.00), the lien is reduced by 60% to \$8,769.59. (40% of \$21,923.97).

The lien is then further reduced by attorney's fees and cost sharing pursuant to W&I §14124.72. (see this firm's case of *Lopez v. DaimlerChrysler Corp.* (2009) 179 Cal.App.4th 1373.) The 25% reduction results in a figure of \$6,577.19, and after subtracting DHCS' proportionate share of costs of \$3,780.33, the amount due to DHCS is \$2,796.86. Thus, we propose to pay DHCS \$2,796.86 to satisfy its lien on Mr. Smith's settlement proceeds so far.

Mr. Smith's case has not concluded and we are continuing to proceed against two defendants. We further propose that should we obtain additional money from those defendants, we will pay DHCS additional money, following the Ahlborn methodology as discussed above.

If this proposal is unacceptable to you, we will file a motion in the Superior Court pursuant to W&I §14124.76(a-c) to reduce the lien as indicated herein.

Please provide us a response to our proposal within the next fifteen (15) days, or we will proceed with the motion.

Very truly yours,
WILCOXEN CALLAHAM, LLP

DANIEL E. WILCOXEN

DEW:BHW

ATTACHMENT 2

WILCOXEN CALLAHAM, LLP
2114 K Street, Sacramento, CA 95816

1 DANIEL E. WILCOXEN, SBN 054805
2 BLAIR H. WIDDERS, SBN 301741
3 WILCOXEN CALLAHAM, LLP
4 2114 K Street
5 Sacramento, CA 95816
6 Telephone: (916) 442-2777
7 Facsimile: (916) 442-4118

8 Attorneys for Plaintiff
9 BRYAN SMITH

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 IN AND FOR THE COUNTY OF ANONYMOUS

12 BRYAN SMITH,

13 Plaintiff,

14 -vs-

15 CLAIRE JONES;
16 CITY OF HAPPINESS;
17 ABC LAND COMPANY;
18 and DOES 1 through 100, inclusive,

19 Defendants.

Case No.

20 **PLAINTIFF'S MOTION TO REDUCE
21 MEDI-CAL LIEN PURSUANT TO
22 WELFARE & INSTITUTIONS CODE
23 §14124.76**

Date:
Time:
Dept:

Assigned to:

Complaint Filed:
Trial Date: None Set

24 I.

25 INTRODUCTION

26 On August 14, 2015, now twenty-four year old plaintiff BRYAN SMITH suffered
27 splintering fractures of his right ankle in a motor vehicle accident. In November 2016, Mr.
28 SMITH settled with defendant CLAIRE JONES for her insurance policy limits of \$100,000.00.
As Mr. SMITH is a Medi-Cal beneficiary, the Department of Health Care Services (DHCS)

1 asserted a lien of \$21,923.97 against the settlement.

2 Pursuant to Welfare & Institutions (W&I) Code §14124.76 and the United States
3 Supreme Court's holding in *Arkansas Department of Health & Human Services v. Ahlborn*
4 (2006) 547 U.S. 268, plaintiff's counsel requested DHCS reduce its lien to that portion of the
5 settlement that was payment for past medical expenses. Plaintiff's counsel further
6 requested DHCS reduce its lien for its share of attorney's fees and costs pursuant to relevant
7 statutory and case law. DHCS declined to consider plaintiff's proposed reduction until the
8 entire case was resolved. After DHCS refused to consider plaintiff's proposal, plaintiff filed
9 this motion pursuant to W&I §14124.76.

10 II.

11 STATEMENT OF FACTS

12 A. Background of the case

13 BRYAN SMITH was twenty-two years old when he moved to Santa Barbara to
14 complete his A.A. degree at Santa Barbara City College. Mr. SMITH obtained work as a
15 restaurant waiter making between \$1,200 and \$1,500 per month to pay his living expenses.
16 (see Plaintiff's Responses to Defendant's Form Interrogatories, set one, p. 6, Exhibit 1 to
17 Decl. of Daniel E. Wilcoxon (Wilcoxon Decl.).)

18 On August 14, 2015, Mr. SMITH was driving east on Cathedral Road in the city of
19 Happiness. As he approached the T-intersection of Cathedral Road and Carneros Road,
20 CLAIRE JONES pulled out from the stop sign at Carneros Road, intending to drive west on
21 Cathedral Road. She crossed in front of Mr. SMITH, who had no time to avoid her. Ms. JONES
22 stated to the police she did not see Mr. SMITH because a line of trees and branches on the
23 southern side of Cathedral Road to her left obscured her view. (see subject Traffic Collision
24 Report, Exhibit 2 to Wilcoxon Decl.)

25 The front bumper of Ms. JONES's vehicle hit the right side of Mr. SMITH's motorcycle,
26 severely injuring Mr. SMITH's right foot and ankle. He underwent surgery that day at Cottage
27 Hospital for a comminuted (splintering of the bone) fracture of his right talus (the ankle bone
28 that articulates the foot), and a comminuted fracture of his medial malleolus (the end of the

1 tibia bone where it joins the talus). Mr. SMITH's surgeon reconstructed the fragmented
2 bones with stabilizing screws. (see Operative Report of Eric Jacks, M.D., Exhibit 3 to
3 Wilcoxon Decl.)

4 Mr. SMITH filed the subject complaint on March 23, 2016 against CLAIRE JONES, CITY
5 OF HAPPINESS, and ABC LAND COMPANY. CITY OF HAPPINESS owns and controls the
6 intersection where the accident occurred. ABC LAND COMPANY is the owner of the property
7 where the line of trees is located. Plaintiff's complaint sought damages for pain and
8 suffering, past and future medical and medical incidental expenses, past and future loss of
9 earnings, and incidental expenses.

10 CLAIRE JONES quickly offered her motor vehicle insurance policy limits of
11 \$100,000.00 to settle Mr. SMITH's claims. Ms. JONES declared she had no additional assets or
12 insurance to pay for Mr. SMITH's damages in excess of the policy limits. On November 4,
13 2016, Mr. SMITH settled with Ms. JONES. On December 6, 2016, this Court approved Ms.
14 JONES' Application for Determination of Good Faith Settlement.

15 The two remaining defendants cross-complained against each other. Neither has
16 taken responsibility for the intersection defects that plaintiff alleges contributed to the
17 accident. When plaintiff's attorneys investigated the subject intersection, they found that the
18 stop line for the stop sign at Carneros Road was too far back to allow an unobstructed view to
19 the left down Cathedral Road because the trees and tree branches obstructed the view of Ms.
20 JONES towards Mr. SMITH, and the view of Mr. SMITH towards Ms. JONES.

21 **B. Mr. SMITH's injuries and damages**

22 On July 11, 2016, Mr. SMITH was examined by Dr. John Christopher, Chief of the
23 Podiatry Department at Kaiser Medical Center. Dr. Christopher stated Mr. SMITH's
24 continued pain was due to nerve damage in his right ankle. He further stated that the cause
25 of Mr. SMITH's knee pain is an altered gate from ankle pain. Dr. Christopher recommended
26 sclerosing injections to kill the nerve causing the pain. (see Progress Notes by John
27 Christopher (DPM), Exhibit 4 to Wilcoxon Decl.)

28 On August 11, 2016, Mr. SMITH stated in response to defendant's Form

1 Interrogatories that he had "tremendous" right ankle pain. He compensates for the pain and
2 lack of range of motion when he walks or stands. This causes pain in his right knee, hip and
3 back. He is depressed that he can no longer do the physical activities he loved. He also lost
4 the opportunity to live, work and go to school in Santa Barbara. Instead, he is living with his
5 parents and cannot work because of the pain. (see Plaintiff's Responses to Defendant's Form
6 Interrogatories, set one, pp. 4-5, Exhibit 1 to Wilcoxon Decl.)

7 On October 5, 2016, more than a year after the accident, Mr. SMITH was evaluated by
8 foot and ankle orthopedist Michael King, Jr., M.D. Dr. King assessed arthrofibrosis (scar
9 tissue formation) aggravated by a tight Achilles tendon. Dr. King recommended Achilles
10 tendon lengthening surgery to bring the right ankle joint back to a neutral position. During
11 surgery, he advised removing loose pieces of bone and the surgical screws in Mr. SMITH's
12 ankle. Dr. King declared Mr. SMITH was unable to work at any job requiring long periods of
13 standing, bending, lifting, climbing and pulling for 6-9 months after the accident, and was
14 temporarily totally disabled for approximately a year. (see Medical Evaluation report of
15 Michael King, Jr., M.D., page 9, Exhibit 5 to Wilcoxon Decl.)

16 Mr. SMITH is now twenty-four years old. He has a life expectancy of 53 years. Dr.
17 King recommends he undergo surgery. Even with the surgery, the trauma to his ankle will
18 result in ankle arthritis as he ages. He will also likely require additional arthroscopy for the
19 arthritis, and/or an ankle fusion as his damaged ankle joint deteriorates.

20 C. Negotiations with DHCS

21 On December 20, 2016, DHCS notified Mr. SMITH's counsel he received \$21,923.97 in
22 Medi-Cal services as a result of the August 14, 2015 accident. DHCS offered to reduce its lien
23 by 25% for attorney's fees pursuant to W&I Code §14124.72(d). DHCS demanded
24 \$16,442.98 in reimbursement for its lien. (see letter with itemization of charges from DHCS,
25 attached as Exhibit 6 to Wilcoxon Decl.)

26 On February 23, 2017, plaintiff's counsel Daniel Wilcoxon informed DHCS in a letter
27 that the \$16,442.98 lien amount had not been further reduced by DHCS' share of litigation
28 costs pursuant to W&I Code §14124.72(d). Additionally, Mr. Wilcoxon stated that Mr. SMITH

1 had recovered only \$100,000.00, or approximately 40% of the realistic value of his case. It
2 was contended pursuant to W&I Code §14124.76 and *Ahlborn, supra*, that the lien should be
3 reduced by 60% to that portion of Mr. SMITH's settlement that was payment for medical
4 expenses (\$8,769.59.) The lien should then be reduced by DHCS' share of attorney's fees
5 and costs pursuant to W&I Code §14124.72(d) and the case of *Lopez v. DaimlerChrysler Corp.*
6 (2009) 179 Cal.App.4th 1373 (\$2,796.86.) Mr. Wilcoxon proposed to pay DHCS additional
7 money if Mr. SMITH obtained money from the two remaining defendants in the case. (see
8 letter to DHCS by Daniel E. Wilcoxon, Exhibit 7 to Wilcoxon Decl.)

9 DHCS responded on March 22, 2017. DHCS stated the proposal would not be
10 considered until all settlements had been reached on the case and the final lien had been
11 issued. (see letter from DHCS, Exhibit 8 to Wilcoxon Decl.)

12 On April 18, 2017, DHCS sent another demand letter for \$16,442.98 as reimbursement
13 of its lien. There was again no reduction for litigation costs as required by W&I Code
14 §14124.72(d), or reduction pursuant to W&I 14124.76(a). (see letter from DHCS, attached as
15 Exhibit 9 to Wilcoxon Decl.)

16 III.

17 LAW & ARGUMENT

18 A. **The ruling in *Arkansas Department of Health & Human Services v. Ahlborn*** 19 **(2006) 547 U.S. 268**

20 Heidi Ahlborn was a 19-year old college student who sustained severe injuries in a
21 motor vehicle accident. The parties stipulated that the reasonable value of Ms. Ahlborn's
22 entire claim was approximately \$3,000,00.00. Due to comparative fault issues, the case
23 settled for \$550,000.00. Ms. Ahlborn's complaint sought damages for past and future
24 medical expenses, pain and suffering, and past and future loss of earnings. The \$550,000
25 settlement was not allocated amongst the different categories of damages.

26 The Arkansas Department of Health & Human Services asserted a lien for
27 \$215,645.30, the entire amount it paid for Ms. Ahlborn's accident-related medical care. On
28 May 1, 2006 the Supreme Court unanimously ruled that any state that participates in the

1 Medicaid program (ie: California via Medi-Cal) is prohibited by preemptive Medicaid anti-
2 lien statutes from asserting a lien on any portion of a Medicaid recipient's tort settlement
3 that is not payment for medical expenses. (*Ahlborn, supra* at 291.)

4 The Supreme Court set forth a rule that in cases where the recovery is less than the
5 case value, the ratio between the recovery and the case value (\$550,000/\$3,000,000) is
6 multiplied times the lien amount to determine the appropriate amount of the lien. Applying
7 this formula, the Supreme Court reduced the Arkansas Department of Health & Human
8 Services' lien from \$215,645.30 to \$35,581.47. (*Ahlborn, supra* at 274-275.)

9 **B. Pursuant to W&I Code §14124.76, an injured Medi-Cal beneficiary can
10 seek a court's decision, to be guided by *Ahlborn*, as to what portion of a
settlement is payment for medical expenses**

11 W&I Code §14124.76 states as follows:

12 Recovery of the director's lien from an injured beneficiary's action or claim is limited
13 to that portion of a settlement, judgment, or award that represents payment for
14 medical expenses, or medical care, provided on behalf of the beneficiary. All
15 reasonable efforts shall be made to obtain the director's advance agreement to a
16 determination as to what portion of a settlement, judgment, or award that represents
17 payment for medical expenses, or medical care, provided on behalf of the beneficiary.
18 Absent the director's advance agreement as to what portion of a settlement,
19 judgment, or award represents payment for medical expenses, or medical care,
20 provided on behalf of the beneficiary, ***the matter shall be submitted to a court for
decision. Either the director or the beneficiary may seek resolution of the dispute
by filing a motion, which shall be subject to regular law and motion procedures.*** In
determining what portion of a settlement, judgment, or award represents payment for
medical expenses, or medical care, provided on behalf of the beneficiary and as to
what the appropriate reimbursement amount to the director should be, ***the court
shall be guided by the United States Supreme Court decision in Arkansas
Department of Health and Human Services v. Ahlborn (2006) 547 U.S. 268 and
other relevant statutory and case law.*** (emphasis added.)

21 On August 24, 2007, the California Legislature amended W&I §14124.76 to
22 incorporate the above language requiring that the *Ahlborn* decision guide a court in
23 determining what portion of a settlement, judgment or award was payment for past medical
24 expenses. When an action has been filed, the court where the action was filed has
25 jurisdiction to make the determination. (W&I Code §14124.76(b).)

26 Since the 2007 amendment to W&I Code §14124.76, California appellate courts have
27 held that a court's application of the *Ahlborn* formula is a proper approach in reducing a
28 Medi-Cal lien. (see *Lopez v. DaimlerChrysler Corp.* (2009) 179 Cal.App.4th 1373, 1387-1388)

1 [affirming the trial court's decision to apply the *Ahlborn* formula and reduce the Medi-Cal
2 lien]; *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, 754 [approving the use of the
3 *Ahlborn* formula when a settlement has not been allocated between past medical expenses
4 and other items of damages]; *Lima v. Vious* (2009) 174 Cal.App.4th 242, 261 [holding that
5 *Ahlborn* formula was an appropriate approach when the estimates of plaintiff's total damages
6 and the settlement amount were reasonable.]

7 **C. Determination of Case Value**

8 In order to apply the rule from *Ahlborn, supra*, the court must determine the actual
9 recovery compared with the reasonable total value of the case. As the settlement amount of
10 **\$100,000.00** has been determined to be in good faith by this Court, all that is needed here is
11 the reasonable case value.

12 Plaintiff's counsel Daniel Wilcoxon in his declaration provided a reasonable value for
13 Mr. SMITH's case. The foundation for Mr. Wilcoxon's valuation is over 40 years experience
14 litigating personal injury cases, including over 50 jury trials. He also has over 20 years
15 experience as an expert witness evaluating case values. Mr. Wilcoxon has reviewed the
16 Exhibits discussed above and attached to his Declaration, as well Mr. SMITH's other accident-
17 related medical records. In Mr. Wilcoxon's opinion, the value of Mr. SMITH's claims for past
18 and future pain and suffering, past and future medical care, past and future loss of earnings,
19 and incidental expenses is at least \$250,000.00. (Wilcoxon Decl., ¶4.)

20 Applying *Ahlborn, supra*, the settlement amount of \$100,000.00 is divided by the case
21 value of \$250,000.00 to result in a ratio (percentage) of 40%. Multiplying this ratio by the
22 total Medi-Cal lien of \$21,923.97 results in a lien of \$8,769.59. This is the portion of Mr.
23 SMITH's \$100,000.00 settlement that represents his recovery for medical expenses.

24 **D. The ruling in *Lopez v. DaimlerChrysler Corp.* (2009) 179 Cal.App.4th 1373**

25 Ruben Lopez was a minor when a rear-end motor vehicle accident caused permanent
26 brain injury. Mr. Lopez sued the at-fault driver and DaimlerChrysler, the manufacturer of
27 the car in which plaintiff was riding. Mr. Lopez' claims were settled for \$2,000,000 and DHCS
28 asserted a lien of \$547,680.08, (*Lopez, supra* at 1375.)

1 Following the settlement and the amendment to W&I 14124.76, plaintiff's counsel
2 Daniel Wilcoxon filed a motion pursuant to W&I Code §14124.76 and *Ahlborn, supra* to have
3 the lien reduced. He further moved that the lien be reduced pursuant to W&I Code
4 §14124.72(d) for DHCS' 25% share of attorney's fees and its pro-rata share of litigation costs.
5 Mr. Wilcoxon filed declarations that Mr. Lopez' total case value was \$11,635,132.82.

6 The court granted the motion, reducing the lien first by approximately 83%
7 (\$2,000,000.00/\$11,635,132.82 = 17.19%) from \$547,680.08 to \$94,142.47, and then
8 reduced by DHCS' share of attorney's fees and litigation costs, resulting in a total lien of
9 63,216.69. (*Id.* at 1378.)

10 DHCS appealed. (*Id.* at 1382.) The 3rd DCA affirmed, relying on *Bolanos, supra* and the
11 California Legislature's intent as shown by incorporating the language that courts be guided
12 by *Ahlborn* when making a determination under W&I Code §14124.76. (*Id.* at 1387-1388.)

13 **E. The lien should be further reduced by DHCS' share of attorney's fees and**
14 **costs**

15 The lien should also be reduced pursuant to W&I Code §14124.72(d) and *Lopez,*
16 *supra.* (see W&I 14176(a): "the court shall be guided by the United States Supreme Court
17 decision in *Arkansas Department of Health and Human Services v. Ahlborn* (2006) 547 U.S.
18 268 and other relevant statutory and case law." [emphasis added].)

19 W&I Code §14124.72(d) provides:

20 Where an action or claim is brought by the beneficiary alone and the beneficiary
21 incurs a personal liability to pay attorney's fees and costs of litigation, the director's
22 claim for reimbursement of the benefits provided to the beneficiary shall be limited to
23 the reasonable value of the benefits provided under the Medi-Cal program less 25%
24 which represents the director's reasonable share of attorney's fees paid by the
beneficiary and that portion of the litigation expenses determined by multiplying by
the ratio of the full amount of reasonable value of benefits so provided to the amount
of the judgment, award, or settlement.

25 Reducing the lien of \$8,769.59 by 25% for DHCS' reasonable share of attorney's fees
26 reduction results in a lien of \$6,577.19.

27 Plaintiff's litigation costs were \$17,183.30 as of February 23, 2017. (see spreadsheet
28 provided to DHCS, Exhibit 7 to Wilcoxon Decl.) The full reasonable amount of total Medi-Cal

1 services provided to Mr. SMITH is \$21,923.67. Dividing \$21,923.67 by the settlement
2 amount of \$100,000.00 yields a percentage of costs of 22 percent. Multiplying that
3 percentage (22%) times \$17,183.30 in litigation costs equals \$3,780.33. DHCS' share of
4 litigation costs is then subtracted from \$6,577.19 resulting in a lien of \$2,796.86. This is the
5 amount that satisfies DHCS' lien on Mr. SMITH's settlement proceeds of \$100,000.00 so far.
6 Should Mr. SMITH obtained more money, additional payments to DHCS would be made based
7 upon the same methodology.

8 **F. Plaintiff attempted to obtain DHCS' director's advance agreement as to**
9 **what portion of the settlement was payment for medical expenses**

10 W&I Code §14124.76(a) requires the injured beneficiary to make "reasonable efforts
11 to obtain the director's advance agreement to a determination of what portion of a
12 settlement, judgment or award represents payment for medical expenses, or medical care,
13 provided on behalf of the beneficiary." In his February 23, 2017 letter, Daniel Wilcoxon
14 requested DHCS respond to his proposal that DHCS' \$21,923.67 lien on Mr. SMITH's
15 \$100,000.00 recovery should be reduced to \$2,796.86. (see letter to DHCS, Exhibit 7 to
16 Wilcoxon Decl.)

17 On March 22, 2017, DHCS responded it would not consider what portion of the
18 \$100,000.00 settlement represented payment for past medical expenses until all settlements
19 in the case had been reached and the final lien has been issued. (see letter from DHCS,
20 Exhibit 8 to Wilcoxon Decl.) On April 18, 2017, DHCS again demanded \$16,442.98 as
21 reimbursement of its lien without a reduction of its share of litigation costs as required by
22 W&I Code §14124.72(d). (see letter from DHCS, Exhibit 9 to Wilcoxon Decl.) DHCS has thus
23 refused to respond to plaintiff's reasonable efforts to obtain the DHCS' director's advance
24 agreement as to what portion of Mr. SMITH's settlement was payment for medical expenses,
25 making the filing of this motion necessary pursuant to W&I Code §14124.76(a).

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IV.

CONCLUSION

DHCS' position that the determination of the settlement amount that was payment for medical expenses must wait until the case is concluded is unwarranted. W&I 14124.76 only states that "a settlement, judgment, or award" occur before this determination is made. To pay the full amount of the lien now would be a prepayment when Mr. SMITH has already agreed to pay said full value upon a resolution for \$250,000.00 or greater.

Further, W&I Code §14124.76 was amended in 2007 because the United States Supreme Court set forth a formula that can be utilized by every court in California to determine the appropriate amount of a Medi-Cal lien. In that the public policy in California is to resolve cases short of trial, W&I Code §14124.76 obviates the need of trying, or fully resolving, a case to determine the amount of money collected in a settlement that is compensation for past medical expenses.

The unallocated settlement amount of \$100,000.00 has been determined to be in good faith by this Court. Mr. Wilcoxon has provided a reasonable probable case value of \$250,000.00. Applying the formula from *Ahlborn, supra*, and the requirement that DHCS bear its share of attorney's fees and litigations costs pursuant to W&I Code §14124.72(d) and *Lopez, supra*, Plaintiff BRYAN SMITH respectively requests that the Court reduce DHCS' lien pursuant to W&I §§14124.76 and 14124.72(d) from \$21,923.67 to \$2,796.86.

DATED: May 22, 2017

WILCOXEN CALLAHAM, LLP

By: _____
DANIEL E. WILCOXEN
BLAIR H. WIDDERS
Attorneys for Plaintiff

ATTACHMENT 3

1 **WILCOXEN CALLAHAM, LLP**
2 **DANIEL E. WILCOXEN, SBN 054805**
3 **E.S. DEACON, SBN 127638**
4 **BLAIR H. WIDDERS, SBN 301741**
5 **2114 K Street**
6 **Sacramento, CA 95816**
7 **Telephone: (916) 442-2777**
8 **Facsimile: (916) 442-4118**

9 **Attorneys for Plaintiff**
10 **JANE DOE**

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **IN AND FOR THE COUNTY OF ANONYMOUS**

13 **JANE DOE,**

14 **Plaintiff,**

15 **-vs-**

16 **NATIONAL CARS COMPANY;**
17 **AUTO COMPANY, INC.;**
18 **DOE 1, SEATBELT MANUFACTURER;**
19 **DOE 2, SEATBELT COMPONENT**
20 **MANUFACTURER;**
21 **and DOES 3 through 100, inclusive,**

22 **Defendants.**

23 **Case No.**

24 **PLAINTIFF'S MOTION TO REDUCE**
25 **MEDI-CAL LIEN PURSUANT TO**
26 **WELFARE & INSTITUTIONS CODE**
27 **§14124.76**

28 **Date:**

Time:

Dept.:

Complaint Filed:

Trial Date:

MSC:

29 **I.**

30 **INTRODUCTION**

31 **On September 7, 2014, now fifty-two year old plaintiff JANE DOE suffered catastrophic**
32 **injuries, including a paralyzing stroke, following a 70 mph speed rollover motor vehicle accident**
33 **where she was thrown from the vehicle to the roadway as a result of an alleged seatbelt failure.**

34 **///**

35 **1**

36 **PLAINTIFF'S MOTION TO REDUCE MEDI-CAL LIEN PURSUANT TO**
37 **WELFARE & INSTITUTIONS CODE §14124.76**

1 In March 2018, Ms. DOE settled with defendant NATIONAL CARS COMPANY for
2 \$1,500,000.00. Prior to settlement, on March 1, 2018 Department of Health Care Services
3 ("DHCS") provided an itemization through March 1, 2018 showing a total of \$470,316.04 in
4 charges paid by Medi-Cal as a result of the accident.

5 Pursuant to Welfare & Institutions ("W&I") Code §14124.76 and the United States
6 Supreme Court's holding in *Arkansas Department of Health & Human Services v. Ahlborn* (2006)
7 547 U.S. 268 interpreting federal Medicaid law, Ms. DOE's counsel requested that DHCS reduce
8 its lien to that portion of the settlement that was payment for past medical expenses. DHCS
9 refused to consider Ms. DOE's proposed reduction until its final lien had been issued, claiming
10 it would take up to 4 additional months to make said calculations after being notified of the
11 request for the final lien figure on April 3, 2018. DHCS' refusal to provide a final lien amount for
12 up to 4 months will cause the settlement herein to fail in that the funds are needed to
13 immediately fund the purchase of a home for Ms. DOE that is in escrow. After DHCS refused to
14 consider Ms. DOE's proposal, she filed this motion pursuant to W&I §14124.76.

15 II.

16 **STATEMENT OF FACTS**

17 **A. Background of the case**

18 Ms. DOE was forty-eight years old when in the early morning of September 7, 2014 her
19 2002 National Cars Thunderbolt drifted from the westbound lane across the eastbound lane and
20 onto the south shoulder of Highway 162 near Willows where her left front tire struck the
21 roadway's edge causing the Thunderbolt to roll several times. Ms. DOE was ejected onto the
22 pavement and suffered catastrophic injuries, including but not limited to a paralyzing stroke,
23 scapula fracture, multiple rib fractures, pelvic fractures, sacral fracture, right arm degloving,
24 lacerations of both kidneys, and collapsed lung (pneumothorax). The stroke resulted in
25 neurologic damage, causing Ms. DOE to have cognitive deficits and left side hemiparesis.

26 Ms. DOE filed the subject complaint on July 18, 2016, alleging a products defect claim
27 against the Thunderbolt's manufacturer, NATIONAL CARS COMPANY and used car reseller THE
28 AUTO COMPANY. Ms. DOE's complaint sought damages for loss of earnings, future earnings

1 impairment, past and future pain and suffering, as well as past and future medical expenses.

2 The investigating police officers stated in the accident report that Ms. DOE was not
3 wearing her seatbelt during the accident. Plaintiff's expert's opinion was that the seatbelt failed
4 during the rollovers causing Ms. DOE to be ejected. Defendant NATIONAL CARS COMPANY
5 denied liability, disputing both that Ms. DOE was wearing her seatbelt during the accident and
6 that the seatbelt failed. On March 9, 2018, the parties agreed to settle for \$1,500,000.00.

7 **B. Ms. DOE's injuries and damages**

8 On January 3, 2018, Ms. DOE was evaluated by Andrew Barrett, M.D., a board certified
9 rehabilitation physician. In his Life Care Plan Report, Dr. Barrett lists Ms. DOE's current, residual
10 injuries, including left hemiparesis, cognition deficits, impaired mobility and ADL (Activities of
11 Daily Living) status. (see Exhibit 1 to Declaration of Daniel E. Wilcoxon ("Wilcoxon Decl."), at
12 page 2.) Dr. Barrett's Report determines the medical care, equipment and attendant needs that
13 Ms. DOE requires for the rest of her life. Because Ms. DOE is physically unable to care for herself,
14 her needs include 24 hour a day attendant care. Dr. Barrett's opinion is that Ms. DOE'S life
15 expectancy is normal minus 10%. (see Exhibit 1 to Wilcoxon Decl., at pages 3-7.)

16 The costs of the medical care, equipment and attendant needs that Ms. DOE requires for
17 the rest of her life was determined by Christine Roland, M.A., M.S. Ms. Roland is a Certified Life
18 Care Planner and Certified Disability Management Specialist. Ms. Roland relied on Dr. Barrett's
19 Report and researched the costs for Ms. DOE's needs on an annual, procurement, maintenance,
20 and/or replacement basis. (see Exhibit 2 to Wilcoxon Decl.)

21 The lifetime costs for Ms. DOE's needs was determined by Ronald Burkett, CPA. Mr.
22 Burkett is a Certified Public Accountant specializing in the cost of life care needs. Using a life
23 expectancy of 32 additional years of life, Mr. Burkett calculated that Ms. DOE requires
24 \$8,838,562.00 using an agency for her 24 hour a day attendant care. If Ms. DOE pays privately
25 for attendant care, the costs are \$7,352,898.00. (see Exhibit 3 to Wilcoxon Decl., at pages 5-6.)

26 Prior to the September 7, 2014 rollover accident, Ms. DOE worked at Wal-Mart earning
27 \$8.50 per hour 36 hours a week. Using 36 hours a week at California's minimum wage until
28 retirement, Mr. Burkett calculated that Ms. DOE's lost earnings are \$444,352.00. (see Exhibit

1 4 to Wilcoxon Decl., at page 1.)

2 Ms. DOE has been deemed totally disabled by the Social Security Administration as a
3 result of the injuries she suffered in the September 7, 2014 rollover accident and since late 2017,
4 Medicare has paid for Ms. DOE's medical care other than attendant care. Because Medicare does
5 not pay for attendant care, Medi-Cal pays Ms. DOE's daughter, Jennifer Johnson, \$12.95 per hour
6 266 hours per month, or 3,192 hours per year, to provide attendant care to Ms. DOE. Ms. DOE
7 requires 24 hour per day 365 day per year or 8,760 hours per year of attendant care. Ms.
8 Johnson is and has been providing Ms. DOE an additional 5,568 hours (8,760 - 3,192) per year
9 of attendant care without pay.

10 **C. Negotiations with DHCS**

11 On March 1, 2018 DHCS provided an itemization showing Medi-Cal paid \$470,316.04 in
12 accident-related charges on behalf of Ms. DOE. (see Exhibit 5 to Wilcoxon Decl.) Following
13 notification to DHCS that Ms. DOE's case had settled, on May 2, 2018 Ms. DOE's counsel Daniel
14 Wilcoxon requested that pursuant to W&I Code §14124.76 and *Ahlborn, supra*, the lien be
15 reduced by 77% from \$470,316.04 to \$108,172.69. Mr. Wilcoxon further requested that
16 pursuant to W&I §14124.72(d) and the cases of *Lopez v. DaimlerChrysler Corp.* (2009) 179
17 Cal.App.4th 1373 and *Martinez v. Superior Court* (2017) 19 Cal.App.5th 370, the lien be further
18 reduced by DHCS' share of attorney's fees and litigation costs to \$59,549.02. In an effort to
19 compromise, Mr. Wilcoxon proposed to pay DHCS \$75,000.00 to satisfy its lien. (see Exhibit 6
20 to Wilcoxon Decl., at page 4.)

21 On May 11, 2018, DHCS responded that it would not consider Mr. Wilcoxon's proposal
22 until all settlements have been reached on this case and the final lien has been issued. (see
23 Exhibit 7 to Wilcoxon Decl.) DHCS was informed on April 3, 2018 the entire case settled,
24 however DHCS has stated it will not consider Mr. Wilcoxon's proposal until its final lien has been
25 issued which they claim can take up to 4 more months. A 4 month delay will preclude the
26 purchase of a home now in escrow which will allow Ms. DOE's daughter to live in the same house
27 easing her burden to care for her mother.

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III.

LAW & ARGUMENT

A. The ruling in *Arkansas Department of Health & Human Services v. Ahlborn* (2006) 547 U.S. 268

Heidi Ahlborn was a 19-year old college student who sustained severe injuries in a motor vehicle accident. The parties stipulated that the reasonable value of Ms. Ahlborn's entire claim was approximately \$3,000,000.00. Due to comparative fault issues, the case settled for \$550,000.00. Ms. Ahlborn's complaint sought damages for past and future medical expenses, pain and suffering, and past and future loss of earnings. The \$550,000.00 settlement was not allocated amongst the different categories of damages.

The Arkansas Department of Health & Human Services (Arkansas' Medicaid system) asserted a lien for \$215,645.30, the entire amount it paid for Ms. Ahlborn's accident-related medical care. On May 1, 2006 the Supreme Court unanimously ruled that any state that participates in the Medicaid program (ie: California via Medi-Cal) is prohibited by preemptive Medicaid anti-lien statutes from asserting a lien on any portion of a Medicaid recipient's tort settlement that is not payment for medical expenses. (*Ahlborn, supra* at 291.)

The Supreme Court set forth a methodology to determine the amount of medical expenses recovered, holding that in cases where the actual recovery is less than the case value, the ratio between the actual recovery and the reasonable case value is multiplied times the lien amount to determine the appropriate amount of the lien. Applying this methodology, the Supreme Court reduced the Arkansas Department of Health & Human Services' lien from \$215,645.30 to \$35,581.47. (*Ahlborn, supra* at 274-275.)

B. Pursuant to W&I Code §14124.76, an injured Medi-Cal beneficiary can seek a court's decision, to be guided by *Ahlborn*, as to what portion of a settlement is payment for medical expenses

W&I Code §14124.76 states as follows:

Recovery of the director's lien from an injured beneficiary's action or claim is limited to that portion of a settlement, judgment, or award that represents payment for medical expenses, or medical care, provided on behalf of the beneficiary. All *reasonable efforts shall be made to obtain the director's advance agreement to a determination as to what portion of a settlement, judgment, or award that*

1 **represents payment for medical expenses, or medical care, provided of behalf on**
2 **the beneficiary.** Absent the director's advance agreement as to what portion of a
3 **settlement, judgment, or award represents payment for medical expenses, or medical**
4 **care, provided on behalf of the beneficiary, the matter shall be submitted to a court**
5 **for decision. Either the director or the beneficiary may seek resolution of the**
6 **dispute by filing a motion, which shall be subject to regular law and motion**
7 **procedures.** In determining what portion of a settlement, judgment, or award
8 **represents payment for medical expenses, or medical care, provided on behalf of the**
9 **beneficiary and as to what the appropriate reimbursement amount to the director**
10 **should be, the court shall be guided by the United States Supreme Court decision in**
11 **Arkansas Department of Health and Human Services v. Ahlborn (2006) 547 U.S.**
12 **268 and other relevant statutory and case law. (emphasis added.)**

13 On August 24, 2007, the California Legislature amended W&I §14124.76 to incorporate
14 the above language requiring that the *Ahlborn* decision guide a court in determining what
15 portion of a settlement, judgment or award was payment for past medical expenses. When an
16 action has been filed, the law and motion department of the court where the action was filed has
17 jurisdiction to make the determination. (W&I Code §14124.76(b).)

18 Since the 2007 amendment to W&I Code §14124.76, California appellate courts have held
19 that a court's application of the *Ahlborn* methodology is a proper approach in reducing a Medi-
20 Cal lien. (see *Lopez, supra* at 1387-1388 [affirming the trial court's decision to apply *Ahlborn* and
21 reduce the Medi-Cal lien]; *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, 754 [approving
22 the use of the *Ahlborn* methodology when a settlement has not been allocated between past
23 medical expenses and other items of damages]; *Lima v. Vious* (2009) 174 Cal.App.4th 242, 261
24 [holding that the *Ahlborn* methodology was an appropriate approach]; *Martinez, supra* at 374-
25 375 [affirming the trial court's application of the *Ahlborn* methodology.]

26
27 **C. Determining the portion of the settlement that is payment for medical**
28 **expenses**

In order to apply the rule from *Ahlborn, supra*, the court must determine the actual
recovery compared with the reasonable value of the case. As the settlement amount is
\$1,500,000.00, this court must now determine the reasonable case value from the declarations
of the experts.

Ms. DOE's counsel Daniel Wilcoxon's May 2, 2018 letter to DHCS, relying on Dr. Barrett,
Christine Roland, and Mr. Burkett's Reports, establishes the total value of Ms. DOE's case is in

1 the range of \$8,540,082.00. (see Exhibit 6 to Wilcoxon Decl., at page 4.) However, this case
2 value may not take into account any amount that Medi-Cal may pay in the future for a portion
3 of Ms. DOE's attendant care. (see *Aguilera v. Loma Linda University Medical Center* (2015) 235
4 Cal.App.4th 821.) Subtracting that portion of Ms. DOE's future attendant care to be paid by
5 Medi-Cal results in a reasonable value of Ms. DOE's case of \$6,536,516.74.

6 Applying the *Ahlborn* methodology, the settlement amount is divided by the reasonable
7 value of the case which results in a ratio of 23%. Multiplying this ratio by the total Medi-Cal lien
8 of \$470,316.04 results in a lien of \$108,172.69. This is the portion of Ms. DOE's \$1,500,000.00
9 settlement that represents recovery for medical expenses.

10 **D. The ruling in *Lopez v. DaimlerChrysler Corp.* (2009) 179 Cal.App.4th 1373**

11 Ruben Lopez was a minor when a rear-end motor vehicle accident caused permanent
12 brain injury. Mr. Lopez sued the at-fault driver and DaimlerChrysler, the manufacturer of the
13 car in which plaintiff was riding. Mr. Lopez' claims were settled for \$2,000,000 and DHCS
14 asserted a lien of \$547,680.08, (*Lopez, supra* at 1375.)

15 Following the settlement and the amendment to W&I 14124.76, plaintiff's counsel Daniel
16 Wilcoxon filed a motion pursuant to W&I Code §14124.76 and *Ahlborn, supra* to have the lien
17 reduced. He further moved that the lien be reduced pursuant to W&I Code §14124.72(d) for
18 DHCS' 25% share of attorney's fees and its pro-rata share of litigation costs. Mr. Wilcoxon filed
19 declarations that Mr. Lopez' total case value was \$11,635,132.82.

20 The court granted the motion, reducing the lien first by approximately 83%
21 (\$2,000,000.00/\$11,635,132.82 = 17.19%) from \$547,680.08 to \$94,142.47, and then reducing
22 the lien by DHCS' share of attorney's fees and litigation costs, resulting in a total lien of
23 63,216.69. (*Id.*, at 1378.)

24 DHCS appealed. (*Id.* at 1382.) The 3rd DCA affirmed, relying on *Bolanos, supra* and the
25 California Legislature's intent as shown by incorporating the language that courts be guided by
26 *Ahlborn* when making a determination under W&I Code §14124.76. (*Id.* at 1387-1388.)

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F. Plaintiff attempted to obtain DHCS' director's advance agreement as to what portion of the settlement was payment for medical expenses

W&I Code §14124.76(a) requires the injured beneficiary to make "reasonable efforts to obtain the director's advance agreement to a determination of what portion of a settlement, judgment or award represents payment for medical expenses, or medical care, provided on behalf of the beneficiary." In his May 2, 2018 letter, Ms. DOE's counsel Daniel Wilcoxon requested that DHCS respond to his proposal that DHCS' accept \$75,000.00 to satisfy its lien on Ms. DOE's \$1,500,000.00 recovery. (see letter to DHCS, Exhibit 6 to Wilcoxon Decl.)

On May 11, 2018, DHCS responded that it would not consider what portion of the \$1,500,000.00 settlement represented payment for past medical expenses until all settlements in the case had been reached (which they have) and the final lien has been issued. DHCS has thus refused to respond to Ms. DOE's reasonable efforts to obtain the DHCS' director's advance agreement as to what portion of the settlement was payment for medical expenses, making the filing of this motion necessary pursuant to W&I Code §14124.76(a).

IV.

CONCLUSION

W&I Code §14124.76 was amended in 2007 because the United States Supreme Court set forth a methodology in that can be utilized by every court in California to determine the appropriate amount of a Medi-Cal lien. The unallocated settlement amount is \$1,500,000.00 and the reasonable case value is \$6,536,516.74. Applying the methodology from *Ahlborn, supra* and the reduction for attorney's fees and litigations costs sharing pursuant to W&I Code §14124.72(d), plaintiff JANE DOE respectively requests that the Court reduce DHCS' lien pursuant to W&I §§14124.76 and 14124.72(d) from \$470,316.04 to \$59,549.02.

DATED: _____, _____

WILCOXEN CALLAHAM, LLP

By: _____
**DANIEL E. WILCOXEN
E.S. DEACON
BLAIR H. WIDDERS**

1 **WILCOXEN CALLAHAM, LLP**
2 **DANIEL E. WILCOXEN, SBN 054805**
3 **E.S. DEACON, SBN 127638**
4 **BLAIR H. WIDDERS, SBN 301741**
5 **2114 K Street**
6 **Sacramento, CA 95816**
7 **Telephone: (916) 442-2777**
8 **Facsimile: (916) 442-4118**

9 **Attorneys for Plaintiff**
10 **JANE DOE**

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **IN AND FOR THE COUNTY OF ANONYMOUS**

13 **JANE DOE,**

Case No.

14 **Plaintiff,**

15 **-vs-**

**DECLARATION OF DANIEL E. WILCOXEN
IN SUPPORT OF PLAINTIFF'S MOTION
TO REDUCE MEDI-CAL LIEN PURSUANT
TO WELFARE & INSTITUTIONS CODE
§14124.76**

16 **NATIONAL CARS COMPANY;**
17 **AUTO COMPANY, INC.;**
18 **DOE 1, SEATBELT MANUFACTURER;**
19 **DOE 2, SEATBELT COMPONENT**
20 **MANUFACTURER;**
21 **and DOES 3 through 100, inclusive,**

Date:
Time:
Dept.:

22 **Defendants.**

Complaint Filed:

Trial Date:
MSC:

23 **I, Daniel E. Wilcoxen, declare as follows:**

24 **1. I am an attorney at law licensed to practice before all the courts of the State of**
25 **California. I am the founding, managing and senior partner of the law firm of Wilcoxen Callaham,**
26 **LLP in Sacramento, California. I received my juris doctor, cum laude, from the University of the**
27 **Pacific McGeorge School of Law in 1972 and was admitted to the California State Bar in 1972.**
28 **I am a founding member and diplomat of the American Board of Professional Liability Attorneys,**

1 a member of the American Association of Justice, and have been a Certified Specialist in Civil
2 Trial Advocacy by the National Board of Trial Advocacy. I am a Board of Directors member and
3 past President of the Capital City Trial Lawyers Association (CCTLA), where I was recognized as
4 Advocate of the Year in 1996 and 2002. I am a member of the American Board of Trial Advocates
5 (ABOTA), where I serve on the National Board of Directors with an Advocate Rank, requiring
6 over 50 jury trials, and was the 2008 President of the Sacramento Valley Chapter and the
7 Sacramento Valley Chapter 2010 Trial Lawyer of the Year. I am "AV" rated by Martindale-
8 Hubbell and have been listed as a Super Lawyer of Northern California for over 10 years. I serve
9 as an arbitrator and Judge Pro Tem in Sacramento, Placer and El Dorado Superior Courts.

10 2. I have personal knowledge of the matters set forth in the declaration, and if called
11 upon to testify as to these matters, I could and would competently do so.

12 3. Attached hereto as **Exhibit 1** is the Life Care Plan Report for plaintiff JANE DOE
13 prepared by Andrew Barrett, M.D.

14 4. Attached hereto as **Exhibit 2** are the Summary Life Care Plan and Life Care Plan
15 Reports prepared by Christine Roland, M.A., M.S.

16 5. Attached hereto as **Exhibit 3** is the Summary of Economic Damages - Future Life
17 Care Costs Report prepared by Ronald Burkett, CPA.

18 6. Attached hereto as **Exhibit 4** is Summary of Economic Damages - Earnings Report
19 prepared by Ronald Burkett, CPA.

20 7. Attached hereto as **Exhibit 5** is a true and correct copy of Department of Health
21 Care Services' ("DHCS") March 1, 2018 itemization showing Medi-Cal paid \$470,316.04 in
22 accident-related charges on behalf of Ms. DOE.

23 8. Attached hereto as **Exhibit 6** is a true and correct copy of my May 2, 2018 letter
24 requesting that DHCS' \$470,316.04 lien on Ms. DOE's \$1,500,000.00 recovery be reduced to
25 \$59,549.02 but that Ms. DOE was willing to compromise and pay \$75,000.00 to satisfy DHCS'
26 lien. This proposal was never responded to thus necessitating this motion pursuant to W&I
27 14124.76(a).

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9. Attached hereto as Exhibit 6 is DHCS' May 11, 2018 response to my letter stating that DHCS would not consider my proposal until all settlements have been reached on this case and the final lien has been issued.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: _____

DANIEL E. WILCOXEN

ATTACHMENT 4

WILCOXEN CALLAHAM, LLP

ATTORNEYS AT LAW

DANIEL E. WILCOXEN †
WILLIAM C. CALLAHAM †
E. S. (TED) DEACON
MICHELLE C. JENNI †
WALTER H. LOVING III †

2114 K STREET
SACRAMENTO, CALIFORNIA 95816
TELEPHONE: (916) 442-2777
FACSIMILE: (916) 442-4118
www.wilcoxenlaw.com

DREW M. WIDDERS
MARTHA A. TAYLOR
BLAIR H. WIDDERS
CHRISTOPHER G. ROMERO

WILLIAM M. LYONS †
(OF COUNSEL)

* CERTIFIED SPECIALIST IN
CIVIL TRIAL ADVOCACY BY
THE NATIONAL BOARD OF
TRIAL ADVOCACY

‡ AMERICAN BOARD OF
PROFESSIONAL LIABILITY
ATTORNEYS

† AMERICAN BOARD OF TRIAL
ADVOCATES

September 11, 2018

Via email to: gariannw@leiboviclawgroup.com
Gariann Weisenberg
Leibovic Law Group, LLP
21540 Plummer St. Unit B
Chatsworth, CA 91311

* NOTE:
LIEN WAIVED IN ITS
ENTIRETY ON 9/13/18

Re: Our Client: DOE
Your Client: UC Davis Medical Center
Your File No.: UCDXXXXXXXX

Dear Gariann:

As you know, I have been retained by ATTORNEY to handle the DOE lien claims. I dispute your claim that UC Davis has any right to assert a lien against Mr. DOE's settlement. Mr. DOE's ERISA Plan Document and SPD clearly limit any subrogation rights against his third party settlement, to the amount paid by said Plan. As stated therein, "Network providers (Anthem Blue Cross) have agreed to not charge more than the Negotiation Fee Rate and the Covered Person (Mr. DOE) will not be responsible any amount in excess of the Negotiated Fee Rate for the Covered Expense of a Network Provider." The Health Plan goes on to state, "The Plan's subrogation and refund rights, as well as the rights assigned to it, are limited to the extent to which the Plan has made, or will make, payments for health care charges as well as any costs and fees associated with the enforcement of its rights under the Plan." Thus, Mr. DOE's ERISA Health Plan restricts the amount he is responsible to pay back as a result of a third party claim to the amount paid by said Plan. To the extent Anthem Blue Cross, through a contract that Mr. DOE and his ERISA Health Plan were not a party to, attempted to give UC Davis rights in excess of said ERISA Health Plan, said contract(s) are not binding on Mr. DOE.

Furthermore, any attempt to contract away rights given to Mr. DOE under his ERISA Health Plan would be preempted by ERISA. (see *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan* (2009) 555 U.S. 285 - ERISA Health Plans documents and forms control over waiver of benefits in a divorce settlement.) All of the Supreme Court cases that have addressed the

WILCOXEN CALLAHAM, LLP

September 11, 2018

Page 2

issue state that the ERISA Plan sets forth what can be collected from a plan participant. This is the same reason plaintiffs cannot use Civil Code 3040 to reduce ERISA Health Plan liens.

Finally, even assuming *arguendo* Mr. DOE's Health Plan was not controlling, I refer you to the case of *State Farm Mutual Automobile Insurance Co. v. Huff* (2013) 216 Cal.App.4th 1463. The hospital in that case alleged a lien for emergency medical care and relied exclusively on the evidence that all of its bills remained unpaid. The Court of Appeal held that the hospital failed to meet its burden of proving the reasonableness of its lien. It specifically referenced the *Parnell* case you frequently assert gives you the right to balance bill if contracted for with a health plan. *Huff* makes it clear that a hospital asserting a lien must introduce competent expert testimony on the reasonable value of the services provided. The Court of Appeals was explicit that the hospital's bill alone "is not an accurate measure of the value of medical services." (*Huff*, *supra*, 216 Cal.App.4th at 1472 [quoting *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1326].) Here, Mr. DOE's ERISA Health Plan has already paid UC Davis the negotiated fee rate. That is the amount we would have contended is reasonable and necessary if we went to trial.

If you wish to discuss the above, do not hesitate to contact me.

Very truly yours,
WILCOXEN CALLAHAM, LLP

DANIEL E. WILCOXEN

DEW:d

ATTACHMENT 5



[REDACTED]
Licensed In Ky & Va
9390 Bunsen Parkway
Louisville, KY 40220
P.O. Box 32080
Louisville, KY 40232-2080

Telephone (800) 419-5197
Fax (800) 873-2803

[REDACTED]
DANIEL E. WILCOXEN
WILCOXEN CALLAHAM
2114 KST.
SACRAMENTO CA 95816-

RE: Plan Member: **[REDACTED]**
Health Plan: DIGNITY HEALTH
Date of Injury: **[REDACTED]**
Event Number: **[REDACTED]**

Dear Counselor:

We received your letter dated January 31, 2019. Please let this letter confirm that we are not pursuing the above patient's Bodily Injury claim that was settled in 2016.

However, we were under the impression that there is still an open Underinsured Motorist claim. If that is not the case, please let me know. Otherwise, we will continue to pursue any recovery Mr. Isbell receives from his Underinsured Motorist claim.

As far as I know, in California, there are no regulations or statutes which specifically address a health insurer's right to be reimbursed from the member's own UM/UIM coverage. The health plan's own language should control.

Our client's language clearly requires reimbursement from any recovery that a covered person may receive. Recovery is defined as any compensation received "which arises from the act or omission of a third party, including uninsured and underinsured motorist claims."

If you are going to be handling this lien for the patient's attorney, please contact me immediately. Otherwise, we will continue to be in contact with the attorney directly.

Sincerely,

[REDACTED]
Senior Recovery Attorney
[REDACTED]

ATTACHMENT 6

WILCOXEN CALLAHAM, LLP

ATTORNEYS AT LAW

DANIEL E. WILCOXEN † ‡
WILLIAM C. CALLAHAM † ‡*
E. S. (TED) DEACON
MICHELLE C. JENNI † ‡
WALTER H. LOVING III † ‡

WILLIAM M. LYONS †
(OF COUNSEL)

‡ AMERICAN BOARD OF
PROFESSIONAL LIABILITY
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ADVOCATES

2114 K STREET
SACRAMENTO, CALIFORNIA 95816
TELEPHONE: (916) 442-2777
FACSIMILE: (916) 442-4118
www.wilcoxenlaw.com

DREW M. WIDDERS
MARTHA A. TAYLOR
BLAIR H. WIDDERS
CHRISTOPHER G. ROMERO

* CERTIFIED SPECIALIST IN
CIVIL TRIAL ADVOCACY BY
THE NATIONAL BOARD OF
TRIAL ADVOCACY

Equian On Behalf of Dignity Health
Attn: Joni Bratcher
9390 Bunsen Parkway
Louisville, KY 40220

Re: Event No.:
Plan Member:

Dear Ms. Bratcher:

I have been asked to respond to your communication of XXXXX, regarding the above plan member and event numbers, and to defend against any and all claims made by Equian on behalf of Dignity Health.

It is my belief that you do not have any rights to any sums whatsoever derived from the resolution of Mr. DOE's claim. His claim was resolved via a signed release on XXXXX. A check was issued dated XXXXX, and the funds disbursed on XXXXX.

You were notified long before the resolution of this case of the existence of the case, but you failed to notify Mr. DOE's attorneys of any claims you had, until XXXXX. You have stated no basis to support any claims for payment.

In the event you believe you have any facts, evidence of any type, and/or law supporting your contention that you are entitled to payment, please direct them to my attention immediately.

WILCOXEN CALLAHAM, LLP

October 20, 2021

Page 2

In the event you make any attempt to bring an action against, or collect from Mr. DOE, I will bring a declaratory relief action against you to establish that you have no rights and seek damages pursuant to California Civil Code §1788.30, seeking actual damages, attorney's fees, costs and punitive damages under the Fair Debt Collection Practices Act of the State of California.

**Very truly yours,
WILCOXEN CALLAHAM, LLP**

DANIEL E. WILCOXEN

DEW:d

FAMILY LAW UPDATE:
THE CHANGES IN THE PRACTICE OF
LAW AND OUR JUDICIAL SYSTEM OVER
47 YEARS IN PLACER COUNTY

SATURDAY, SEPTEMBER 10
9:45AM - 11:15AM

PRESENTED BY
HON. JOHN PAULSEN, COMMISSIONER, RET.

HON. JOHN H. PAULSEN
Commissioner, Placer County Superior Court

1970 Bachelor of Arts, Economics, University of Southern California

1974 Juris Doctor, Pepperdine University School of Law

Law Review

Admitted to practice December 1974

Certified Family Law Specialist 1980 to present

Family Law Executive Committee

Editor Family Law News – Editor in Chief

American Bar Association – Family Law Publication Development Board

Vice Chairperson

Judicial Council Family Law Advisory Committee

Private practice from March 1, 1975 to April 1, 2016

Superior Court Commissioner (Family Law) –

Superior Court of California - County of Placer – April 1, 2016 to present

The changes in the practice of law and our Judicial system over 47 years in Placer County.

A conversation with Comm. John H. Paulsen, Retired.

The early days in transition from fault to no-fault divorce (dissolution).

Hangovers and holdouts from the early days of transition.

The husband had sole management and control of the community estate.

Husband had no duty of full disclosure, held to a good faith standard. (See, *Boeseke v. Boeseke* (1974) 10 Cal.3d 844).

Spousal support replaced “alimony” did the legislative changes to the then Civil Code mean that post-judgment support should be short in duration? (See, *In re Marriage of Brantner* (1977) 67 Cal.App.3d 416 . Finally settled by the Supreme Court in *In re Marriage of Morrison* (1978) 20 Cal.3d 437.

Did pre-1972 child support orders still require payment for “children” who are now adults at 18?

Oral transmutation of property was still enforceable. The classic “pillow talk”.

Because the husband had sole management and control of the community estate, if he used community property to improve wife’s separate property it was presumed to be a gift; if he used community property to improve his separate property it would give rise to either reimbursement to the community or the community acquired a pro-tanto interest.

Dunn v. Mullen (1931) 211 Cal. 593.

The history behind the Section 2581 presumption that property held in joint title by a husband and wife was presumed to be community property for the purposes of death or dissolution. Civil Code Section 164 was passed by the legislature in order to address a fairly common litigation tactic under fault-based divorce. Because the Family Law Court did not have jurisdiction over a parties’ separate property, a principal residence held by husband and wife as joint tenants under real property rules required the “four identities” if it was “true joint tenancy” then each spouse owned the family home (typically) as their respective separate property; the only remedy was partition.

Under fault, if a court found the spouse to be at “fault” due to either “adultery” or “extreme cruelty” an unequal division of the community estate could be ordered. Hence the litigation might turn upon whether or not it was a true and intended joint tenancy and

if so, was not subject to disposition in the divorce. To avoid this outcome, the “guilty” spouse might offer to stipulate to the fault basis provided their spouse stipulated to an equal division

New concepts and changing societal norms required adjustments in law. With the landmark *Marvin* holding setting aside previous public policy that non-marital relationships based upon express or implied in fact agreements would be enforceable even if the relationship involved sex as long as it was not the sole-primary consideration in the agreement. *Marvin v. Marvin I* (1976) 18 Cal.3d 660; *Marvin v. Marvin II* (1981) 122 Cal.App.3d 871.

In *Marriage of Brown* (1976) 15 Cal. 3d 939 set aside the 1946 holding in *French v. French* 17 Cal.2d 775; non-vested pensions were now subject to characterization, valuation and division. Making us to become familiar with the language of the actuary.

In re Marriage of Sullivan (1984) 37 Cal.3d 762, sent a “shock wave” through the medical community (and other highly paid professionals whose spouse worked while they went to school and received medical, legal or other similar degrees). To be more accurate, the Court of Appeal decision sent the shock, the Supreme Court granted certiorari and sat on the decision while the legislature step in with then Civil Code Section 4800.3

In Juvenile Court, after *In re Galt*, out of control minors (Welfare & Institutions Code Section 601) could no longer be incarcerated unless they had committed a crime; in which case it was charged under Section 602.

Changes in the Legal Community and Justice System

Did everyone smoke? Well, not everyone. But..

Mandatory settlement conferences in Dept. 2 with Judge Cameron was a group effort. Judge Cameron was an avid chain smoker who would ask the gathered lawyers to weigh in on any negotiation.

So, one story where I could have input to both sides and the judge hearing a matter after the decision in *Marriage of Brown* (1976).

The arrival of women in the law: By 1971 fully 25% of my first year class were female. Fast forward to the 1990’s and 2000’s women in some law schools out number men.

This is one of the most important changes in the legal community. In 1975 all law and motion hearings were heard at 10:00 am in what was then Dept. 1, with Judge Propp. There was one female identified lawyer usually present, Laura Coffield. She always came in with multiple files and essentially was nearly the lone lawyer handling several Orders to Show Cause.

The increase and presence of women on the bench began in earnest. In 1975 there was one female judge in the tri-county region of Placer, Nevada and El Dorado counties; Justice Court Judge Karen Gunderson in Nevada County. Soon to be followed by Comm. Mary Muse in El Dorado County.

Technology and the law:

In 1975 the IBM correcting selectric was the main work-horse. Soon followed by mag-card selectrics.

The first IBM word processor used the CPM operating system and was the size of a secretarial desk with the "L". The floppy disks were the size of an 33 1/3 LP record.

The advent and rise of the personal computer. This technology would soon drive the pace of litigation. It was and is a contributing factor in the volume and length of pleadings. Some of the consequences has been beneficial others not so much.

Child Custody and the normalization of non-marital relationships.

The Uniform Parentage Act and the fact that no child is "illegitimate".

1981 and the advent of custody mediation.

Assisted reproduction and surrogacy.

The possibility of having more than two "legal parents".

With the increase in societal mobility, the advent of the Uniform Child Custody Jurisdiction Act (UCCJA); followed some decades later by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).

Then the Hague Convention to address international custody jurisdiction and enforcement issues.

The explosion of family law at the Appellate and Supreme Court level.

Is there one principal change that has been the most significant over the last four decades? Yes, and that change is.....

ESTATE PLANNING TAX STRATEGIES
FOR IRA-TCUT, A TOOL EVERY ESTATE
PLANNING ATTORNEY SHOULD BE CONSIDERING

SATURDAY, SEPTEMBER 10

9:45AM - 11:15AM

PRESENTED BY

EDWARD COTNEY

OLYMPUS TAX, BUSINESS AND INSURANCE SOLUTIONS, INC.

Edward W. Cotney



Author

Tax Secrets Made Simple

Founder / CEO

Olympus Tax, Business and Insurance Solutions, Inc.

Involvement

Business Enterprise Institute
National Center for
Employee Ownership (NCEO)

Contact

Address:

1799 River Run Drive
Marysville, CA 95901

Phone:

US: 530-913-0562

Email:

Ed@OlympusTax.com

Web Sites:

www.OlympusTax.com
www.TaxSmartIRA.com

Summary

I help business owners and families pay less tax and enjoy more life - guaranteed. I will show you how to avoid overpayment of income tax, and never pay capital gains tax or estate tax. My book introduces a few of my proven tax smart tools for individuals and business owners to increase your wealth!

Skills

- National Tax Strategist
- Popular speaker
- Client focused
- Accomplished instructor
- Collaborator
- Trout fisherman

Experience

Olympus Tax	2016-present
Cunningham Legal	2014-2016
The Shafer Law Group	2009-2014
Wordell Law Group	2006-2009
Steve Orsillo Enterprises	2001-2006
US Air Force	1978-1998

Education

Degrees in Aviation Management and Physiology
Attended: Mississippi University for Women, East Mississippi Community College, Community College of the Air Force, Sierra College, Yuba College, US Air Force Leadership and Management Academy

Certifications / Licenses

CExP Certified Exit Planner
CPhD Certified Philanthropic Developer
National Philanthropic Training Institute
FWC Family Wealth Counselors of America
CA Life Insurance license #0K67189

Accomplishments

2021 Co-Founded FIN CW, LLC - Analytical Tax Software
2019 Began National Speaking Circuit
2018 Published: Tax Secrets Made Simple
2000 Graduated Professional Mentoring Program
1998 US Air Force Retired
1988 Pilot Training
1986 US Army Paratrooper
1977 Alabama Boys State Representative – American Legion



Estate Planning Tax Strategies for the IRA using a TCRUT

SEPTEMBER 10, 2022

EDWARD W. COTNEY



Edward W. Cotney

Certified Exit Planner
Family Wealth Counselor

www.OlympusTax.com
www.TaxSmartIRA.com



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Pandemics, Economy, SECURE Act I, CARES Act, SECURE Act II, Son of SECURE Act, IRS Staffing, Legislative Confusion...

***Wise Counsel is Needed Now
More Than Ever.***

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The Two Greatest Fears

#1

Will I Run Out of Money Before I Die?

©2022 Olympus Tax, Business and Insurance Solutions, Inc.

The Two Greatest Fears

#2

Unintended Beneficiaries?

Blended Families

Their Divorces

Their Bankruptcies

Taxes – Income and Estate

©2022 Olympus Tax, Business and Insurance Solutions, Inc.

Ticking Tax Time Bombs and Estate Planning

CONSUMER GOALS

- Retire in Style
- Control (While Alive and After Death)
- Flexibility
- Remove Stock Market Risk
- Remove Tax Risk

Wealth Transfer

- To My Heirs and Charity
- Tax Free
- Asset Protected

ADVISOR ROLES

- Assets Under Management (AUM)
- Tax – Defer, Defer, Defer
- Pay the Tax
- Annuities
- Will / Trust / POA / AHCD (Review DB)
- Probate / Trust Admin
- Life Insurance

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Types of Money

NON-QUALIFIED ASSETS

After Tax Funding

- Cash
- ROTH IRA
- Land
- Businesses

QUALIFIED ASSETS

Pre-Tax Funding

- Traditional IRA
- 401(k), 403(b), 457(b), TSP
- SEP
- ROTH 401(k), etc.

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Clark vs Rameker Supreme Court Decision No. 13-299

2001, Mom (Mrs. Ruth Heffron) died with an IRA \$450,000, Daughter, Heidi Heffron-Clark elected Stretch Option

2010, Heidi filed Chapter 7 (wins), Creditor Appealed, Heidi Appeals to Supreme Court

2014, Unanimous Supreme Court Decision awards **Creditor** (Rameker)

[2015, IRA Custodian issues 1099R to Heidi \(How will Heidi Pay this Tax?\)](#)

This creates a HUGE Asset Protection and Tax Planning opportunity.

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Who Gets The Estate?

\$59T will transfer from 94M Estates between 2007 and 2061

\$5.6T will go to federal estate taxes

50-60% of Americans do not have a Will

56% of Americans between the ages of 50 -64 have a Will

68% of Americans over 65 have a Will

74% Believe estate planning is a confusing topic

64% of American adults have not discussed this topic with their financial planner

Source - <https://www.legalzoom.com/articles/estateplanning-statistics>

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US Retirement Asset Amounts

\$26.1T on 28 June 2017

\$37.4T on 30 September 2021

Source - <https://fiscalpolicy.com/html/us-retirement-assets-4p-04gty-0-0/>

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Retirement Accounts (2018)

Peter Thiel = \$5B ROTH IRA as of 2019

28,000 People have \$5M+ in both Traditional and ROTH IRAs

3,000 People have ROTH IRA in excess of \$5M

156 Americans hold \$15B in ROTH accounts

\$39,108 Average ROTH balance

Source - <https://www.propublica.org/article/the-number-of-people-with-3-or-more-5-million-or-more-ira-4total-congress-ways>

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Ed Slott, CPA

"It's not my kids I worry about, it's the ones they marry."

Your hard-earned money is one divorce away from an in-law's inheritance."



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Divorce Statistics

Age 30 is the Average Age for the First Divorce
60% of all divorces involved individuals aged 25 -39
66% of Divorce filings were initiated by females
Average length of a marriage which ends in divorce is 8 years
January is considered Divorce Month (Magic week is Jan 12-16)
If you live in a Red State, you are 27% more likely to get divorced than a Blue State
Couples who argue about finances weekly are 30% more likely to divorce.

Source - <https://www.wflawyers.com/divorcestatisticsandfacts/>

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Divorce Statistics cont.

Marriage Divorce rate per 1,000		Duration of Marriages	
First Marriage	= 41%	First Marriage	
Second Marriage	= 60%	• Males	= 7.3 years
Third Marriage	= 73%	• Females	= 7.9 years
* The US ranks 6 th highest Divorce Rate in the World		Second Marriage	
		• Males	= 7.3 years
		• Females	= 6.8 years

Average wait time to Remarry after Divorce is 3 years

Source - <https://www.wflawyers.com/divorce-statistics-and-facts/>

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Most Common Reasons for Divorce

43% Lack of Commitment
28% Infidelity
22% Money
5.8% Domestic Violence
1.2% Communication Issues

Source - <https://www.judgealawyers.com/>

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Divorce Rate by Profession

HIGHEST		LOWEST	
Gaming / Casino Managers	52.9%	Actuaries	17%
Bartenders	52.7%	Physical Scientist	18.9%
Flight Attendants	50.3%	Clergy	19.8%
Telemarketers	49.2%	Software developers	20.8%
Textile knitting operators	48.9%	Physicians and Surgeons	21.8%

US Navy Seals 90%, One Spouse in Prison 1+ year = (M) 80% (F) 90%+

Source - <https://www.judgealawyers.com/>

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Retirement Statistics

- 75% of Americans have a Retirement Plan
- 51% of Americans retired between ages 61 and 65
- 56% of Workers retired sooner than they had planned
- 91% of Retirees state they are **generally happy**
- 13.8M Seniors live alone (almost 1/3) (10% live with their children)
- 68% Fear they will outlive their retirement funds**
- 38% of Retirees have moved to a new home since retiring
- 46% of Homeowners aged 65-79 have mortgage debt

Source - <https://huddlehelp.org/highretirement-statistics/>



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Causes of Bankruptcy in America

- Medical Expenses
- Layoffs or Resignations
- Unskilled use of Credit
- Separation or Divorce
- Floods, Earthquakes, Tornadoes
- Unaffordable Mortgages
- Living Beyond Means

Source - www.Statista.com



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Personal Bankruptcy Rate per 100K

Alabama	306.37
Nevada	246.7
Florida	151.67
Oregon	127.2
California	112.29
Texas	65.17
Indiana	22.98

Source - www.Statista.com



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US Bankruptcy Statistics

- 2009 Great Recession – Over 60,000 Business Filed BK
- Insolvencies are expected to increase by 26% in 2021 on a global level
- 2020 Chapter 7 BK Filings were 378,953
- CA – Highest Single Month Chapter 7 was 36,186
- Approximately 530,000 Americans file BK annually due to High Medical Expenses (66.5%)

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Our Confiscatory Tax System

What You Can Keep → Personal Wealth

What You Can't Keep → Government Donation

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Assets Subject to Double Tax Trap

Understanding Estate Tax Form 706

- Lost Art
- Planning Opportunities
 - Section 691(c) and 2053

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Qualified Assets (IRD)

Income in Respect to a Decedent

- Traditional IRA
- 401(k)
- Certain Annuities
- Certain Bonds
- Pensions
- Etc.:
- Ordinary Income to Parents or Their Heirs

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Section 691(c) DRD

The Heirs may apply 691(c) to claim a Deduction to their Ordinary Income due to the Estate Taxes Taken as part of the 706 settlement!

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Tax Mistakes Upon Death

Tax Free Assets to Heirs	Taxable Assets to Charity
House	IRA
Cash	401K
Land	
Stocks	
Cars	
Life Insurance	

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Most Common Mistakes While Alive

- Annual Tax Planning Overpayment
- Estate Tax Planning Mistakes
- Failure to Take Required Minimum Distributions (RMD) when Required (**50% Penalty**)
- Failure to Properly Plan for IRA / 401(k) upon Death
 - Special Needs Beneficiaries
 - Asset Protection for Heirs
- Failure to use IRA funds to Pay for Tax Deductible Medical Expenses

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Old Rules / New Rules for RMD

- Setting Every Community Up for Retirement Enhancement (**SECURE ACT 2020**)
- Secure Act of 2020 Changed RMD to age 72
- Secure Act of 2020 Preserved Qualified Charitable Distribution (70.5 at \$100,000.00)
- Inherited IRA Rule Changed Time Frame for Heirs to Take Distribution
- Added New Beneficiary Class

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Qualified Charitable Distribution (QCD)

Age 70.5
 Maximum \$100,000.00 per donor per year (Timing)

Many Donors Fail to Understand the Tax Efficiency of QCD verse Cash Gifts

IRS Standard Deduction verse Itemized Deductions on Schedule A for 2022

Married	\$25,900.00
Single	\$12,950.00

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Does My Estate Plan Govern My IRA or 401(k)?

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-  IRA See Through Provision?
-  Beneficiary Forms? Spouse then Kids?
-  Will Estate Taxes Eat Up Your IRA?
-  Over 95% of Heirs Pull the IRA / 401(k) Money Out in Two Years!

IRS SECURE Act – Big Changes

- 2019 Use Old Rules
- 2020 SECURE Act I and II
- Eliminated the 70.5 age limit for making traditional IRA Contributions
 - Qualified Charitable Distributions (QCD) remains 70.5
 - Raises RMD age to 72
 - Allows \$5,000.00 penalty free withdrawal for births or adoptions
 - Allows taxable non-tuition fellowship and stipend payments to be treated as comp – IRA or ROTH
 - Provides employer liability protections for annuities in plans
 - Eliminates the STRETCH IRA – Replaced with 10 Rule for Most Beneficiaries
 - New Class of Beneficiary for those who inherit after 2019 - **Eligible Designated Beneficiary**

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SECURE Act for Death After 2019

SEE GOLD HAND OUT

Required Beginning Date (RBD) a.k.a. Really Big Deal

3 Types of Beneficiaries

1. Non-Designated Beneficiary (NDB)
2. Non-Eligible Designated Beneficiary (NEDB)
3. Eligible Designated Beneficiary (EDB) NEW



SECURE Act
 Enhancement Plus Proposed To Amend 2019 RBD

10 Year Rule
 For all designated beneficiaries (DB) who are not eligible designated beneficiaries (EDB), the 10-year rule will apply. This means that the entire IRA or 401(k) must be distributed within 10 years of the owner's death.

Eligible Designated Beneficiary (EDB)
 A new class of beneficiary, the EDB, is created. EDBs are eligible for the 10-year rule. EDBs include:

- The surviving spouse of the decedent.
- A child of the decedent.
- A grandchild of the decedent.
- A descendant of the decedent.
- A trust for the benefit of the decedent's surviving spouse.
- A trust for the benefit of the decedent's child or grandchild.
- A trust for the benefit of the decedent's descendant.

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2021 RMD Distribution Rule?

CARES Act Suspended 2020 RMD

REG – 105954-10, Establishes 2022 RMD

For 2021 RMD the IRS states...

"Taxpayers can use reasonable, good faith interpretation of the SECURE Act"

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Reasons to Leave IRA to a Trust

Tax vs Control

A Minor
Disabled
Incompetent
Unsophisticated / Vulnerable
Avoid State Estate Tax
Creditor Protection
Divorce Protection
Charitable Remainder Trust



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Reasons NOT to Leave IRA to Trust

Simplicity

Tax Reasons – There is NO benefit that can be gained with a Trust

Avoid Trust Taxation

- 2022 Trust Tax Rates
 - 10% \$0-\$2,750
 - 23% \$2,751-\$9,850
 - 35% \$9,851-\$13,450
 - 37% Over \$13,450
- Married Filing Joint 37% = \$647,850
NIIT = 3.8%

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Types of Trust

Look Through or See-Through Trust (Regulation Section 1.401(a)(9) -4, A-5:

1. Valid under State Law
2. Is or will become Irrevocable
3. Beneficiaries are Identifiable
4. Trust provided to Plan Administrator NLT 31 Oct of the Year following IRA Owner Death
5. All Trust Beneficiaries MUST be Individuals

Otherwise, the Trust does not qualify as a See-Through Trust – Thus No Designated Bene

If the estate is the beneficiary, then the IRA does Not have a designated beneficiary

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Conduit Trust

Conduit passes the RMDs from the IRA to the trust beneficiary
Trust Beneficiary pays tax at their tax rate
If the IRA is a ROTH, trust tax rates are not an issue (5 -year rule for ROTH)
Must meet four trust requirement as a [look through Trust](#)

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Discretionary or Accumulation Trust

Does NOT have to pay out RMDs
Discretion to Pay Out some, all or None
Funds NOT paid out are accumulated and subject to Trust Tax Rates
For example, funds held in Trust until beneficiary reaches age 30
Must meet four trust requirement as a [look through Trust](#)
Class of Beneficiaries or addition of another member of a class of beneficiaries would not cause the trust to fail the identifiability requirement
ALWAYS – if a trust is named as an IRA Beneficiary, verify it meets “see through” rules

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IRA Trust Rulings Allow Estate to be removed as Trust Beneficiary

PLR:
2004432027
200432028
200432029

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IRS Denies Spousal Rollover When Trust is Beneficiary

H died leaving his IRA in Trust to Support W
Surviving Spouse received permission from State Court to distribute the entire IRA to the Trust, then distribute the trust funds to herself, then Spousal Rollover to fund her IRA
The Trust had Ascertainable Standards, HEMS, and Spendthrift Provisions
The IRS asserted the termination of the Trust in favor of the Spouse would violate the Spendthrift Provisions of the Trust that was Barred by State Law

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Reactive Tax Planning vs Proactive Tax Planning

Reactive Tax Advice



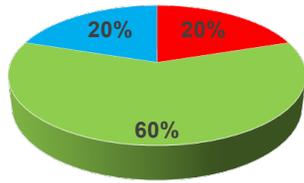
Rent / Expense
Interest
Taxes – Trade or Biz
Insurance – Trade or Biz

Proactive Tax Advice



Transferrable Tax Credits
Charitable Retirement Planning (Ch 11)
Insurance Tax Planning

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Charitable Receptivity

■ No Charity ■ Receptive ■ Pure Intent

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Paradigm Shift



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Example Client AGI = \$1,000,000.00

What is the Maximum Amount of Money or Assets a Person Can Donate to

Charity Each Year? **No Limit**

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Maximum Charitable AGI Deduction Rules

Schedule A, Line 11

CASH = 60%

Schedule A, Line 12

APPRECIATED ASSETS = 30%



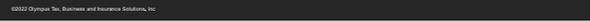
Schedule A, Line 14 (\$1M AGI)

\$50,000 Cash

Buys @ 50% Tax Rate

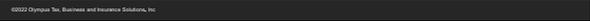
\$25,000 of Tax Savings

(AGI \$950,000.00)



	9	Investment interest. Attach Form 4952 if required. See instructions.	9
	10	Add lines 8e and 9	10
Gifts to Charity	11	Gifts by cash or check. If you made any gift of \$250 or more, see instructions. You must attach Form 9259 if over \$500.	11
Casualty and Theft Losses	12	Other than by cash or check. If you made any gift of \$250 or more, see instructions. You must attach Form 9259 if over \$500.	12
	13	Carryover from prior year	13
	14	Add lines 11 through 13	14
	15	Casualty and theft loss(es) from a federally declared disaster (other than net qualified disaster losses). Attach Form 4694 and enter the amount from line 18 of that form. See instructions.	15
Other Itemized Deductions	16	Other—from list in instructions. List type and amount	16
Total Itemized Deductions	17	Add the amounts in the far right column for lines 4 through 16. Also, enter this amount on Form 1040 or 1040-SR, line 12a	17
Deductions	18	If you elect to itemize deductions even though they are less than your standard deduction, check this box	18

For Paperwork Reduction Act Notice, see the Instructions for Forms 1040 and 1040-SR. Cat. No. 17143C Schedule A Form 1040 2021



The 90 / 90 / 90 Rule



90% OF PEOPLE



90 YEARS OF AGE



90% OF IRA

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Tim and Susan Miller Estate Planning (Case Study)



TRANSFER WEALTH
TO THEIR HEIRS



FREE FROM
TAX



FREE FROM
LAWSUITS



FREE FROM
PREDATORS

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Susan Miller age 80

(Husband Tim Died 2017)



4 Children



Home \$400,000.00



Cash / Stock
\$400,000.00



IRA \$800,000.00

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The Children



Mike
Successful Physician
Net worth \$25M
Good Marriage



Mary
Bad Marriage
Husband looking for new Truck and
Bass Boat upon Death of month-law



Ed
Rocky 3rd Marriage
Good with Money



Dan
Cannot manage money
Currently Divorced
Looking for work

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Tax Issues Upon the Death of Susan Miller



HOUSE
STEP UP IN BASIS



CASH / STOCK
STEP UP IN BASIS



IRA / 401K – ORDINARY
INCOME TAX

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2020 Inherited IRA Distribution Rule

ALL AT ONCE

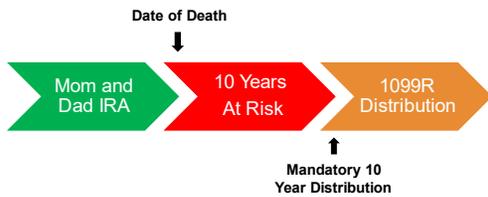
Proceeds Distributed All At Once
On Top of Earned Income
• Higher Tax Bracket

10 YEAR RULE

RMD for NEDB Beneficiaries
Distribute All NLT 10 Years
• Distributed on Top of Earned Income
• At Unknown Future Income Tax Rate!
Who will be Responsible to **Make Certain**
the account is Fully Distributed at 10
Years?
Insufficient Distribution Penalty = 50%
5 Classes of EDBs

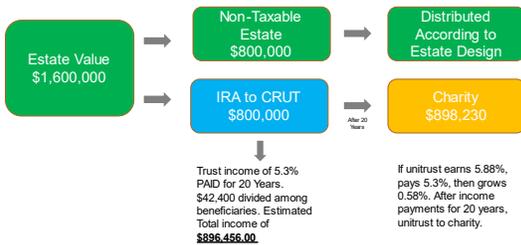
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Understanding the Risk



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\$800,000 IRA to CRUT with 20 Year Term Payout



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TCRUT Payout Tax Treatment

Provided that Trust is a charitable remainder unitrust within the meaning of section 664(d)(2), the amounts from the qualified retirement plan that are IRD will be "first tier" income, described in section 664(b)(1).

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IRA to CRUT Benefits

-  The CRUT is Irrevocable and Provides a Degree of **ASSET PROTECTION**
-  The CRUT is Outside of Everyone's Taxable Estate
-  The CRUT will payout up to 20 years with potentially less income tax exposure
-  The **CHARITY** gets a **SUBSTANTIAL** gift
-  The **IRS** gets **LESS** (Potential Income Tax Savings of +30%)
-  Susan has peace of mind that her children will remember her and Tim with each distribution
-  Susan is pleased their IRA will not be subject to their children's creditors and her children could pay less income tax

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Better Creditor and Predator Protected



Mike
IRA Inheritance
Protected from Lawsuits



Mary
IRA Inheritance
Protected from Husband



Ed
IRA Inheritance Protected from
Divorce #3 (She filed today)



Dan
IRA Inheritance Protected from
Himself!

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For the Rest of Mrs. Miller's Life...

- Maintains **Full Control and Use** of the IRA / 401K
- Can Change the IRA Beneficiary Form Everyday
- Can Sleep Comfortably Knowing...
 - Her Kids Have a Safety Net
 - Her Church Will Get a Whopper Gift
 - Tim Would be Proud of Her



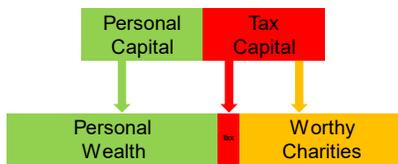
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\$1M Inherited IRA - 2nd Death Comparison

Outright Distribution	10 Year Rule	IRA to CRUT
\$1,000,000.00	\$1,000,000.00	\$1,000,000.00
\$450,000.00 Tax	Judgement	\$1,100,000.00 Paid Out
\$550,000.00 Wealth Gain	\$1,000,000.00 Creditor	\$250,000.00 Tax
	\$450,000.00 Tax	\$850,000.00+ Wealth Gain
	\$1,450,000.00 Wealth Loss	\$850,000.00+ Charity

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Maximum Wealth Control



All Under the Control of the Family

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Issues for Charitable Trust Oversight

- Registration with State Authorities may be required
- Annual Tax Return (Fed/State)
- Administration and Reporting
- Prudent Investors Act
- Self-Dealing
- Terminating a Charitable Trust (15400)

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Best Practices - TCRUT

- Loop in Financial Planner – Introduction opportunity
- Explore allocation amounts or percentages
- Update Designated Beneficiary Forms
- Send Copy of CRUT or portion of RLT Springing TCRUT to Custodian
 - File receipt and copy to FP / CPA
- Use IRA / 401K as Client Awareness / Update Opportunity
- Use this as one of your arrows in the quiver to attract new referral agents

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*Pay Less Tax,
Enjoy More Life.*

Edward W. Cotney

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Insurance Solutions, Inc.

www.OlympusTax.com
www.TaxSmartIRA.com

Ed@OlympusTax.com
530-913-0562



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INVESTIGATIVE GENETIC GENEALOGY
AND SOLVING VIOLENT CRIME

SATURDAY, SEPTEMBER 10

12:00PM - 1:00PM

PRESENTED BY

ANNE MARIE SCHUBERT, ESQ.

SACRAMENTO COUNTY DISTRICT ATTORNEY

Anne Marie Schubert
Sacramento County District Attorney

Anne Marie Schubert is a career prosecutor with 31 years of law enforcement experience. As a Sacramento County prosecutor, she spent most of her career prosecuting some of the area's most notorious and dangerous criminals – murderers, rapists and child molesters.

One of Anne Marie's passions is the pursuit of justice through DNA evidence and cold case prosecution. In 2002, she formed the Cold Case Prosecution Unit, and served as its first prosecutor. Today, she is nationally recognized in her knowledge of forensic DNA. The Sacramento DA's office is proud to train and assist other law enforcement agencies across the country in the use of DNA and Investigative Genetic Genealogy (IGG) to solve violent crime.

Anne Marie has also created innovative community programs focused on helping children by combatting truancy, educating our youth, and honoring citizens who have helped to serve justice with the development of the Annual Outstanding Citizen Awards Ceremony. During her career as a prosecutor, Anne Marie has been recognized by her peers with the Prosecutor of the Year Award and the POST ICI Instructor of the Year Award.

Anne Marie was elected Sacramento County's District Attorney in 2014. Since taking office in 2015, she has been committed to working both in the courtroom and in the community to provide the highest level of public safety through prosecution, prevention and innovation.

Investigative Genetic Genealogy
Anne Marie Schubert

Outline

- I. Unit I Overview of the Golden State Killer Case Investigation
Learning Goal - To acquaint the student with underlying facts of the investigation

- II. Unit II Overview of Investigative Genetic Genealogy
Learning Goal - The student will obtain a basic understanding of the steps involved in IGG

- III. Unit III Overview of Legal and Policy Implications of Investigative Genetic Genealogy
Learning Goal - The student will be made aware of the constitutional and legal rules that are implicated in the use of IGG. The student will also be given an overview of privacy concerns raised by IGG.

- IV. Unit IV Overview of Best Practice Model of Investigative Genetic Genealogy
Learning Goal - The student will be instructed on the best practice model for the use of Investigative Genetic Genealogy.

**E-DISCOVERY 101 -
INTRODUCTION TO THE ELECTRONIC DISCOVERY
REFERENCE MODEL**

SATURDAY, SEPTEMBER 10

1:15PM - 2:45PM

**PRESENTED BY
JENNIFER RESNICKE
HERRIG & VOGT LLP**

JENNIFER RESNICKE

EDISCOVERY SPECIALIST



4210 Douglas Blvd. Ste. 100 

j.resnicke@herrigvogt.com 

linkedin.com/in/jresnicke 

916-960-1000 

PROFILE

I am a certified eDiscovery Specialist at a boutique civil-litigation firm in Granite Bay. Most of my time is spent supporting our complex construction litigation matters, but our firm also represents clients in family law, estate & probate, business, real estate, and general civil litigation.

EXPERIENCE

2012- Present **Herrig & Vogt, LLP**
eDiscovery Specialist & Litigation Support

- Data collection, processing, production and presentation of evidence
- Provide eDiscovery project management
- Create and maintain searchable databases for document review and organization
- Management of large & complex data sets
- Litigation hold implementation & litigation readiness
- Data culling, review, & identification of pertinent documents for production
- Apply principles of the EDRM (Electronic Discovery Reference Model) across the discovery workflow

CERTIFICATION

Association of Certified eDiscovery Specialists

2016-Present | CEDS

Candidates who earn the Certified E-Discovery Specialist (CEDS) credential demonstrate the ability to evaluate complex scenarios related to document requests and productions. A CEDS is able to communicate across the entire EDRM. They are able to articulate cost, risk and time alternatives to a cross functional team and support legal teams to meet their technical competence ethical mandate.

EDUCATION

California State University, Chico

2007-2011 | Bachelor's Degree
News Editorial Journalism

SKILLS

Data Culling | Data Processing |
Data Production | Data Collection |
Information Management | Litigation
Readiness | Organization | EDRM |
Communication | Data Control |
Project Management | Database
Creation & Maintenance | Document
Review | Exhibit Preparation

SOFTWARE

- Microsoft Office Suite, 365, & Microsoft Azure Purview
- Google Workspace & Takeout
- Centerbase & NetDocuments
- Adobe Acrobat Pro & Reader
- Cloud Storage: Dropbox, One Drive, Google Drive, Box, iCloud
- Video Call: Zoom, Teams, Webex

RECOGNITION

CULLER AWARD NOMINEE

2020 - Logikcull

Culler Award nominee for
eDiscovery Innovation

eDiscovery 101

Intro to EDRM & Practical eDiscovery – Jennifer Resnicke

Introduction

Jennifer Resnicke, CEDS - eDiscovery Specialist & Litigation Support at Herrig & Vogt, LLP

- CEDS certified since 2016
- Culler Award Nominee for eDiscovery Innovation, Logikcull (2020)
- Recovering journalist
- Avid Baker
- Sucker for a good meme

j.resnicke@herrigvogt.com

916-960-1000

LinkedIn/in/jresnicke

What is eDiscovery?

Electronic Discovery is the procedure by which parties involved in a dispute collect, review and exchange information in electronic format for the purpose of using it as evidence.

In early days a lot of the eDiscovery process was outsourced to vendors & service providers. More recently folks have been seeing the benefits of bringing this process in-house – partially as a cost-control measure, and partially to gain more control, transparency, predictability, and defensibility to the process.

Why do I care about eDiscovery?

State Bar of California Standing Committee on Professional Responsibility and Conduct issued [Formal Opinion No. 2015-193](#) regarding an attorney's ethical duties in the handling of discovery and electronically stored information ("ESI").

Attorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, including the discovery of ESI.

On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a matter, and the nature of the ESI. Competency may require even a highly experienced attorney to seek assistance in some litigation matters involving ESI.

If an attorney is not familiar with eDiscovery technology, what should he or she do?

- Decline representation

- Associate with or consult competent counsel or technical experts who are familiar with the technology
- If latter, attorney is under ethical responsibility to oversee the process

TL;DR because you HAVE to.

If you don't learn this stuff, then you must

- decline representation
- Associate with or consult competent counsel or technical experts
 - BUT even so the attorney must oversee the process

Definitions

- Custodian: The person who created or has control over an electronic file
- DeDupe/DeNist: Removing duplicative or unnecessary system files
- Forensic Image: A method of capturing & storing data without altering it
- Load File: Format to import data into a database & link specific files
- Metadata: Data about data – author, recipient, creation date, modified date, etc.
- Native File: Original format – not converted to a digital image (PDF, JPG, TIFF)
- ESI: Electronically Stored Information

Electronically Stored Information

Electronic information is commonly referred to as ESI (electronically stored information), and refers to everything from email, word documents, photos, and excel spreadsheets to cell phone data, social media, instant and ephemeral messaging, call logs, voicemails, GPS data etc.

The amount of ESI has grown exponentially in recent years with the expansion of the “Internet of Things” (IOT devices) such as Alexa, Siri, Google Assistant, video doorbells, smart TVs, speakers, washing machines, lightbulbs, watches, even diapers. For every connected “thing” there is associated (and potentially discoverable) data.

Know the rules

Rule 26(f)

This is a meet and confer that should happen as early as practicable and is where the parties agree on some discovery basics – like the form of production

i.e. – Production in Load File Format with specific metadata fields etc.

These agreements are often memorialized in a Case Management Order

Rule 26(b)(1)

Amendments made in 2016 brought the idea of proportionality back to the forefront of the discussions about the scope of discovery.

Proportionality = limit on scope of discovery

Even relevant & nonprivileged info may not be discoverable if effort to produce is not proportional to needs of the case.

Rule 37(e)

Governs the spoliation of electronic evidence

Organizations have a duty to “undertake reasonable actions” to preserve information relevant to the case

OK, I’m convinced. Where do I start? The EDRM

Start with the EDRM – Electronic Discovery Reference Model. It’s a visual framework for the eDiscovery process and it’s stages.

Keep in mind that this isn’t meant to be used as a workflow, but as a sort of framework of the majority of the eDiscovery Process.

Step 0 – Information Governance

This step really belongs to your client. Information governance refers to the way you create, use, retain, store, and dispose of data. For a company this includes things like: how long they keep emails or project/client files before deleting/shredding them. For a person this may look like how often they replace their cell phone without backing up the data, or whether they have an auto-delete preference to text messages that are past a certain age.

Understanding what kind of information governance is in place is crucial to understanding what data even exists.

Step 1 – Identification

As soon as litigation is reasonably foreseeable, parties have a legal duty to preserve relevant ESI. BUT before you can preserve it, you have to identify it.

At this point you’re thinking about literally ANYTHING that could potentially be relevant. You’re drawing the map of where data resides. Does your client have 2 cell phones? Do they have multiple email addresses? What computers did they use? How did they save documents/data? Do they use cloud storage? Flash drives? Hard Copies? All of the above?

TL;DR: WHO has the data, WHERE are they keeping it, WHEN – how far back do we go, HOW is the data stored, etc.

Hand in hand here is Early Case Assessment (ECA). This is where you hone the elevator pitch of your case. The early data you gather to estimate the key facts, risk, and case strategy. (More on that later)

Step 2 - Preservation

The duty to preserve ESI isn’t explicitly defined in the FRCP, but rather born out of case law – which means there are some grey areas here (particularly *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003)). There are a few areas that are consistent though:

Trigger

The duty to preserve begins when you know about, or can reasonably anticipate, litigation. That means the duty to preserve can be triggered BEFORE a lawsuit is filed or a preservation letter has been sent.

Scope

The scope of preservation can vary greatly on a case-by-case basis, but lauded eDiscovery think tank The Sedona Conference cites these factors in determining the scope of preservation: “the nature of the issues raised in the matter, the accessibility of the information, and the relative burdens and costs of the preservation effort.”

Since the adoption of the 2016 Amendments to the FRCP (particularly FRCP 26(b)(1) defining the scope of discovery permitted under the rules), proportionality came back to the forefront of the discussion of the scope of discovery.

Rule 26(b) outlines six factors in determining whether propounded discovery is “proportional to the needs of the case”:

- The importance of the issues at stake in the action
- The amount in controversy
- The parties’ relative access to relevant information
- The parties’ resources
- The importance of the discovery in resolving the issues
- Whether the burden or expense of the proposed discovery outweighs the likely benefits

Disputes over these factors often arise during early “meet & confer” sessions, as required by Rule 26(f) of the FRCP which states that parties must confer as soon as practicable to discuss discovery issues and craft a discovery plan. Often, IF these meetings are held at all, many lawyers show up without any real understanding of the ESI or the facts of the case, resulting in no substantive plan other than “we’ll figure it out later” which can lead to confusion, spoliation, and costly discovery disputes.

Preservation Letter

A common preservation trigger is receiving a preservation letter (but the duty to preserve exists whether a letter was sent or not). For more on preservation letters see Craig Ball’s paper on [“The Perfect Preservation Letter”](#).

Even a “perfect” preservation letter isn’t a cure-all, but, it is a good habit to get into. For example, a preservation letter could be a good tool to show that the party knew about their duty to preserve evidence, and therefore their destruction of the evidence, or reckless handling of the evidence amounts to spoliation and sanctions should be sought.

Failure to preserve

The consequences of a failure to preserve are up to the judge’s discretion, so they vary widely. In determining sanctions for spoliation courts generally consider the level of culpability (was spoliation intentional or negligent), and whether the party who brought the motion for sanctions was prejudiced by the spoliation.

Sanctions can range from monetary fines, to adverse inference instructions (where the jury is told to infer the lost evidence was unfavorable to the spoliating party), or default judgments.

Step 3 – Collection

I've identified the data and sent my litigation hold letters. What do I do now?

Now you're ready to collect your data. Collection can be a technically challenging process, but it shouldn't just be passed off to IT and forgotten about.

Let's get a couple of things straight first: COLLECTION IS NOT PRESERVATION. The general rule of thumb is that you should Preserve broadly, and collect narrowly.

This phase should be thought of as a funnel. You preserve broadly, collect fewer documents than you preserve, and then you review for privilege, confidentiality and responsiveness, and produce an even smaller subset of that data.

Types of collection

Forensic Collection vs Logical Copy

A forensic collection is something you do when the metadata (the data about the data i.e. the file properties, the date created, date modified, date accessed etc.) really matters. This is a bit-by-bit copy of the original data. This is a technically challenging process that is typically performed by digital forensics professionals.

A logical copy is a less forensically sound way to capture the data, but is also more cost effective for matters where the integrity of the metadata is less crucial. Most experts will tell you that in most civil matters a logical copy will meet the court's expectation unless there's suspicion of data tampering or the matter involves previously deleted files. This type of collection can be performed by almost anyone with a little training and the right software.

Types of ESI to collect:

- Active Data
 - Data you interact with regularly. Email, word documents, excel files, etc. These are the things on your hard drive, or a networked drive. Typically this is easy to access and easy to collect.
- Cloud Data
 - Since the COVID-19 pandemic MUCH more of our work takes place in the cloud, so this has become a larger data source in the past several years. This is data created and stored on cloud servers. This could be social media, Google Drive, OneDrive, Dropbox, iCloud, etc. There are usually several ways to access this kind of data, either through the cloud application itself, or through integrations with eDiscovery tools.
- Mobile
 - Cell phones and other mobile devices can pose a challenge in that they require specialty software and expertise to collect from. However, they should not be overlooked as an important data source that can be a key part of discovery and the facts of the case. Forensic imaging experts (like Digital Evidence Ventures locally), can defensibly collect

cell phone data if you need a forensic collection, or if you'd like to self-collect you can use tools such as iMazing or CoolMuster to collect a logical copy of call logs, SMS text messages, photos, and the like. Could be App data or device data.

- Offline
 - No longer active, but is stored/archived. These can be external hard drives, synced backup servers, that kind of thing. Normally fairly simple to access/collect.
- Backups
 - Traditional backup tapes or disaster recovery systems – these are normally compressed files that are not easily searchable and can be difficult to collect. Yes – some people legitimately still use these things, but more often than not these are legacy systems nowadays.
- Hidden
 - Previously deleted or fragmented files that aren't readily usable or readable. These are difficult (but not impossible) to collect, and requires specialized tools and forensic imaging.

Who is doing the collection

A couple of different options here:

- Employee Self-Collection
 - The custodian themselves copy the relevant files.
 - Most experts advise against this because most employees aren't technically savvy and may make mistakes. There's also been some questions in court as to whether "self-collection" is defensible because of the potential for bad-actors and spoliation. (Remember, as the attorney, it's your butt on the line here).
 - BUT for small matters with a small amount of traditional data, this can be a reasonable approach.
- IT Collection
 - Most common approach. IT department performs the collection at the direction of the legal department.
 - Remember that IT is NOT legal, and they need specific and clear instructions about what it needed. Communication is key to make sure they understand what is needed and in what formats.
- External Collection
 - For folks without IT or limited IT – a 3rd party can perform the collection.
 - Need an outside expert, can be costly. This person may need to testify, so choose wisely and document thoroughly
- Remote Collection
 - Using a centralized internal collection system integrated with company data to collect remotely.

- Collection may still be performed by IT, but happens remotely. A common and cost-effective approach. Many eDiscovery platforms have integrations to these systems built right in to collect from Box.com, Slack, Office 365 etc.

Step 4 – Processing

Next up is processing. You take all that data you've successfully retrieved and you feed it into an eDiscovery tool for processing. Most modern eDiscovery tools (Relativity, Reveal/Brainspace, Exterro, Everlaw, OpenText, Logikcull) will more or less do the processing for you.

Early in the days of eDiscovery this meant manually running OCR (optical character recognition) on documents to make them searchable, and hand-coding .dat files to create and edit databases from scratch (example of a dat file).

Modern tools will find and suppress duplicates (called deduping and can be done globally or by custodian), deNIST (remove NIST files – aka system files, program files, other non-user created ESI).

A lot of this process has now been automated, and you're just doing the QC to check out files that didn't process correctly, were encrypted or corrupted etc.

Step 5 – Document Review

An attorney's favorite pastime – document review.

We're WELL past the days of printing out pages and pages of hard copy documents and setting up an inscrutable "floor filing" system.

Most document review platforms give you some kind of built-in TAR (technology assisted review) tools to speed up the review process. The options here depend greatly on what platform you're using, but can include everything from email threading, to near-duplicate or similar document detection, sentiment analysis, to full on AI predictive coding.

The nearly ubiquitous basic features include keyword searching, document tagging, redaction, batching, and bates numbering/stamping.

Document review is often said to account for between 70-80% of total eDiscovery costs for the average case. It's VERY costly. Any way you can speed up review is going to save you time and money.

What are you reviewing for?

Privilege (attorney client, marital, work product), Confidentiality (employee information, Personal Identifiable Information/PII (SS# etc.), Responsiveness

WHILE we're on the subject – let's talk about Clawbacks (looking at you Alex Jones). There's a Federal Rule of Evidence (502(d)) that for some reason seems to rarely be used that allows parties to enter into "clawback agreements", whereby each party agrees to return inadvertently produced privilege documents to the opposing party. It's not a get out of jail free card, but it's another tool against waiver.

Search Tips

- Phrases: Encapsulate specific phrases in quotes to have them search for that exact phrase
 - "peanut butter"

- Code words & jargon: Use language real people use in their emails – abbreviations & nicknames. For example, we say “depo” instead of deposition or RFPD instead of “request for production of documents”
 - PB&J
- Boolean logic: Use “AND”, “OR”, “NOT” to refine searches
 - “Peanut Butter” AND “Jelly”
- Proximity searches: when specific words are used in the same sentence or paragraph
 - “Peanut Butter” Jelly~10 = “Peanut Butter” within 10 words of Jelly
- Wild Cards: Symbols can replace one or more characters
 - “p*nut butter”
- Stemming: Reduces a word to its root form. As in: “eating,” “eat,” and “eater.”
 - Jell* = Jelly, Jelled, Jellied, Jellish
- Stop Words: Ignore common words like the, and, or with
- Fuzzy Searching/Misspellings: Searches for words with a certain “Similarity score” between 0 & 1 with 0.1 being less similar and 0.9 being more similar
 - Jelly~0.2 = Jolly, Telly, Really, Jellied
- Metadata fields
 - Date limiters
 - To & From fields
 - File type & more

Step 6 - Analysis

Kind of part and parcel with Review.

Attorneys must review ESI for content and context, identifying key custodians, subjects, patterns, and discussions.

This is how your team will find factual issues and develop legal strategies to pursue based on information that is found in a collection of documents.

Analysis is how you build your “story” – the narrative behind your case. Because this is so strongly tied to case strategy – being able to bring this process in house can be immensely helpful in getting to the “meat & potatoes” quickly.

THIS is also where you find you may have to circle back and collect further data that you didn’t realize was pertinent, or incorporate a new custodian etc.

Step 7 – Production

We’ve done our privilege review and tagging and we’re ready to produce. If you haven’t already agreed upon the terms of production with opposing counsel via the Rule 26 conference or in a Case Management Order, then you’ll want to reach out and agree on how to produce/receive documents.

There are a few different ways to produce.

- Native – Files produced in the format in which they were originally created/kept

- Near-Native – files extracted or converted into another searchable format that’s native-ISH. This would be the common “Load File Format” with load files, Images, extracted metadata, and searchable text.
- Image (Near-Paper): Files converted to images (typically PDFs or TIFFs). May include load files, metadata & searchable text
- Paper: ESI produced in literal paper format. This is frowned upon

There are pros & cons to each of these options, and the best option for your matter should be determined on a case-by-case basis.

Once you’ve got your production prepared, you need to send those items to opposing party. Data can be delivered in a handful of ways, but by far the most common option is via an online repository (shared folders like Dropbox, Google Drive, OneDrive etc.). You can also copy the data to physical media, like an external hard drive, Flash Drive, or even a DVD/CD (though you should keep in mind that most modern computers don’t have a built-in CD drive anymore).

Let’s talk about Alex Jones again here for a second. His attorney’s office inadvertently uploaded his ENTIRE cell phone to an online repository. It’s much easier to inadvertently share something with someone with a link than it is to inadvertently write the contents of his entire phone to a flash drive and mail it to someone.

That doesn’t mean that online repositories aren’t a good option – just that you need to be careful with them. It’s a good practice to encrypt the data that you load to an online repository, ESPECIALLY if there is any PII or otherwise sensitive data included in the production. Most vendors offer a wide variety of tools to control access rights, such as password protection, edit rights, printing/download rights, credential-based access rights, time-based access rights etc.

The Other Side of Production – Receiving docs

Once you receive documents you load them into your internal database and QC the production. Then you begin your review and tagging for importance & issues.

Step 8 – Presentation

You’ve identified your key documents, and now you’re ready to wow the judge and jury with your evidence. From here you take those records and present them.

There are a lot of different options for presentation. From the old-school ELMO and foam-core boards, to Powerpoint and sophisticated litigation specific tools like Trial Director, Sanction, OnCue or ExhibitView.

Wrapping Up

Things to remember – This process is iterative! Notice the line across the bottom of the EDRM. It’s common to get deeper into the case and realize that “John Doe” is more of a key witness than we thought, and to need to return to earlier portions of the EDRM.

This is just a FRAMEWORK – not an exhaustive list

eDiscovery changes with every new technology that is adopted – so you need to keep learning about new collaboration and communication tools & technologies.

[EDiscovery Tools](#)

You can use software review aggregators like Capterra, G2, or Gartner to compare different eDiscovery solutions

A few of note: Relativity, Exterro, Concordance, Everlaw, Logikcull

CRYPTOCURRENCY AND NFT'S IN THE
WORLD OF FAMILY LAW

SATURDAY, SEPTEMBER 10

1:15PM - 2:45PM

PRESENTED BY
DOROTHY HARAMINAC
GREENVETS LLC



DOROTHY HARAMINAC

MBA, CFE, MAFF, PI

Partner, GreenVets

(346) 400-6554



23115 S. State Hwy 78
Leonard, TX 75452

GreenVetsLLC.com

DALLAS

BANJA LUKA

HOUSTON

DUBAI

SUMMARY

Ms. Haraminac is one of the first court-qualified experts in bitcoin asset and cryptocurrency tracing. She has provided consulting, tracing, valuation, and expert witness testimony in complex commercial disputes in the oil & gas industry and in high net worth, tech-centric matrimonial cases. She conducts traditional fraud investigations and financial forensic engagements, deploying sophisticated methods to determine whether indications of fraud exist, to assess the risk in an organization, and to monetize risk assessments in valuations.

CERTIFICATIONS

Certified Fraud Examiner (CFE), Association of Certified Fraud Examiners, #706176, July 31, 2023

Master Analyst in Financial Forensics (MAFF), National Association of Certified Valuators and Analysts, #1013163, June 10, 2023

Licensed Private Investigator and CE Instructor (TX PSB), #31951201, March 31, 2023

MEMBERSHIPS, BOARD POSITIONS, & RECOGNITION

- Science and Engineering Advisory Board, Houston Baptist University
- Trusted Financial Professional, The Graceful Exit, California
- Editorial Board, *The Value Examiner*
- Litigation Forensics Board, 2019-2022, National Association of Certified Valuators and Analysts (NACVA), Chairman 2021-2022
- Credential Commissioning Board, NACVA, Chairman 2022
- NACVA Outstanding Member, 2022, 40 Under 40 Honoree, 2019
- Houston ACFE Speaker of the Year, 2019
- Member, Association for Computing Machinery (ACM, ACM-W), Special Interest Group for Management of Information Systems (SIGMIS), Special Interest Group for Knowledge Discovery and Data (SIGKDD), and Special Interest Group for Logic and Computation (SIGLOG)

EXPERIENCE

Current: GreenVets, LLC, Partner, Houston TX

Current: Houston Baptist University, Adjunct Cyber Engineering Professor, Houston TX

Current: Kiribex, CoFounder and Chief Operating Officer, Houston TX

Current: YBR Consulting Services, Founder, Houston TX

2019 to 2020: Adeona, Chief Operations Officer, Houston TX

2018: Snap Diligence, Chief Operations Officer, Houston TX

2017 to 2018: McCann Investigations, Director of Forensics, Houston TX

2015 to 2017: HSSK, Litigation Associate, Houston TX

2013 to 2014: CFISD, High School Math Teacher, Houston TX

2008 to 2013: Energy Consulting Analyst, Houston TX

2007 to 2008: MI SWACO, Strategic Marketing Research Analyst, Houston TX

2006 to 2007: Global Industries, Systems Administrator, Houston TX

2005 to 2006: Site Supervisor, IST Management Services, Atlanta GA

EDUCATION

University of Houston, Bauer College of Business

MBA, Decision and Information Science, Houston, TX

McNeese State University, Honors College

BA Magna Cum Laude, Liberal Arts, Minors: Computer Science and Psychology, Lake Charles, LA

PUBLICATIONS & PRESENTATIONS, 2012-2022

Upcoming

Cryptocurrency Considerations for the Judiciary – Judges Conference, Tennessee, October 25, 2022
Internet Income Streams – American Bar Association, Family Law Section Fall 2022, Oct. 15, 2022
Domestic Cryptocurrency – TX Association of Domestic Relations Offices, October 5, 2022
Cryptocurrency Tracing & Valuation – AAML and BVR Joint Divorce Conference, September 2022
Practical Cryptocurrency in Divorce – Placer County Bar Association, September 10, 2022

Past

Pulling Bitcoin from the Ether – Advanced Family Law Conference, San Antonio, TX, August 2022
On Records and Objections with Cryptocurrency – Published with above conference materials for Advanced Family Law Conference and for the Joint Divorce Conference
The Down Low on Crypto – Accounting Financial Women’s Alliance, June 23, 2022
Cryptocurrency Tracing – American Bar Association Annual Conference, Arizona Chapter, June 2022
Advance to Go. Cryptocurrency & NFTs – Co-Presenter, Annual Conference for AAML, Northern California Chapter, April 2022
Crypto and Royalty Owners: An Intersection – Council of Petroleum Accountants Societies, April 2022, October 2022 (upcoming)
Cryptocurrency for Divorce – Orange County & LA County Attorneys, February 2022; Wisconsin Attorneys March 2022
Virtual Currency in a Real World Divorce – Co-Presenter, Annual Conference for American Academy of Matrimonial Attorneys, November 2021
GDPR and the Increasing Cost of Cybersecurity – Article in *The Value Examiner*, July 2021
Cybersecurity for Financial Experts – 15 hrs, NACVA, June 2021, September 2021, October 2021
Open Source Investigations – 8 hrs, Presented to the Texas State Auditor’s Office, March 2021
Media Appearance: Around the Valuation World – Offered commentary on cybersecurity fines, March 2021
Cryptocurrency Investigations and Tracing – 8 hr presentation, Texas State Auditor’s Office, February 2021; Presented to NACVA, August 2021, November 2021, February 2022
Business Email Compromise Investigations – 1 hr presentation, Dayton Fraud, Cyber, & Ethics Conference, Dayton, OH, October 2020
Matrimonial Litigation – 12 hr presentation, National Association of Certified Valuators and Analysts, September 2020, June 2022
GDPR Fines Exceed Oil & Gas Tax Revenue for Texas Counties–September 2020, Self-posted article
Bitcoin: An Intro to Crypto – 2 hr presentation, NACVA Business Valuation and Financial Litigation Super Conference, August 2020
Collaborative Divorce for Financial Professionals – 1 hr presentation, NACVA Valuation and Litigation Super Conference, August 2020
The Darkside of Cryptocurrency Holdings – 1 hr, Presented to the American Academy of Matrimonial Lawyers, Northern California Chapter, October 2019
Fake Invoices, Vendors, and CEOs: FinCEN updates BEC Warnings–July 2019, Self-posted informational article
Blockchains: Don’t Panic (An Introduction for the Oil & Gas Industry) – 1 hr, Presented to the Petroleum Accountant’s Society of Houston, Annual Education Day, May 2019
Business Email Compromise: Defend, Identify, and Pursue–1 hr presentation, Harris County Attorney’s Office, May 2019

PUBLICATIONS & PRESENTATIONS (CONT.)

- Tracing Bitcoin via Mueller* – April 2019, Self-posted informational article
- Cyber[word]: Who Do You Call?* – March 2019, Self-posted informational article
- Darknet and Bitcoin for the Court* – February 2019, Self-posted informational article
- The New Face of Fraud* – February 2019, Self-posted informational article
- OSINT: Gathering Evidence from Non-Poisonous Trees* – February 2019, Self-posted article
- Bitcoin and the Darknet for Court* – 2 hr, Presented at the North TX Midwinter Conference, TX Association of Licensed Investigators, Feb. 2019
- Open Source Intelligence* – 2 hr, Presented at the Midwinter Conference, Texas Association of Licensed Investigators, February 2019, March 2018, and Houston TALI meeting, September 2018
- Blockchain and Its Impact on Business* – 1 hr presentation, Institute of Management Consultants, Houston Chapter, October 2018
- Building a Comprehensive Business Identity* – 1 hr, Presented to Crain, Caton, & James, October 2018
- Comprehensive Forensic Investigations* – 8 hr, Presented at the Annual Conference, TX Association of Licensed Investigators, August 23, 2018
- Blockchain for Business Development Panelist* – 1 hr, Presented at the National Business Development Association Signature Event, Houston, Texas, August 21, 2018
- Bitcoin: Intro to Cryptocurrency and Evidence* – 2 hr, Presented at the North Texas Midwinter Conference, Texas Association of Licensed Investigators, February 8, 2018
- Blockchain Breakdown: Smart Contracts, Tokenization/ICOs, Cryptocurrencies and Legal Implications of Artificial Intelligence* – 2 hr, Moderator, State Bar of Texas International Law Institute, April 2018
- Bitcoin, the First ICO* – 2 hr, Presented at the Petroleum Accountants Society of Houston, March 8, 2018, and at the Texas Association of Licensed Investigators Monthly Luncheon, April 19, 2018
- Cybercrime: Building a Digital Street Sense* – 8 hr, Presented to Alvin ISD Police Department, 2017, and Harris County DA Investigators and the U.S. Secret Service, Houston, TX 2018
- Bitcoin: An Introduction to Cryptocurrency* – 2 hr, Houston Police Department, Financial Crimes and Crain, Caton, and James, 2017, TALI North TX Midwinter Conference, BoyarMiller, 2018
- Media Appearance: FOX News* – Offered commentary as a cybercrime evidence expert <http://www.fox26houston.com/news/the-isiah-factor/man-convicted-of-stalking-ex-girlfriend>
- The Darknet: A Guided Tour* – 2 hr, Presented to the Texas Association of Licensed Investigators, Annual Conference, San Antonio, Texas, August 2017
- Math Models with Applications for Texas* – August 2014, an online Mathematics textbook, ck12.org

Crypto Decoded

Decoding cryptocurrency within the realm of matrimonial litigation.



1



Agenda

- 1) Cryptocurrency
 - 1) What is it?
 - 2) Why is it?
 - 3) Who cares?
- 2) Records and Availability
- 3) You and Your Practice

2



Dorothy Haraminac, MBA, CFE, MAFF, PI

Phone: (346) 400-6554
 Email: dorothy.haraminac@greenvetsLLC.com

<p>Professor, Cyber Engineering at HBU</p> <p>ACFE Speaker of the Year & NACVA 40 Under 40 Honoree, 2019</p> <p>Litigation Forensics Board Chair, NACVA</p> <p>Science and Engineering Advisory Board, HBU</p>	<p>Testifying Expert on bitcoin asset & cryptocurrency tracing</p> <p>Consulting and testimony in civil and criminal litigation</p> <p>Consulting for digital & physical asset security</p>	<p>Matrimonial Litigation</p> <p>Civil Disputes & Criminal Defense</p> <p>Training for Law Enforcement</p> <p>Oil & Gas Operator Disputes</p> <p>IP and Trade Secret Theft</p> <p>Crypto Defense</p> <p>Data Privacy Compliance & Breach Investigations</p> <p>Business Email Compromise Investigations</p> <p>Risk Assessments and Due Diligence for M&A</p> <p>Pen Testing, Ethical Hacking, & Security Consultation</p>
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3

**What is it?
Why is it?
Who cares?**

A thing with

- 1) a **value** and
- 2) a **tax liability** and
- 3) an **additional value/loss.**

Do you suspect your spouse holds cryptocurrency, including NFTs? Please describe.

Do you hold cryptocurrency, including NFTs? Please describe.

You, The Attorney

4

Tax Records

- Form 8938 (Foreign Assets)
- Form 8949 (Capital Gains/Losses)
- Form 8283 (Sch. A Contributions)
- Form 1099 Misc (for payments/receipts)

**Where are the records?
(Part 1 of 3)**

5

Form **1040** Department of the Treasury—Internal Revenue Service (99) **2020** OMB No. 1545-0074 IRS Use Only—Do not write or staple in this space.

Filing Status Single Married filing jointly Married filing separately (MFS) Head of household (HOH) Qualifying widow(er) (QW)
 Check only one box. If you checked the MFS box, enter the name of your spouse. If you checked the HOH or QW box, enter the child's name if the qualifying person is a child but not your dependent ▶

Your first name and middle initial _____ Last name _____ Your social security number _____
 If joint return, spouse's first name and middle initial _____ Last name _____ Spouse's social security number _____

Home address (number and street). If you have a P.O. box, see instructions. _____ Apt. no. _____ Presidential Election Campaign
 City, town, or post office. If you have a foreign address, also complete spaces below. _____ State _____ ZIP code _____ Check here if you, or your spouse if filing jointly, want \$3 to go to this fund. Checking a box below will not change your tax or refund.

Foreign country name _____ Foreign province/state/country _____ Foreign postal code _____ You Spouse

any time during 2020, did you receive, sell, send, exchange, or otherwise acquire any financial interest in any virtual currency? Yes No

Standard Deduction Spouse itemizes on a separate return or you were a dual-status alien

Age/Blindness You: Were born before January 2, 1956 Are blind Spouse: Was born before January 2, 1956 Is blind

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6

Old-Fashioned Financial Records

- Bank statements
- Investment statements
- Credit card statements
- Employment agreements (incl. options, 83b?)

Where are the records?
(Part 2 of 3)

7

Crypto Transaction Records

- From the wallet, exchange, AND web 3 (defi) service provider
- Must include all addresses generated and transaction IDs
- Must include USD deposits and withdrawals
- Not self-created or public site screenshots
- Public blockchain records (not sufficient as a discovery response)

Where are the records?
(Part 3 of 3)

8

Is there a crypto account? Yes.

CHECKCARD 03/01 COINBASE CHEAPSIDE	⊖	[P]	-350.00	2,208.04
CHECKCARD 03/01 COINBASE CHEAPSIDE	⊖	[P]	-1.99	2,558.04
CHECKCARD 03/01 COINBASE CHEAPSIDE	⊖	[P]	-1.94	2,560.03
CHECKCARD 03/01 COINBASE CHEAPSIDE	⊖	[P]	-1.00	2,561.97
CHECKCARD 03/01 HUGS & DONUTS HOUSTON TX	⊖	[P]	-18.01	2,562.97
CHECKCARD REVERSAL 03/01 COINBASE CHEAPSIDE	⊕	[P]	1.00	2,580.98

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9

Do we need to trace these? Yes.

You can use this transaction report to inform your likely tax obligations. For US customers, Sell, Converts, and Rewards Income, and Coinbase Earn transactions are taxable events. For final tax obligations, please consult your tax advisor.

Timestamp	Transaction Type	Asset	Quantity	Price at USD	Subtotal USD	Fees USD	Total (including fees) USD	Notes
2019-05-31 10:08:25Z	Buy	ETH	0.193	248.5	48.01	50	1.99	Bought 0.19320207 ETH for \$50.00 USD
2019-05-31 10:09:03Z	Send	ETH	0.193	247.3				Sent 0.19320207 ETH to 0x9a0A34df169273e4aa8347C734d092E88652df7
2019-05-31 10:28:07Z	Convert	BCH	0.296	419.2	122.8	123.9	1.11	Converted 0.29634422 BCH to 0.15174719 LTC
2019-05-31 10:34:15Z	Sell	LTC	4.571	105.3	481.2	474	7.44	Sold 4.57099858 LTC for \$474.02 USD
2019-05-31 11:47:12Z	Receive	ETH	1.519	254.5				Received 1.51883576 ETH from an external account
2019-05-31 11:54:22Z	Convert	ETH	1.519	254.5	383.2	386.5	3.29	Converted 1.51883576 ETH to 20.42256999 REP
2019-05-31 11:55:13Z	Send	REP	20.42	18.76				Sent 20.42256999 REP to 0x9a0A34df169273e4aa8347C734d092E88652df7

10

Address USD BTC

This address has transacted 3,338 times on the Bitcoin blockchain. It has received a total of 81,432.09109296 BTC (\$3,243,462,174.90) and has sent a total of 81,432.0910984 BTC (\$3,243,462,173.58). The current value of this address is 0.00003312 BTC (\$1.32).

Address: 1XPtGDRiN8RfNziWCdsbD9KZatvH4

Format: BASE58 (P2PKH)

Transactions: 3,338

Total Received: 81432.09109296 BTC

Total Sent: 81432.0910984 BTC

Final Balance: 0.00003312 BTC

Activity

Almost ALL Transactions

Transactions 0

Hash: a1075db55416d3ca199f5b6094e2115b9345e16c5cf302f680e9d5bf5d48d

2010-05-22 13:16

1XPtGDRiN8RfNziWCdsbD9KZatvH4 150.00000000 BTC

179kEw2mdSavVnyYg6RiKuQKwKxvF... 10000.00000000 BTC

11

Bitcoin Pizza Transaction View information about a bitcoin transaction

Transaction ID: a1075db55416d3ca199f5b6094e2115b9345e16c5cf302f680e9d5bf5d48d

Received From Address: 1XPtGDRiN8RfNziWCdsbD9KZatvH4

Receiving Address: 179kEw2mdSavVnyYg6RiKuQKwKxvFyQ

Amounts: 10,000 BTC

Date/Time: 2010-05-22 18:16:31

Summary

Size	23620 (bytes)
Weight	94480
Received Time	2010-05-22 18:16:31
Included In Blocks	57043 (2010-05-22 18:16:31 + 0 minutes)
Confirmations	436858 Confirmations

Inputs and Outputs

Total Input	10,000.99 BTC
Total Output	10,000 BTC
Fees	0.99 BTC
Fee per byte	4,191.363 sat/B
Fee per weight unit	1,047.641 sat/WU
Estimated BTC Transacted	10,000 BTC

Scripts: Show scripts & coinbase

View using blockchain.com, one of many websites known as block explorers.

Same kinds of information as a traditional wire transfer.

https://www.blockchain.com/btc/tx/a1075db55416d3ca199f5b6094e2115b9345e16c5cf302f680e9d5bf5d48d

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Your keys,
your coins.

Wallets

- + A group of addresses* accessed by the same private key.
- + Can you identify wallets on the blockchain? **Yes-ish.**
- + Do wallets store crypto? **Nope. Wallets store access.**

Software

Hardware

Web App

Phone App

Paper

*Addresses look like long strings of numbers and letters; they identify locations on a blockchain. (c) 2022 GreenVets, LLC 16

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ADDRESS WALLET EXCHANGE

Exchange
Buy and Sell

Wallet
Send and Receive

Address
Location used in Transactions

- Stores the access to the addresses.
- Stores your **private key**.
- More than one** crypto per wallet.
- More than one** address per wallet.
- Allows sends and receipts of crypto.
- Can be recreated from **seed words**.

17 (c) 2022 GreenVets, LLC

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ADDRESS WALLET EXCHANGE

Never ask for Private Keys or Seed Words
in Discovery, without proper security.

Address
Location used in Transactions

Can be recreated from **seed words**.

18 (c) 2022 GreenVets, LLC

18

Not your keys, not your coins.

Exchanges

- + Third-parties that allow buying and selling of crypto (\$\$\$).
- + Can you identify exchanges on the blockchain? **Yes-ish.**
- + Do exchanges store crypto? **Nope-ish.**
- + Can you identify exchanges in bank records? **You betcha.**

Binance

Gemini

Kraken

Coinbase

Mt. Gox

Huobi

And many more!

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EXAMPLE EXCHANGES

LOGOS ARE COPYRIGHT THEIR OWNERS

changelly

Huobi

BITTREX

KuCoin

POLONIEX

BINANCE

kraken

coinbase

CEX:IO

GEMINI

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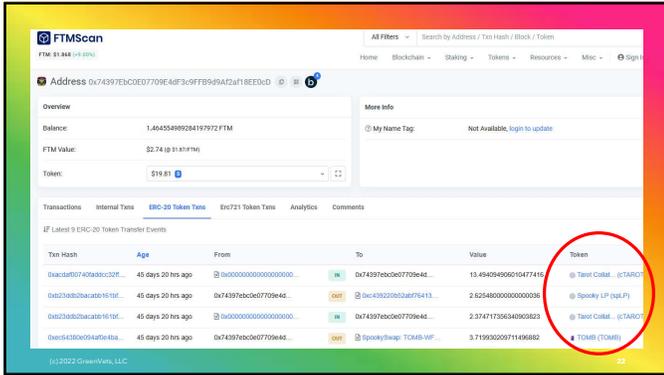
20

Is this sufficient? No.

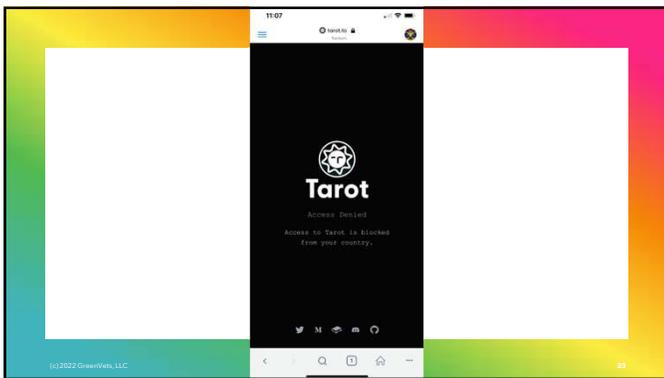
Did the expert search more than one blockchain? Attorney

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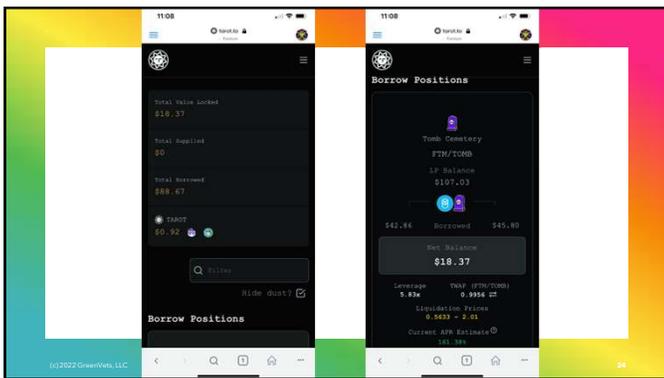
21



22



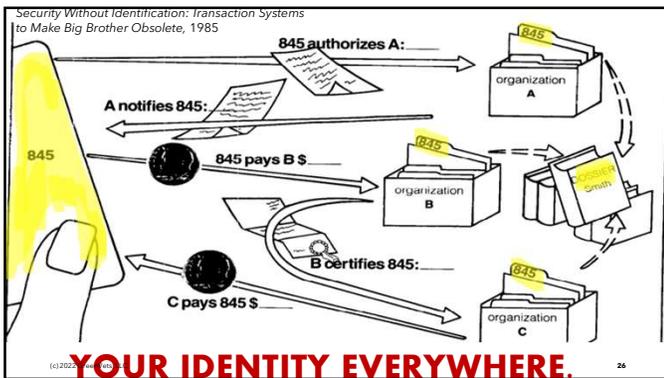
23



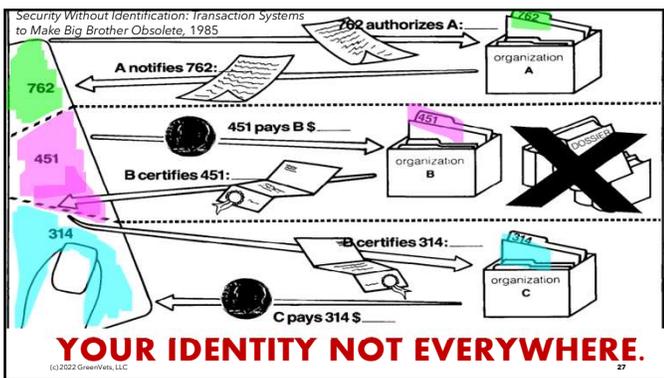
24



25



26



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1993/6 – ENCRYPTION DEWEAPONIZED

Not without a fight.

1991 - Phil Zimmerman and Hal Finney create PGP, encryption that uses private keys to protect information. The NSA wants access.

1993 - Clinton drops the federal investigation into PGP following the release of PGP's code to the world (books on planes)

1996 - Encryption, some of it, is moved off the munitions list.

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CYPHERPUNKS MANIFESTO

"We are defending our privacy with

- **cryptology**,
- with **anonymous mail forwarding** systems,
- with **digital signatures**, and with
- **electronic money**...

We cannot expect governments, corporations, or other large, faceless organizations to grant us privacy out of their beneficence...

We must defend our privacy."

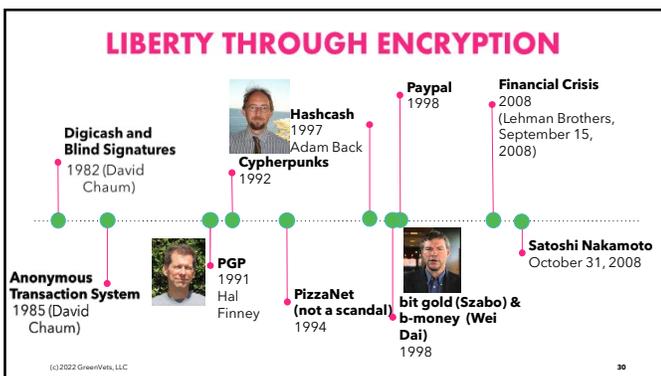
- Eric Hughes



EFF logo plain, 6 August 2013. Author EFF; <https://commons.wikimedia.org/wiki/File:EFF-Logo-plain.svg>
CryptoPartyHandbook cover, <https://www.cryptoparty.in/learn/handbook> 29

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LIBERTY THROUGH ENCRYPTION



The timeline includes the following events:

- 1982**: Digicash and Blind Signatures (David Chaum)
- 1985**: Anonymous Transaction System (David Chaum)
- 1991**: PGP (Hal Finney)
- 1992**: Cypherpunks (Adam Back)
- 1994**: PizzaNet (not a scandal)
- 1997**: Hashcash
- 1998**: Paypal
- 1998**: bit gold (Szabo) & b-money (Wei Dai)
- 2008**: Satoshi Nakamoto (October 31, 2008)
- 2008**: Financial Crisis (Lehman Brothers, September 15, 2008)

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From: Satoshi Nakamoto <satoshi@at.vistomail.com>
 Subject: Bitcoin P2P e-cash paper
 Newsgroups: gmane.comp.encryption.general
 Date: Friday 31st October 2008 18:10:00 UTC (over 8 years ago)

I've been working on a new electronic cash system that's fully peer-to-peer, with no trusted third party.

The paper is available at:
<http://www.bitcoin.org/bitcoin.pdf>

The main properties:
 Double-spending is prevented with a peer-to-peer network.
 No mint or other trusted parties.
 Participants can be anonymous.
 New coins are made from hashcash style proof-of-work.
 The proof-of-work for new coin generation also powers the network to prevent double-spending.

Bitcoin: A Peer-to-Peer Electronic Cash System

Abstract. A purely peer-to-peer version of electronic cash would allow online payments to be sent directly from one party to another without the burdens of going through a financial institution. Digital signatures provide part of the solution, but the main

WHAT IS BITCOIN?

A system with special characteristics that allows transactions.

In the same way that your computer is required to run an application, the blockchain is required to use bitcoin.

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NAKAMOTO AND FRIENDS



Hal Finney
(PGP)



Wei Dai
(b-money
& Crypto++)



Nick Szabo
(bit gold)



Adam Back
(hash cash
& DoS prevention)

Hal Finney Obituary - The Santa Barbara Independent, <https://www.independent.com/obits/2014/09/02/hal-finney/>
 Nick Szabo, Nick Szabo, Global Financial Assets, on bitcoin, blockchain and the benefits of smart contracts, <https://www.youtube.com/watch?v=wXCOfTeQAAo>, Apr 2016
 Adam Back, Adam Back's home page (cypherspace.org), <http://www.cypherspace.org/adam/>

32

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FROM MY COLD, DEAD HANDS.

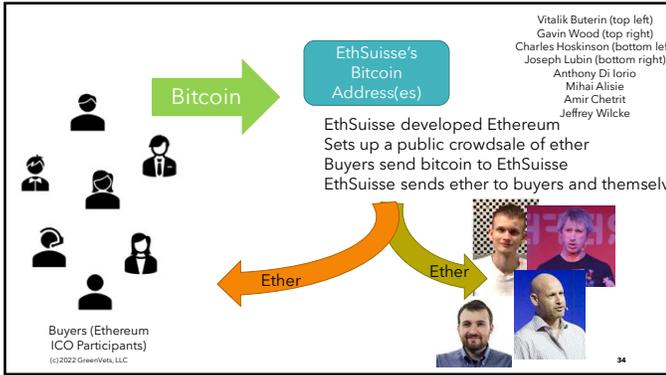
Privacy may be 4th amendment, but a right to encryption is a **2nd amendment** right.



Aug 2015,
<https://openclipart.org/detail/224281/key-in-fist>

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Who cares? | You probably should.

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NOT A CERTIFIED OPINION
Not to be published in official reports. CA "prohibits courts and parties from citing or relying on opinions not certified."

DESOUZA VS. DESOUZA
California Court of Appeals (NOV 2020, case began DEC 2012)

- Breached fiduciary duty (pg. 7, affirmed pg. 17)
 - Withheld information about his bitcoin investments during discovery
 - Failed to disclose bitcoins were tied up in bankruptcy
 - Failed to produce & falsely denied having docs related to bitcoins
 - Failed to disclose cryptocurrency generated by forks
 - Failed to file a bankruptcy claim regarding U.S. dollars
- Ordered to transfer bitcoins and other crypto - affirmed (pg. 17)
- Ordered to pay attorneys' fees and costs - affirmed (pg. 17)

<https://www.courts.ca.gov/opinions/nonpub/A156311.PDF>
<https://webapp.sfsd.org/ci/CaseInfo.dtl?CaseNum=FD1127784988&sessionID=04E675800E7567DA8E2327375C8828E351923A>

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Why It Matters

<p>It is Real.</p> <ul style="list-style-type: none"> • It's used to buy things. • It's used as collateral. • It's used as a loan. • It's legal tender in some countries. • It was legal tender in Ohio (briefly). 	<p>It has a Value.</p> <ul style="list-style-type: none"> • Can be easily traded for U.S. dollars. • Generates other assets (forks and airdrops). • Transfer can generate a loss. • Generates capital gains and losses. • Recognized as a taxable thing by the IRS. 	<p>It matters Early.</p> <ul style="list-style-type: none"> • \$350,000 total other assets • \$50,000,000 in crypto • Motions for Attorneys Fees • Discovery Requests • Fiduciary Duty Issues • Difficult Characterization
--	--	---

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Civil Complaint

- Accuse the opposing expert of a crime
- Accuse the opposing expert of tortious acts
- Client attacks on the opposing expert (DDoS, malware spam)
- Expert spends a lot of time with the client to "understand"

Worrisome Objections

- Violation of privacy
- Overburdensome
- Other party has equal access
- Outside the dates of marriage/relationship
- Calls for expert opinion
- Vague definitions

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Common Myths (These are false statements)

Cryptocurrency is stored on devices.	Wallets and records are private info.	People are honest.
I don't have to disclose crypto.	Forks, airdrops, and mining rewards are gifts.	All transactions are on the blockchain.

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Common Myths BUSTED (These are true.)

Cryptocurrency is stored on the blockchain.	Wallets and records are not any more private than bank records.	People are rarely completely honest.
I should disclose crypto.	Forks, airdrops, and mining rewards are usually income.	All transactions are NOT on the blockchain.

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Expert Red Flags

- Zero financial forensics expertise (e.g. MAFF, CFE, or CFF)
- Hired to explain, but then attempts to value.
- Crypto expertise is "I've read about it" or "I have it".
- Has a crypto credential and nothing else.
 - Review credentials for education and exam
 - Needs financial expertise for tracing and valuation
 - Crypto credentials are not substitutes for financial expertise and **MAY NOT** convey appropriate knowledge and skills

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Maybe you don't need an expert?

- No pattern of non-disclosure.
- Assets are easily divisible.
- Detailed tax filings exist since 2014.
- Clients are amicable and happy with the division.
- Both clients are tech-savvy enough to self-manage assets.
- May still need an asset advisor or manager (e.g. family office or cousin-in-law?).



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Questions?

Security Consultation
Pen-Testing
Corporate Training
Litigation Support
Diligence & Economics
Cryptocurrency, Blockchains, and more

Dorothy Haraminac
Dorothy.Haraminac@GreenvetsLLC.com
www.GreenvetsLLC.com
(346) 400-6554

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Provide all account records from the opening of the account to date for the below named account holder:

Primary Identifying Information

Name:

Alias(es):

Date of Birth (Month Year):

Secondary Information

Last Known Address:

Other Known Address(es):

Phone Number(s):

Known Email(s):

Notes: The account may be held under different secondary information. Secondary information is provided for additional clarification and is not intended to limit this request. Definitions for clarification, but not limitation, are attached as Attachment A. This is not a request for any access information to any account. This is not a request for any personally identifying information (the account holder's identity is provided above).

1. Identify each account held by or on behalf of the above-named account holder. If there are multiple accounts, provide records requested herein for each account separately, with the account clearly identified.
2. Identify each type of cryptocurrency received by, sent by, or held by the above-named account holder.
3. Provide any and all records, with each account clearly identified, related to transactions that occurred on your platform by or on behalf of the above-named account holder, to include all transactions listed below:
 - a. Receipts aka deposits
 - b. Sends aka withdrawals
 - c. Sales
 - d. Purchases
 - e. Vault or vault-type storage, where cryptocurrency or other assets must first be transferred out of this type storage and into a different location to be used in a transaction
 - f. Conversions, such as from one type of cryptocurrency to another type of cryptocurrency
 - g. Deposits and withdrawals of U.S. dollars or other types of legal tender
 - h. Forks, whether or not they have been claimed or accessed
 - i. Air Drops
 - j. Rewards

- k. Trading Pair Transactions
- l. Decentralized Finance Transactions, such as loans
- m. Decentralized Application transactions
- n. Any other transaction type

Records for the above transaction types must include, where applicable, an opening balance, a closing balance, a current balance, date, time, currency name (including cryptocurrency and U.S. dollars), currency symbol (including cryptocurrency and U.S. dollars), transaction type, amount of cryptocurrency, U.S. dollar value associated to the transaction, any associated fees (if not listed as a separate transaction type), and trading pair with the to-portion and from-portion clearly identified.

4. Identify all cryptocurrency addresses generated for use in a transaction, whether or not that cryptocurrency address has been used in a transaction, with the cryptocurrency type clearly identified.
5. Identify any email addresses associated to the account and the relevant time period for each address.
6. Identify any mailing or physical addresses associated to the account and the relevant time period for each address.
7. Identify the name, address, and routing number of all financial institutions, including banks, payment services, credit card providers, or other payment processors used for depositing U.S. dollars or other currency or asset into the account.
8. Identify the name, address, and routing number of all financial institutions, including banks, payment services, credit card providers, or other payment processors used for withdrawing U.S. dollars or other currency or asset from the account.
9. Identify the current status of the account and date the account was closed, if applicable.
10. Identify the current balance for each currency or asset held in the account.
11. Identify any physical hardware devices, such as a Trezor or Ledger wallet, that were connected to the account at any time during the period above.
12. Identify any participation in mining services, such as mining pools, including the receipt of any block rewards.
13. Provide any completed tax forms, such as 1099-B, 1099-K, and 1099-INT, prepared for or provided to the above-named account holder.

14. Provide a complete transaction history report for each account, such as the document intended to be used to calculate capital gains or losses for the purposes of tax reporting.
15. Identify any credit, loan, margin, or other such arrangements between the user and your organization.
16. Identify any additional authorized users related to this account, past or present, along with complete contact information or other information, including access times and dates, related to additional authorized users.
17. Identify any additional account holders related to this account, past or present, along with complete name, address, email, and phone information or other information, including access times and dates, related to additional account holders.
18. Provide all records relating to access information for this account including dates, times, and IP addresses, of any access (such as login access or API access)
19. Provide all additional records relating to this account, including third-party consumer reports, that may be part of your Anti-Money Laundering controls (KYC, CDD, EDD, etc.), including notices, warnings, communications, monitoring reports, and actions.

Attachment A

Cryptocurrency – any digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value including but not limited to virtual currency (see additional, but not limiting descriptions of virtual currency in IRS Rev. Rul. 2019-24 and Notice 2014-21). Examples of cryptocurrency include but are not limited to those that include encryption methods to validate or maintain records such as bitcoin, bitcoin cash, bitcoin SV, litecoin, ether, dogecoin, and over 1,000 others. Other industry terms used are digital asset, coin (such as those issued in an Initial Coin Offering (ICO)), token (such as those issued in a Simple Agreement for Future Tokens (SAFT)), virtual currency, Non-Fungible Token (NFT), and digital cash are included in the term Cryptocurrency.

Cryptocurrency Fork – any permanent diversion from a blockchain that results in a new cryptocurrency in addition to the original cryptocurrency from which the diversion occurred (See additional, but not limiting, descriptions in IRS Rev. Rul. 2019-24). An example of an original cryptocurrency and fork are Bitcoin and Bitcoin Cash, respectively.

Cryptocurrency Wallet – a device or software that enables access to and/or management (such as sending and receiving) of cryptocurrency stored at one or multiple cryptocurrency addresses. Companies providing wallet software or devices may offer more than one type of wallet and exchanges may offer wallet services. There are five basic types of wallets:

- hardware, such as the Ledger Nano, Trezor, and KeepKey
- desktop, such as Electrum, Exodus, and Bitcoin Core
- mobile, such as Mycelium, Coinomi, and Electrum
- web-based, such as MetaMask, Coinbase, and Paypal
- paper, such as a piece of paper with a private key(s) and bitcoin address(es) written down or printed onto it.

Cryptocurrency Address – a string of alphanumeric characters displayed on the blockchain, if public, and which is used in a transaction to send and/or receive cryptocurrency (herein referred to in a short form as address). All cryptocurrency transactions contain at least one cryptocurrency address. All cryptocurrency addresses requested refer to this type of identification number. For instance, bitcoin addresses are typically displayed in base58.

String - a set of numbers and letters that does not contain any spaces

base58 - a computer science term that refers to how text is displayed from binary code (1s and 0s). This is the typical convention for displaying bitcoin addresses and does not require any change, formatting, or other type of work to fulfill the request for documents showing addresses in this format. All requests for cryptocurrency addresses are as displayed in the wallet, exchange, or other software providing a view of storage or transactions, without alteration.

Cryptocurrency Exchange – software that enables users to engage in purchases or sales of cryptocurrency. Some exchanges also provide wallets to enable users to send or receive cryptocurrency in addition to buying or selling cryptocurrency. Exchanges provide transaction histories that show cryptocurrency addresses used in transactions made by or on behalf of the user.

Cryptocurrency Transaction – the purchase, sale, sending, or receipt of cryptocurrency through a wallet, exchange, agreement, or physical transfer of a storage device. Cryptocurrency transactions that occur through a wallet are displayed on that cryptocurrency's blockchain, if public, and are assigned a transaction id.

Digital Ledger – See Blockchain.

Blockchain – a linked list of data related to a specific cryptocurrency, also referred to as digital ledger or digital ledger technology. Bitcoin's blockchain, for example, contains a list of cryptocurrency addresses, amounts of bitcoin stored at those addresses, and transaction histories for each address.

Block Reward – An amount of cryptocurrency received at a cryptocurrency address in return for work performed by a computer, also known as a miner. The amount of cryptocurrency received may originate from new cryptocurrency or from transaction fees.

Miner – The computer or device running specialized software to submit, group, and/or validate cryptocurrency transactions; this action is also referred to as mining. The individual or organization operating the device is also sometimes referred to as a miner.

Proxy – An individual or organization authorized to act on behalf of another individual or organization.

Account – Any software or devices, including wallets, exchanges, and retail websites (including but not limited to Overstock.com, any accessible through websites ending in .onion, and Paypal), that enable the storage of, access to, or transactions with currency, including cryptocurrency, are herein referred to as accounts.

DEFINITIONS

These definitions are standard industry terms and are provided to clarify, but not limit, the requests for documentation related to financial transactions made by or on behalf of **[insert subject name]**.

Cryptocurrency – any digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value including but not limited to virtual currency (see additional, but not limiting descriptions of virtual currency in IRS Rev. Rul. 2019-24 and Notice 2014-21). Examples of cryptocurrency include but are not limited to those that include encryption methods to validate or maintain records such as bitcoin, bitcoin cash, bitcoin SV, litecoin, ether, dogecoin, and over 1,000 others. Other industry terms used are digital asset, coin (such as those issued in an Initial Coin Offering (ICO)), token (such as those issued in a Simple Agreement for Future Tokens (SAFT)), virtual currency, non-fungible tokens (NFTs), and digital cash are included in the term Cryptocurrency.

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Account – Any software or devices, including wallets, exchanges, and retail websites (including but not limited to Overstock.com, any accessible through websites ending in .onion, and Paypal), that enable the storage of, access to, or transactions with currency, including cryptocurrency, are herein referred to as accounts.

Summary of Requests

¹ Transaction records obtained from public blockchains are not sufficient to fulfill this request; records must be provided from the wallet, exchange, or other account used to access cryptocurrency.

Transactions can occur through multiple types of wallets: software, hardware, mobile, and paper. Some of these transactions will appear on the blockchain with associated cryptocurrency addresses; others will appear only in user account statements, while others will only appear in email confirmations of transactions and may not appear on the blockchain with an associated address at all. While the balances held at different addresses are viewable by anyone with access to the internet, **[insert subject name]** must provide the addresses to which he or someone on his behalf has access.

Transactions that occur through a wallet or exchange may not be individually discernible on the public blockchain due to the practice of wallets and exchanges grouping transactions to conceal the sender and recipient. For instance, Coinbase engages in this kind of transaction grouping. Account records related to wallets or exchanges must include addresses, transaction ids, dates, and beginning and ending balances.

Three sets of documents must be provided for each cryptocurrency held in each identified account, wallet, or exchange:

1) unaltered, unfiltered files downloaded from or exported from the software, website, or institution providing the wallet or exchange (or other such access point, not including a public website) containing all transaction histories such as buying, selling, deposits (receipts), withdrawals (sends), conversions to other cryptocurrency (such as ERC-20 or ERC-721 tokens), and claims of cryptocurrency forks;

2) a screenshot of the ending balance for each identified account, wallet, or exchange; and

3) a screenshot of the beginning balance for each identified account, wallet, or exchange.

Production in this manner allows for the determination of completeness, asset tracing, and property characterization. **Production to date is missing some or all of these components.**

Because some transactions may not appear in account statements, some transactions may not appear in email confirmations, and some transactions may not appear on public blockchains (such as those held in storage in an exchange account or those in private cryptocurrencies such as Monero), the cryptocurrency addresses, wallet or exchange transaction histories, and email communications regarding cryptocurrency related transactions should each be disclosed to enable asset valuation, disposition, and characterization.² The following is a summary of document requests:

- a list of all cryptocurrency addresses used to receive block rewards or other such payments resulting from mining activities;

² In addition, providing documents in this manner may avoid the need to independently access and review each device, wallet, or exchange account in **[insert subject name]**'s possession or held on **his/her** behalf.

- a list of all cryptocurrency addresses used to engage in transactions such as sending, receiving, and/or storage;
- a list of all cryptocurrency addresses generated for use with an account or wallet, whether or not it has been used in a transaction;
- a list of all dispositions of cryptocurrency, including purchases such as mining equipment, precious metals, and others, together with supporting documentation for dispositions;
- email backup files (because they contain transaction confirmations that do not appear on the blockchain and are not discernible with the address alone due to the practice of transaction grouping designed to conceal the sender and recipient), including but not limited to the following accounts and any email account used to conduct or communicate about cryptocurrency transactions and other financial-related matters, such as income:
 - **[insert known email addresses here]**
- any social media or web forum posts and communications regarding cryptocurrency transactions or agreements including but not limited to:
 - Twitter: **[insert known twitter handles here]**
 - Facebook: **[insert known Facebook usernames or business pages here]**
 - Instagram: **[insert known Instagram username here]**
 - Other Message boards or social media: **[insert others here]**
- account records, including those accounts at internet markets ending in .onion, for each account, address, wallet, or exchange showing all transaction activity, including addresses and transaction identifiers;
- any user names and emails associated with a cryptocurrency account;
- any user names and emails associated with a message board forum, including but not limited to bitcointalk.org and reddit.com;
- all devices used to access, view, buy, sell, send, or receive cryptocurrency along with their current location, make, model, and specifications, including any modifications, including but not limited to hardware wallets, computers, mobile devices, and equipment used for mining;
- a list of all VPN software or traffic concealment software, such as Tor or the Freenet, accessed during the time period in question along with any related account information, including a history of assigned IP addresses; and
- any other documentation and records related to cryptocurrency transactions or agreements including but not limited to Initial Coin Offering(s) (ICO) or Simple Agreement(s) for Future Token (SAFT).

Failing to provide documentation in the manner requested may require independent access and review of all wallets, exchange accounts, and devices held by or on behalf of **[insert subject name]**.

None of the requested information would provide unauthorized access to any account, either directly or indirectly, nor does it violate a privacy right or privilege in exactly the same way a request for bank account statements does not violate a right or privilege.

To access any of these accounts, passwords in addition to user names would be required, private keys would be required, and seed words used to create a wallet would be required – none of this kind of information is included in this document request but may be necessitated by a failure to provide documentation as requested.

Where mining activity is suspected or confirmed, the following additional records should be requested:

- all equipment used to mine cryptocurrency, specifying periods of operation;
- all mining software applications used, including the cryptocurrency mined, the equipment on which it relied, the time period it was in operation, and any mining reward address(es);
- all equipment or software used to manage mining operations, including pooling agreements or miner management software, specifying periods of operation;
- all IP addresses assigned to any equipment specified above;
- any receipts for purchases of equipment specified above, to include payment methods;
- an estimate of time contributed to mining efforts, with periods specified to reflect any changes over time;
- all bills and records for electricity or power consumption during the periods mining occurred, to specify power consumption rates per month at a minimum, per day preferred; and
- all bills and records for internet data usage during the periods mining occurred, to specify data usage rates per month at a minimum, per day preferred.

LITIGATION 2022 SENTENCING LAWS:
WHAT EVERY LAWYER NEEDS TO KNOW

SATURDAY, SEPTEMBER 10

1:15PM - 2:45PM

PRESENTED BY

HON. RICHARD COUZENS, RET.
PLACER COUNTY SUPERIOR COURT

J. RICHARD COUZENS

J. RICHARD COUZENS is a retired superior court judge, having served on the Placer County bench for over 28 years and on active assignment in the Assigned Judges Program for an additional 17 years.

Judge Couzens was Editor-in-Chief of the University of California, Davis Law Review, and was a law clerk to California Supreme Court Chief Justices Roger Traynor and Donald Wright. He has served on the California Judicial Council and the California State-Federal Judicial Council. Since 2015 he has been a consultant to the Criminal Justice Services Office of the Judicial Council. He has written and taught on a wide variety of topics in juvenile and criminal law.

Judge Couzens is a co-author of "California Three Strikes Sentencing," "Sex Crimes: California Law and Procedure," and "Sentencing of California Crimes," published by The Rutter Group. He was a regular member of the faculty of the B.E. Witkin Judicial College from 1995 - 2019, primarily teaching felony sentencing.

Since 2016 he has served as an instructor for the California Chief Probation Officers Association on basic and advanced felony sentencing. In 2007-2008 he was designated the on-site supervisor of the Chief Justice's special criminal trial reduction program in Riverside County.

In 2008 Judge Couzens was named Jurist of the Year by the California Judicial Council.

SELECTED CHANGES TO CALIFORNIA SENTENCING LAWS EFFECTIVE 2022

J. RICHARD COUZENS
Judge of the Superior Court
County of Placer (Ret.)

August 2022

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I. INTRODUCTION

The 2020-2021 legislative session saw the enactment of broad changes to the California sentencing laws. Virtually all the changes are designed to increase the court's discretion to impose shorter custody terms; in some instances, the legislation directs the court's discretion to impose a lesser sentence. This memorandum will review the following major changes to the Penal Code¹ effective January 1, 2022:

At sentencing:

- §§ 1170 and 1170.1: Limiting the ability of the court to impose an upper term of custody without aggravating factors being found by a jury or admitted by the defendant.
- § 1170, sub. (b)(6): Requiring the imposition of the low term of custody in specified circumstances.
- § 1170, sub. (h)(9): Specifying term for enhancement to be served where the base term is served.
- § 186.22, subd. (b)(3): Extending the existing gang sentencing structure to January 1, 2023.
- § 654: Permitting the court to select the punishment from the triad for any crime when section 654 applies, not just from the triad of the crime having the longest possible term.
- § 1385: Directing the exercise of discretion in striking enhancements in specified circumstances.
- § 4019: Extending presentence conduct credits to persons committed to facilities to restore trial competency under sections 1368, *et seq.*
- § 1370.01: Providing for diversion of mentally incompetent misdemeanor offenders.

Following sentencing:

- § 1170.03: directing the discretion of the court in considering requests for recall of a custody sentence.
- §§ 1171 and 1171.1: Requiring the removal of specified enhancements from the defendant's criminal record.

¹ Unless otherwise indicated, all statutory references are to the Penal Code.

II. IMPOSITION OF SENTENCE UNDER THE DETERMINATE SENTENCING LAW (§§ 1170 AND 1170.1)

Senate Bill No. 567 (2021-2022 Reg. Leg. Sess.) (SB 567)², amends section 1170 and 1170.1 to establish a sentencing procedure consistent with the decisions of the United States Supreme Court in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), and *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), when a trial court seeks to impose the upper term of custody. Section 1170 also is amended to direct the court to impose the low term of imprisonment in specified circumstances. Section 1170, subdivision (h)(9), is amended to require the service of an enhancement in the same setting (county jail or state prison) as required by the sentence imposed on the base term.

A. Historical Context

The U.S. Supreme Court in *Apprendi* determined “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi, supra*, 530 U.S. at p. 490.) In *Blakely*, the court defined “statutory maximum” to mean “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” (*Blakely, supra*, 542 U.S. at p. 303.)

Prior to 2007, section 1170, subdivision (b), provided in relevant part: “When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. . . .” Section 1170 thus provided a statutory presumption that the middle term was to be imposed unless aggravating or mitigating factors supported the imposition of the upper or lower term.

The California Supreme Court held the triad sentencing options of the Determinate Sentencing Law (DSL) did not violate *Apprendi* or *Blakely*. (*People v. Black* (2005) 35 Cal.4th 1238 (*Black I*)). However, in *Cunningham* the U.S. Supreme Court overruled *Black I*, holding that California’s DSL, insofar as it gives the judge, not the jury, the authority to find the facts that expose a defendant to an upper term sentence by a preponderance of the evidence and not by proof beyond a reasonable doubt, violates the 6th and 14th Amendment rights to a jury trial. (*Cunningham, supra*, 549 U.S. at p. 274.)

In response to *Cunningham*, the Legislature amended section 1170, subdivision (b), in 2007 to provide in relevant part: “When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound

² Assembly Bill Nos. 124 and 1540 (2021-2022 Reg. Leg. Sess.), containing parallel amendments to sections 1170 and 1170.1, also were enacted into law. A reconciliation provision in SB 567 provides that if all three bills are enacted, version 1.3 of the legislation becomes the law. (SB 567, § 3, subd. (c).) Accordingly, the legislation effecting sections 1170 and 1170.1 quoted in this memorandum is taken from version 1.3 of SB 567.

discretion of the court. . . . The court shall select the term which, in the court’s discretion, best serves the interests of justice.” The amendment eliminated the presumption of the middle term, giving the court full discretion to impose any of the three sentencing choices. The change eliminated the problems identified by the Supreme Court in *Apprendi*, *Blakely* and *Cunningham*. (See *People v. Wilson* (2008) 164 Cal.App.4th 988, 991-992.)

In its 2007 amendment to section 1170, and thereafter, the legislature also provided for a sunset of the new provisions which, over the past thirteen years, has been regularly extended by the Legislature – until 2021.

B. Application of *Estrada* to cases not final

There is no question the new sentencing procedures in section 1170 and 1170.1 will be applicable to sentences imposed after January 1, 2022, the effective date of the statutory changes. There remains the issue of whether the changes will be applicable to any case not final as of that date under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). Because the legislative changes confer a substantial benefit on the defendant at sentencing, likely *Estrada* will apply, at least to some extent. Whether *Estrada* will apply in a particular case will depend on the exact circumstances of sentencing.

1. Cases where the court imposed the upper term of imprisonment

- The defendant likely is entitled to a redetermination of the sentence where the court, as a matter of its own discretion, imposed the upper term based solely on an aggravating factor that must now be submitted to the trier of fact. For example, if the defendant was convicted after trial of committing a lewd act on a child, and the court thereafter sentenced the defendant to the upper term solely because the defendant violated a position of trust, the defendant likely will be entitled to a trial on the aggravating factor.

People v. Garcia (2022) 76 Cal.App.5th 887, holds *Estrada* is applicable to the changes made by SB 567 and AB 124 to section 1170. Although the appellate opinion did not review the factors considered by the court in imposing the upper term, the Attorney General conceded the court used factors which now must be either admitted by the defendant or proved to a jury beyond a reasonable doubt. The appellate court remanded the matter for resentencing, admonishing the trial court that it may reconsider *all* sentencing decisions and choices.

- The defendant likely will not be entitled to a new sentencing determination where the court, as a matter of its own discretion, imposed the upper term based on a combination of aggravating factors, but at least one of those factors is included in the “prior conviction” exception or was admitted by the defendant. As observed in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*): “[I]mposition of

the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions.” (*Black II, supra*, 41 Cal.4th at p. 816; *People v. Osband* (1996) 13 Cal.4th 622, 728-729.)

In *People v. Flores* (2022) 75 Cal.App.5th 495, the appellate court observed that because defendant’s case was not final as of January 1, 2022, the amendments made by SB 567 retroactively applied to the case. However, the court declined to remand the case for resentencing because, in imposing an upper term sentence, the trial court referenced defendant’s extensive adult and juvenile criminal record and that defendant was on probation when he committed the current crimes. The trial court also found the crimes in this case “involved a high degree of cruelty, viciousness, and callousness, as the defendant physically assaulted the victim by pulling her hair and punching her on the mouth.” Based on *People v. Sandoval* (2007) 41 Cal.4th 825, *Flores* concluded remand was unnecessary because any error in failing to separately prove the aggravating factors was harmless beyond a reasonable doubt. *Flores* concluded, beyond a reasonable doubt, that a trier of fact would find at least one aggravating factor true.

- The right to resentencing is less clear where the defendant has been sentenced to an upper term based on a plea bargain. Likely much will depend on the specific circumstances of the plea. On the one hand, just like a plea to the underlying charge, the agreement of the defendant to receive the upper term punishment assumes that such a sentence is proper; in essence, the defendant has admitted the aggravating facts that justify the imposition of the upper term. (See *Blakely, supra*, 542 U.S. at p. 310.) “Where the defendants have pleaded guilty in return for a *specified* sentence, appellate courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction. The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process.” (*People v. Hester* (2000) 22 Cal.4th 290, 295.)

On the other hand, *People v. French* (2008) 43 Cal.4th 36 (*French*), severely limits the effect of a plea which implicates the right to a jury under *Apprendi*. “[W]e hold that defendant, by entering into a plea agreement that included the upper term as the maximum sentence, did not implicitly admit that his conduct could support that term. The determinate sentencing law contemplates that issues related to the trial court’s decision whether to impose the upper, middle, or lower term will be litigated at a posttrial (or postplea) sentencing hearing. [Citation.] The defendant must be provided with notice of potential aggravating

and mitigating circumstances prior to the hearing, by means of the probation report. [Citation.] Any statement in aggravation filed by the prosecution, the victim, or the victim's family must be submitted four days prior to the hearing. [Citation.] In imposing sentence, the trial court may consider those documents as well as any additional evidence introduced at the sentencing hearing. [Citation.] A defendant who enters into an agreement to plead guilty or no contest, with a sentence to be imposed within a specified maximum, reasonably expects to have the opportunity to litigate any matters related to the trial court's choice of sentence—including the existence of aggravating and mitigating circumstances—at the sentencing hearing.” (*French, supra*, 43 Cal.4th at pp. 48-49.) While the defendant’s no contest plea to six counts constituted an admission to all the elements of the offenses, it did not constitute an admission to any aggravating circumstances. (*French, supra*, 43 Cal.4th at p. 49.) It is important to observe that the plea in *French* authorized the court to sentence the defendant within a *range* of punishment.

French also did not accept the factual statement of the crime to be sufficient for the purposes of *Apprendi* without an express admission or stipulation by the defendant or his counsel that the facts as stated are true. It is not sufficient that counsel simply acknowledge that witnesses will testify in a particular way; there must be an admission or stipulation that the facts as testified to by the witnesses are true. (*French, supra*, 43 Cal.4th at p. 51.)

Based on the factors discussed in *French* and *Hester*, the following factors will be relevant in determining whether the defendant will be entitled to resentencing of an upper term sentence based on a plea agreement:

- Whether the defendant agreed to a specific upper term sentence. A plea to a specific term includes an implied agreement to the underlying facts supporting the sentence.
- Whether the defendant agreed to a range of sentence, a portion of which could be the imposition of the upper term. If there was no stated agreement to the facts supporting the upper term, the defendant likely will be entitled to resentencing under the new provisions.
- Whether the defendant individually or through counsel agreed to the aggravating factors necessary to support an upper term sentence. Such agreement could be included in the factual statement of the offense under section 1192.5, provided the defendant personally or through counsel *admitted the truth* of the facts as stated.

2. Required imposition of the low term of imprisonment

The application of *Estrada* to the provisions of section 1170, subdivision (b)(6), requiring the imposition of the low term of imprisonment likely will be the same as for the restrictions on the imposition of the upper term of imprisonment discussed, *supra*. Because section 1170, subdivision (b)(6), directs the court to exercise sentencing discretion to impose the low term of imprisonment in certain circumstances, likely its provisions will be potentially applicable to cases not final as of January 1, 2022:

- If the court imposed the middle or upper term of imprisonment as a matter of independent exercise of discretion such as after a trial, likely the defendant will be entitled to a reconsideration of the sentence under section 1170, subdivision (b)(6).
- If the defendant is sentenced to the middle or upper term as part of a specific plea agreement to the sentence, for the reasons discussed in *French* and *Hester*, *supra*, likely the defendant will not be entitled to reconsideration of the sentence.

People v. Banner (2022) 77 Cal.App.5th 226, 240, holds AB 124, requiring the imposition of the low term of imprisonment, applies retroactively to all nonfinal cases on direct appeal.

3. Service of enhancement follows the base term

Section 1170, subdivision (h)(9), provides that punishment for an enhancement will be served in county jail or state prison as required for the base term of the underlying crime: “Notwithstanding the separate punishment for any enhancement, any enhancement shall be punishable in county jail or state prison as required by the underlying offense and not as would be required by the enhancement.” The amendment abrogates the holding of *People v. Vega* (2014) 222 Cal.App.4th 1374, which held if the enhancement specifies punishment in state prison, the entire sentence must be served in state prison, even if the base term provided for punishment in county jail under section 1170, subdivision (h).

Clearly the legislative change will apply to all sentences imposed after January 1, 2022. It is not clear whether the application of *Estrada* will require a reconsideration of the sentence in all cases not final as of January 1, 2022. The application of *Estrada* to the Realignment Law, which created county jail sentencing under section 1170, subdivision (h), was never an issue. The Realignment Law was created with a “savings clause” which made it effective only as to crimes committed on or after October 1, 2011. The addition of section 1170, subdivision (h)(9), by SB 567 comes without a “savings clause.” *Estrada*,

therefore, likely will apply to the change, at least if the service of a term in county jail is considered a lesser punishment than a term to be served in prison. The materiality of the difference between the service of a term in county jail or state prison has been a matter of disagreement between the appellate courts. *People v. Reece* (2013) 220 Cal.App.4th 204, concluded the state prison aspect of a suspended sentence was not an integral part of the plea bargain since there was no difference in the custody term ultimately served. *People v. Wilson* (2013) 220 Cal.App.4th 962, reached the opposite conclusion. *Wilson* reasoned the parties might have negotiated a different plea had they known the court was able to impose a split sentence. The Supreme Court granted review of both cases and ordered them reconsidered in light of *People v. Scott* (2014) 58 Cal.4th 1415 – the opinions were not republished.

Notwithstanding the technical discussion in *Reece* and *Wilson*, the common understanding is that service of a sentence in the local county jail is considered less onerous than a comparable term in state prison, particularly since the court will have the ability to place the defendant on mandatory supervision under section 1170, subdivision (h). Much will depend on the availability of custody rehabilitative services and use of monitored release programs in the particular county. In any event, the court may well wish to reconsider the sentence for equitable reasons after a recall of a sentence under section 1170.03, discussed *infra*.

C. Imposing an upper term of imprisonment

Effective January 1, 2022, section 1170, subdivision (b), provides, in relevant part: “(1) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall, in its sound discretion, order imposition of a sentence not to exceed the middle term, except as otherwise provided in paragraph(2). (2) The court may impose a sentence exceeding the middle term only when there are circumstances in aggravation of the crime that justify the imposition of a term of imprisonment exceeding the middle term, and the facts underlying those circumstances have been stipulated to by the defendant, or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial.”

1. Discretion to impose lower or middle base term of imprisonment

The amendment to section 1170, subdivision (b)(1), preserves the court’s traditional discretion to impose the lower or middle term of imprisonment for a base term sentenced under the DSL. Provided the court is not considering the imposition of an upper term sentence, nothing in the subdivision (b)(1) requires the submission of sentencing factors to the jury. Consistent with California Rules of Court, rules 4.421 and 4.423, in determining whether to impose the middle or lower term of imprisonment, the court will have discretion to consider all relevant sentencing factors, whether they are aggravating or mitigating factors.

2. Imposition of the upper base term of imprisonment

If the court is considering the imposition of the upper base term of imprisonment, unless the facts are stipulated to by the defendant or the factor in aggravation relates to the record of conviction, any fact justifying the imposition of the upper term must be submitted to the trier of fact and proved beyond a reasonable doubt. (§ 1170, sub. (b)(2).)

Aggravating factors admitted by plea

If it is the intent of the parties in a plea agreement that the defendant receive the upper term of imprisonment, some care should be taken in stating the terms of the plea. Likely it would be sufficient for the court to accept a “guilty” or “no contest” plea, coupled with a statement of the agreed upper term sentence. Under such circumstances, the defendant’s admission to aggravating factors could be implied from the plea. Indeed, California Rule of Court, rule 4.412, subdivision (a), provides, in relevant part: “It is an adequate reason for a sentence or other disposition that the defendant, personally and by counsel, has expressed agreement that it be imposed and the prosecuting attorney has not expressed an objection.”

The better practice, however, would be to require an express admission to the aggravating factors justifying the upper term. The court also may request a stipulation by counsel in the presence of the defendant as to the truth of the factual basis for the plea, which statement of facts includes the aggravating factors. (*People v. French* (2008) 43 Cal.4th 36, 48-52, discussed, *supra*; see *People v. Sohal* (1997) 53 Cal.App.4th 911 [factual statement given by prosecution and agreed to by defendant or counsel is part of the record of conviction].)

In *People v. Munoz* (2010) 155 Cal.App.4th 160, 166-168, the defendant entered into a waiver under *People v. Harvey* (1979) 25 Cal.3d 754, that allowed the trial court to consider the defendant’s “prior criminal history and the entire factual background of the case, including any unfiled, dismissed or stricken charges or allegations or cases.” The trial court’s imposition of the upper term based on great violence and infliction of great bodily injury was upheld as being included in the waiver.

Bifurcation of proceedings

If requested by the defendant, the court generally must bifurcate the trial on the factors in aggravation from the trial on the charges and enhancements. (§ 1170, subd. (b)(2).) The only exception to bifurcation is “when the evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law. . . .” (*Id.*) Otherwise, “[t]he jury shall not be informed of the bifurcated allegations until there has been a conviction of a felony offense.”

3. Enhancements with triads

Section 1170.1, subdivision (d)(1), has been amended to provide a process similar to sentencing of the base term under section 1170 for sentencing enhancements with triads. The court has discretion to impose the middle or lower term of imprisonment for an enhancement. (*Id.*) “The court may impose a sentence exceeding the middle term only when there are circumstances in aggravation that justify the imposition of a term of imprisonment exceeding the middle term, and the facts underlying those circumstances have been stipulated to by the defendant, or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial.” (§ 1170.1, sub. (d)(2).)

Unlike section 1170, subdivision (b)(3), section 1170.1, subdivision (d)(1), does not contain a “prior conviction exception” to the imposition of the upper term for enhancements with triads. While such an omission may be a drafting oversight, the plain language of subdivision (d)(1) requires the proof of *any* aggravating factor be stipulated to by the defendant or proved to the trier of fact beyond a reasonable doubt. In the absence of further direction from the Legislature, it seems likely the procedures for proving aggravating factors for the base term under section 1170 are equally applicable to the proof of aggravating factors for an enhancement under section 1170.1. Trial on aggravating factors for an enhancement must be bifurcated if requested by the defendant. “Except where evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law, upon request of a defendant, trial on the circumstances in aggravation alleged in the indictment or information shall be bifurcated from the trial of charges and enhancements.” (§ 1170, subd. (b)(2).) Subdivision (b)(2) does not distinguish between circumstances in aggravation of the base term and circumstances in aggravation of an enhancement.

4. Prior conviction exception

Consistent with *Apprendi*, section 1170, subdivision (b)(3), provides for an exception to the proof requirements for aggravating factors based on a prior conviction: “Notwithstanding paragraphs (1) and (2), the court may consider the defendant’s prior convictions in determining sentencing based on a certified record of conviction without submitting the prior convictions to a jury. This paragraph does not apply to enhancements imposed on prior convictions.”

The legislation specifies the court may aggravate a sentence if based on “a certified record of conviction.” Traditionally courts are advised of the defendant’s record through a probation report. Such reports are not independently “certified” by any government agency. At least one published case commented in dicta that the statement of the defendant’s criminal record in the probation report is not the same as

a certified record of conviction. (See *People v. Zabelle* (2022) ___ Cal.App.5th ___ [C093173].)

Section 1170, subdivision (b)(3), specifies its exception does not apply to enhancements imposed on prior convictions. Accordingly, the legislation appears to allow admission of the fact of conviction of a base crime, but not the fact of any enhancement such as the use of a weapon or infliction of great bodily injury. If the prosecution wants the court to consider the enhancements, likely it will be necessary to hold a mini-trial on the existence of the enhancements utilizing the record of conviction, additional witnesses, or other admissible evidence. If the entire circumstances of the crime are otherwise admissible in the trial pursuant to section 1170, subdivision (b)(2), a separate proceeding to prove the enhancement likely will not be necessary.

Aggravating factors included in the prior conviction exception

Prior to the amendment of section 1170 in response to *Cunningham*, whether a particular aggravating factor was or was not included in the prior conviction exception was subject to considerable appellate litigation. The following factors were determined to be within the exception, thus obviating the need to submit the factor to the trier of fact under *Apprendi*. Whether these factors retain their viability under the prior conviction exception of section 1170, subdivision (b)(3), will be a matter for the appellate courts to determine.

- a. **The fact the defendant was convicted of a particular prior offense.** (*People v. Cardenas* (2007) 155 Cal.App.4th 1468, 1481-1483 [record must reflect the court actually relied on the existence of the prior convictions in imposing the upper term]; *c.f.*, *People v. Stuart* (2008) 159 Cal.App.4th 312 [the mere existence of the prior conviction is an aggravating factor sufficient to support the imposition of the upper term, even though the trial court did not indicate reliance on the prior conviction].)
- b. **Criminal record is of increasing seriousness.** (*Black II, supra*, 41 Cal.4th at pp. 819-820 [“The determinations whether a defendant has suffered prior convictions, and whether those convictions are ‘numerous or of increasing seriousness’ [Citation], require consideration of only the number, dates, and offenses of the prior convictions alleged. The relative seriousness of these alleged convictions may be determined simply by reference to the range of punishment provided by statute for each offense. This type of determination is ‘quite different from the resolution of the issues submitted to a jury, and is one more typically and appropriately undertaken by a court.’ [Citation.]])
- c. **Defendant was on parole at the time the crime was committed.** *People v. Capistrano* (2014) 59 Cal.4th 830, 882-884 [*Capistrano*][overruled on other grounds by *People v. Hardy* (2018) 5 Cal.5th 56], observed: “Among the reasons given by the

trial court for imposing the upper term on count 4 was defendant's criminal history, which included at least one prison term *and the fact he was on parole* when he committed the offenses. Defendant's pattern of recidivism as evidenced by this criminal history constitutes a legally sufficient circumstance in aggravation justifying imposition of the upper term without violating his Sixth Amendment right to a jury trial. [Citation.] [recidivism exception to *Apprendi–Blakely–Cunningham* line of authority include[s] not only the 'fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions' [Citations].]" (*Capistrano, supra*, 59 Cal.4th at p. 884; italics added.)

- d. **Prior performance on probation, mandatory supervision, postrelease community supervision, or parole (if based on conviction of a crime).** *People v. Towne* (2008) 44 Cal.4th 63, 82-83 [*Towne*]. "Whether the aggravating circumstance of a defendant's prior unsatisfactory performance on probation or parole comes within the [prior conviction] exception, in contrast, will depend upon the evidence by which that circumstance is established in a particular case. In some instances, the defendant's unsatisfactory performance on probation or parole is proved by evidence demonstrating that, while previously on probation or parole, he committed and was convicted of new offenses. For example, in *People v. Yim* (2007) 152 Cal.App.4th 366, 370, the Court of Appeal upheld the trial court's finding that the defendant had performed unsatisfactorily on parole, based upon evidence establishing that he was on probation or parole at the time he committed two prior offenses and was on parole when he committed the most recent offense. 'Each time appellant has been granted probation or parole, he has reoffended.' (*Ibid.*) The Court of Appeal in *Yim* also concluded that a jury trial on this aggravating factor was not required, because the factor was related to recidivism and could be 'determined by reference to "court records" pertaining to appellant's prior convictions, sentences and paroles. The mere recitation of his dates of conviction and releases on parole [citation] demonstrate[s], as a matter of law, that he committed new offenses while on parole.' [Citation.] Similarly, in the present case, defendant's criminal history, as recited in the probation report, indicates that several of his prior convictions occurred while he was on probation. When a defendant's prior unsatisfactory performance on probation or parole is established by his or her record of prior convictions, it seems beyond debate that the aggravating circumstance is included within the [prior conviction] exception and that the right to a jury trial does not apply." (*Towne, supra*, 44 Cal.4th at p. 82.)

Towne also observed, however, if the unsatisfactory performance on probation was other than a new conviction, such as failing to report, failed drug tests, and not participating in counseling as directed, the defendant is entitled to a jury finding on the aggravating facts. (*Towne, supra*, 44 Cal.4th at pp. 82-83.)

e. Prior prison terms (aggravating factor v. enhancement for prior prison term.)

Based on the assumption that the defendant had certain due process protections when a prior conviction was obtained, *Apprendi* and *Blakely* do not require a jury determination of the existence of a prior conviction. (*Apprendi, supra*, 530 U.S. at pp. 488-490; *Blakely, supra*, 542 U.S. at p. 490; *People v. Thomas* (2001) 91 Cal.App.4th 212, 220-223.)

The prior conviction authorizing the upper term may be a misdemeanor. (*People v. Stewart* 2008) 159 Cal.App.4th 312, 314.)

The court should distinguish the use of a prior prison term for the purposes of an aggravating factor from the existence of a prior prison term for the purposes of an enhancement under section 667.5, subdivision (b). In the latter circumstance, the enhancement is imposed only if the prior prison term is for a violent sex crime listed in Welfare and Institutions Code, section 6600. For the purposes of selecting a term on a crime's triad, however, the court is free to consider *any* aggravating factors listed in California Rules of Court. Rule 4.421, subdivision (a), specifies circumstances in aggravation include "[f]actors relating to the crime, whether or not charged or chargeable as an enhancement. . . ." Furthermore, Rule 4.421, subdivision (c), permits the court to consider "any other factors . . . that reasonably relate to the defendant or the circumstances under which the crime was committed." The existence and nature of a prior prison term certainly is a relevant factor for the court to consider in the defendant's sentencing.

- f. **Prior juvenile adjudication.** *People v. Nguyen* (1007) 46 Cal.4th 1007 (*Nguyen*), permits the court to consider a defendant's prior juvenile adjudication in imposing the upper term. "[D]efendant claims the *Apprendi* rule barred use of the prior juvenile adjudication to enhance his maximum sentence in the current case because the prior *juvenile proceeding*, though it included most constitutional guarantees attendant upon adult criminal proceedings, did not afford him the right to a jury trial. [Citations.] He bases this claim on language employed by the United States Supreme Court to justify an *exception* to the *Apprendi* rule—i.e., that 'the fact of a prior conviction,' used to enhance the maximum sentence for a later offense, *need not* be proved to a jury beyond reasonable doubt, but may simply be found by the sentencing court." (*Nguyen, supra*, 46 Cal.4th at p. 1011; italics in original.) "[W]e find nothing in the *Apprendi* line of cases, or in other Supreme Court jurisprudence, that interferes, under the circumstances here presented, with what the high court deemed a sentencing court's traditional authority to impose increased punishment on the basis of the defendant's recidivism. That authority may properly be exercised, we conclude, when the recidivism is evidenced, as here, by a *constitutionally valid* prior adjudication of criminal conduct. As we explain below, the high court has expressly so held in analogous circumstances. [Citation.]" (*Nguyen, supra*, 46 Cal.4th at p. 1012; italics in original.)

- g. **Crime committed while out on bail (factor in aggravation v. enhancement).** *People v. Johnson* (2012) 208 Cal.App.4th 1092 (*Johnson*), holds the prior conviction exception to *Apprendi* includes committing a crime while on bail. “The bases for [certain holdings under the prior conviction exception] were, in general, that the aggravating factors were all related to ‘the fact of a prior conviction’ by their recidivistic nature, rather than to the conduct involved in the charged offense(s), and that such factors could be proven by reliable documentation, such as court records. [Citations.] [¶] Section 12022.1 is a recidivist statute—it enhances punishment based upon the defendant’s commission of another offense while on bail for a previous offense. [Citation] [‘a section 12022.1 enhancement turns on the status of a defendant as a repeat offender, not on what the defendant did when committing the current crime, i.e., secondary offense’].) [¶] The only difference between a defendant who commits a felony offense while on probation or parole and a defendant who commits a felony offense while on bail for another felony offense is the timing. In the former circumstance, the prior conviction (primary offense) has already occurred. The distinction is insignificant because in the latter circumstance the defendant cannot be punished until he is convicted of the primary offense. Of course, in both circumstances, additional punishment requires a conviction of the second charged offense. [¶] Because section 12022.1 is an enhancement statute that, like the foregoing examples, penalizes recidivist conduct and does not relate to the commission of either the primary or secondary offense, defendant is not entitled to a jury trial on its truth.” (*Johnson, supra*, 208 Cal.App.4th at pp. 1099-1100; footnote omitted.)

5. Other circumstances where aggravating factors need not be submitted to a jury

There are several other circumstances where aggravating factors need not be separately submitted to a jury.

- a. **Factors submitted to the jury as part of the case.** Facts that prove an aggravating factor that otherwise come into a trial need not be resubmitted to the jury in a separate proceeding. Section 1170, subdivision (b)(2), provides that bifurcation is not required “when the evidence supporting an aggravating circumstance is admissible to prove or defend against the charged offense or enhancement at trial, or it is otherwise authorized by law. . . .”

In *Black II, supra*, 41 Cal.4th at pp. 816-817, the Supreme Court found it proper for the trial court to deny the defendant a grant of probation and impose the upper prison term because the crime was committed by use of force. “The trial court stated that it imposed the upper term in the present case primarily because of ‘the nature, seriousness, and circumstances of the crime.’ In describing those circumstances, the court commented that defendant ‘forced the victim ... to have sexual intercourse with him on numerous occasions.’ The trial court’s identification of the defendant’s use of force as an aggravating circumstance was supported by the

jury's verdict. The information alleged, and the jury found true beyond a reasonable doubt, that defendant committed the offense of continuous sexual abuse by means of 'force, violence, duress, menace, and fear of immediate and unlawful bodily injury.' This finding rendered defendant ineligible for probation. [Citation.] Furthermore, and most significant for the issue presented here, the jury's true finding on this allegation established an aggravating circumstance that rendered defendant eligible for the upper term under section 1170. (See Cal. Rules of Court, rule 4.408(a) [which permits the trial court to consider any criteria 'reasonably related to the decision being made'].)

In a similar case, the trial court was permitted to impose the aggravated term based on the defendant having committed a crime against multiple victims because the jury convicted the defendant of two counts of gross vehicular manslaughter. (*People v. Calhoun* (2007) 40 Cal.4th 398, 406; *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1326.)

- b. Upper term imposed because of a violation of a Cruz waiver.** An upper term imposed after a violation of a waiver entered under *People v. Cruz* (1988) 44 Cal.3d 1247, does not require a decision by a jury, provided the upper term was included in the plea agreement and the defendant agreed the court could impose the term after a violation of the waiver. (*People v. Vargas* (2007) 148 Cal.App.4th 644.)
- c. Imposition of an indeterminate term.** *Blakely* holds *Apprendi* has no application to the imposition of an indeterminate sentence. "[T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury." (*Blakely, supra*, 542 U.S. at pp 308-309; italics in original.)
- d. Facts justifying sex registration.** *People v. Presley* (2007) 156 Cal.App.4th 1027, holds the public notification requirement of the sex offender registration law is not

punishment. Accordingly, *Apprendi* and *Blakely* are inapplicable to the judicial factfinding necessary to establish the registration requirement.

- e. **Defendant convicted of other crimes for which a consecutive sentences could have been imposed but for which concurrent sentences are being imposed.** (Calif. Rules of Court, rule 4.421, subd. (a)(7).) Although there is no reported case determining whether *Apprendi* applies to this aggravating factor, likely the factor falls exclusively within the discretion of the sentencing court and is not a jury issue.

6. Application to the Three Strikes Law.

The application of *Apprendi* and the amendments to sections 1170 and 1170.1 to sentences imposed under the Three Strikes Law likely will depend on whether the sentence is based on a second or third strike and whether the sentencing court actually uses an aggravating factor in selecting the minimum term of a third strike sentence or the upper term of an enhancement with a triad.

Second strike sentences

Second strike sentences, to the extent the underlying crime is under the Determinate Sentencing Law (DSL) and no exception applies, must comply with the new provisions of sections 1170 and 1170.1 if the court intends to impose the upper term on the base term or an enhancement (although the term imposed for the enhancement is not doubled). Second strike crimes sentenced under the DSL remain in the DSL after the term is doubled under the Three Strikes Law. Just like any other crime punished by a DSL term, the court is selecting from three possible terms, the only difference being that the court is doubling the selected term.

If the term is a second strike sentence of a crime punished under the Indeterminate Sentencing Law (ISL), for the reasons discussed in *Blakely v. Washington* (2004) 542 U.S. 296, 308-309, likely *Apprendi* does not apply. Furthermore, in imposing a base term sentence for a crime punished by an indeterminate term, the court is not selecting between three possible terms as required by sections 1170 and 1170.1. However, if the court is imposing an upper term on an *enhancement* with a triad, the plain meaning of the new provisions of section 1170.1 suggest they will apply to the determination. It is an open question, however, whether sections 1170 and 1170.1, which apply to DSL crimes, will have any application to a DSL enhancement imposed on an underlying crime punished under the ISL.

Third strike sentences

Third strike sentencing is more complicated because although the crime is being sentenced under the ISL, the court must compute the minimum term of the life

sentence. Under section 1170.12, subdivision (c)(2)(A), the court is directed to select “the greatest minimum term” from three options:

Option I: a minimum term of three times the term otherwise provided;

Option II: a minimum term of 25 years; or

Option III: a minimum term calculated under section 1170 without the application of the Three Strikes Law.

Option II does not involve any calculation – instead of the term normally specified for the crime, the minimum term is 25 years. With Options I and III, however, the selection of the term is within the discretion of the court. For example, under Option I, if the ordinary punishment is 2, 4 or 6 years, as a third strike offender, the defendant’s calculated term becomes 6, 12 or 18 years. Similarly, under Option III the court selects a term from the normal triad for the crime. Where the court has discretion to select from terms on a triad, the court may exercise that discretion and is not required to impose only the upper term. (*People v. Nguyen* (1999) 21 Cal.4th 197, 205.)

If the court utilizes Option II or uses the middle or low term in selecting a sentence under Options I or III, neither *Apprendi* nor the new provisions of sections 1170 and 1170.1 are implicated. If the court actually selects the upper term as the basis for the calculation of the minimum term of the third strike sentence, however, it seems likely *Apprendi* applies, but it is unclear whether the new provision of section 1170 and 1170.1 will apply.

The calculation of the minimum term of a third strike sentence now has Sixth Amendment implications. *Apprendi* and its progeny, including *Cunningham*, were all cases involving an increase of the maximum punishment that a defendant could receive, based on the existence of certain facts. “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.” (*Apprendi, supra* 530 U.S. at p. 490.) In a case decided two years later, the court held *Apprendi* did not apply to any judicial fact-finding that affected a mandatory minimum sentence. (*Harris v. United States* (2002) 536 U.S. 545 (*Harris*).)

However, *Alleyne v. United States* (2013) 570 U.S. 99 (*Alleyne*), revisited *Harris* and found it inconsistent with *Apprendi*. “In [*Harris*] this Court held that judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment. We granted certiorari to consider whether that decision should be overruled. 568 U.S. ___, 133 S.Ct. 420, 184 L.Ed.2d 252 (2012). ¶ *Harris* drew a distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum. We conclude that this distinction is inconsistent with our decision in [*Apprendi*], and with the original meaning of the Sixth Amendment. Any fact that, by law, increases the penalty for a crime is an ‘element’ that must be submitted to the jury and found beyond a reasonable doubt. [Citation.] Mandatory minimum

sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an ‘element’ that must be submitted to the jury. Accordingly, *Harris* is overruled.” (*Alleyne*, supra, 570 U.S. at p. 103.) “The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an ‘element’ or ‘ingredient’ of the charged offense. [Citation.] In *Apprendi*, we held that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed. [Citation.] While *Harris* declined to extend this principle to facts increasing mandatory minimum sentences, *Apprendi* ‘s definition of ‘elements’ necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. [Citation.] Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.” (*Alleyne*, supra, 570 U.S. at pp. 107-108.) Based on *Alleyne*, therefore, it appears likely that absent an exception, *Apprendi* applies as a matter of constitutional requirement to the determination of the minimum term of a third strike sentence if the court is using the upper term as the basis for a sentence calculated under either Options I or III. *Alleyne* also likely applies to the imposition of the upper term of an *enhancement* that is added to the indeterminate base term.

It is not clear whether the new provisions of sections 1170 and 1170.1 will apply to either the calculation of the base term or the enhancement. If the court is imposing an upper term for the minimum term under Options I or III, or on an enhancement with a triad, the plain meaning of the new provisions of sections 1170 and 1170.1 suggest they may apply to the determination. It is an open question, however, whether sections 1170 and 1170.1, which apply to DSL crimes, will have any application to any aspect of a sentence imposed on a crime punished under the ISL.

Until the issue has been clearly resolved by the appellate courts, prudence suggests that if the court intends to impose the upper term of a third strike sentence based on discretion exercised under Options I or III under section 1170.12, subdivision (c)(2)(A), or an upper term on an enhancement to an indeterminate term, the aggravating factors should be submitted to the trier of fact and proven beyond a reasonable doubt, unless the factors come within an exception such as for prior convictions or the facts are admitted by the defendant. Although there is some question whether sections 1170 and 1170.1 apply to crimes punished under the ISL (as in the case of a third strike sentence), if under *Apprendi/Alleyne* the jury must determine the existence of an aggravating factor, it seems only logical to use the procedures outlined in sections 1170 and 1170.1 until instructed otherwise by an appellate court or the Legislature.

7. Aggravating factors that must be submitted to the trier of fact

The following aggravating factors have been held to come within *Apprendi* and its progeny and, unless admitted by the defendant, must be submitted to the trier of fact and proved beyond a reasonable doubt.

- a. **The victim was particularly vulnerable.** (*People v. Boyce* (2014) 59 Cal.4th 672, 725-729; *People v. Curry* (2007) 158 Cal.App.4th 766, 793-794 (*Curry*); *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1096-1097.)
- b. **The crime involved great violence, great bodily injury, or threat of great bodily injury.** (*People v. Sandoval* (2007) 41 Cal.4th 825, 837-838 (*Sandoval*); *People v. Esquibel* (2008) 166 Cal.App.4th 539, 557-558.)
- c. **Crime committed with extreme cruelty, viciousness, or callousness.** (*Sandoval, supra*, 41 Cal.4th at p. 837; *Curry, supra*, 158 Cal.App.4th at pp. 793-794; *Ybarra, supra*, 166 Cal.App.4th at pp. 1096-1097.)
- d. **Violation of a position of trust.** (*People v. French* (2008) 43 Cal.4th 36, 43, 52; *Curry, supra*, 158 Cal.App.4th at pp. 793-794.)
- e. **Crime involved planning and sophistication.** (*Ybarra, supra*, 166 Cal.App.4th at pp. 1096-1097; See *People v. Tillotson* (2007) 157 Cal.App.4th 517, 547.)
- f. **Unsatisfactory performance on probation, mandatory supervision, postrelease community supervision, or parole.** If the defendant's unsatisfactory performance on probation is based on factors other than being convicted of a new crime, the factors must be submitted to the trier of fact and proved beyond a reasonable doubt. (*People v. Towne* (2008) 44 Cal.th 63, 82-83.)
- g. **The defendant induced others to commit the crime (including a minor), or occupied a leadership position in the commission of the crime.** (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1469-1473.)
- h. **Other factors in aggravation.** Although there are no reported cases on whether the following aggravating factors must be submitted to the trier of fact, likely the following factors are included within *Apprendi*: defendant was armed with or used a deadly weapon (rule 4.421, subd. (a)(2)); defendant threatened or dissuaded witnesses, or interfered with the judicial process (rule 4.421, subd. (a)(6)); crime involved the taking or attempted taking or damage to property of great monetary

value (rule 4.421, subd. (a)(9)); crime involved a large quantity of contraband (rule 4.421, subd. (a)(10)); crime constitutes a hate crime (rule 4.421, subd. (a)(12)); defendant engaged in violent conduct such that he is a danger to society (rule 4.421, subd. (b)(1));

8. Pleading aggravating factors and proof at preliminary hearing

It is not entirely clear whether the aggravating factors must be pled in the accusatory pleadings and established by proof at a preliminary hearing. The two reported cases on this issue are in disagreement.

Barrigan v. Superior Court (2007) 148 Cal.App.4th 1478 (*Barrigan*), holds the aggravating factors may be alleged in the complaint or information, but need not be established at a preliminary hearing. *Barrigan* arose in the context of a demur brought by the defendant when the prosecutor amended the pleadings to allege the aggravating factors. The appellate court observed: “[S]ections 950 and 952 specify only what an accusatory pleading ‘must’ or ‘shall’ contain, namely, a sufficient statement of the ‘public offense’ allegedly committed. [¶] The statutes do not, on their face, preclude allegations other than public offenses. Indeed, because a fact ‘other than a prior conviction’ used to impose the upper term must first be submitted to a jury and proved beyond a reasonable doubt, unless the accused waives the right to jury trial [citations], it now appears that to satisfy procedural due process, an aggravating fact must be charged in the accusatory pleading. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476, 494, fn. 19, 120 S.Ct. 2348, 2355, 2365, fn. 19, 147 L.Ed.2d 435, 446, 457, fn. 19; *Jones v. United States* (1999) 526 U.S. 227, 243, fn. 6, 119 S.Ct. 1215, 1224, fn. 6, 143 L.Ed.2d 311, 326, fn. 6 [‘any fact (other than prior conviction) that increases the maximum penalty for a crime *must be charged in an indictment*, submitted to a jury, and prove[d] beyond a reasonable doubt’ (italics added)].) (*Barrigan, supra*, 148 Cal.App.4th at p. 1483.) [¶] So that the statutory scheme governing accusatory pleadings complies with the notice requirements of procedural due process, we construe sections 950 and 952 to permit the People to amend the information to allege aggravating facts for purposes of sentencing. [Citations.] It is feasible to so construe the statutes because their wording and purpose do not limit an accusatory pleading to allegations of public offenses. [¶] Indeed, a contrary construction of the statutes would not only implicate due process concerns, it would create an absurd result, *i.e.*, the prosecution would be unable to comply with the *Cunningham* holding that precludes an aggravating fact (other than a prior conviction) from being used to impose the upper term unless the fact has been submitted to a jury and proved beyond a reasonable doubt. Courts do not interpret statutes in a manner that results in absurd consequences that could not have been intended by the Legislature. [Citation.]” (*Barrigan, supra*, 148 Cal.App.4th at pp. 1483-1484.)

Barrigan also concluded that because factors in aggravation are not “public offenses,” they need not be proved at the preliminary hearing. “[A]n aggravating fact is not an ‘offense’ within the meaning of section 1009 and the statutes governing accusatory pleadings. [Citation.] Thus, the statutory scheme does not require the prosecution to plead and prove at the preliminary examination the existence of aggravating facts that can be used to impose the upper term in California’s determinate sentencing law.” (*Barrigan, supra*, 148 Cal.App.4th at p. 1484.)

People v. Superior Court (Brooks) (2007) 159 Cal.App.4th 1 (*Brooks*), reached the contrary conclusion. Relying heavily on the California Supreme Court opinion in *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*), *Brooks* found it was the province of the court to determine the existence of the aggravating factors supporting an upper term sentence. As *Brooks* observed: “Applying *Cunningham*, in *Sandoval*, the California Supreme Court considered the appropriate process for resentencing a criminal defendant where an upper term sentence was found unconstitutional under *Cunningham*. In considering this issue, the court held that resentencing under a discretionary scheme was preferable to permitting a jury trial on aggravating circumstances. [Citation.] [¶] Our high court’s reasoning for rejecting the jury trial option is instructive in answering the question before us—whether the prosecution should be permitted to amend an information to allege aggravating circumstances. *Sandoval* explained that, although allowing a jury trial on aggravating circumstances, ‘would comply with the constitutional requirements of *Cunningham*, engrafting a jury trial onto the sentencing process established in the former DSL would significantly complicate and distort the sentencing scheme. Neither the DSL nor the Judicial Council’s sentencing rules were drafted in contemplation of a jury trial on aggravating circumstances. It is unclear how prosecutors might determine which aggravating circumstances should be charged and tried to a jury, because no comprehensive list of aggravating circumstances exists. [Citation.] [¶] The court further reasoned that the ‘Legislature [in enacting amendments to section 1170] authorized the trial court—not the prosecutor—to make the determination “whether there are circumstances that justify imposition of the upper or lower term,” and to do so by considering the record of the trial, the probation officer’s report, and statements submitted by the defendant, the prosecutor and the victim or victim’s family.’ [Citation.] ‘If the prosecutor were to decide which circumstances of the offense justify an upper term and thereby charge defendant accordingly, the prosecutor would be exercising a form of discretion that the Legislature intended to be exercised by the court. To avoid that problem, a prosecutor might be limited to charging aggravating factors specified in rules or statutes, but that approach would distort the process in a different way—the scope of potentially aggravating circumstances would be severely limited.’ [Citation.]” (*Brooks, supra*, 159 Cal.App.4th at p. 5; footnote omitted.)

Given the current amendment of section 1170 and 1170.1, it appears *Barrigan* is the better reasoned decision. The court’s reasoning in *Brooks* fails because the Legislature has now effectively abrogated *Sandoval* and *Brooks* by amending sections 1170 and

1170.1 to expressly provide the right to a jury determination of aggravating factors, the very right rejected by *Sandoval*. Until there is further appellate resolution of the issue, it would be prudent for the People to allege in the felony complaint and information any factors in aggravation. Likely the court would be prohibited from considering any aggravating factors not pled and proved, unless the factors relate to a prior conviction or are admitted by the defendant.

D. Required imposition of the low term of imprisonment

Under specified circumstances, the sentencing court must impose the low term of imprisonment. SB 567 amends section 1170 with the addition of subdivision (b)(6), which states: “Notwithstanding paragraph (1), and unless the court finds that the aggravating circumstances outweigh the mitigating circumstances that imposition of the lower term would be contrary to the interests of justice, *the court shall order imposition of the lower term* if any of the following was a contributing factor in the commission of the offense. . . .” (Italics added.)

1. Sentencing discretion under section 1170, subdivision (b)(1), is limited

Section 1170, subdivision (b)(1), specifies: “When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall, in its sound discretion, order imposition of a sentence not to exceed the middle term, except as otherwise provided in paragraph (2).” Section 1170, subdivision (b)(6), however, provides “[n]otwithstanding paragraph (1),” the court must impose the low term if the provisions of subdivision (b)(6) apply. By excluding paragraph (1) the Legislature means to limit the court’s discretion when the circumstances of sentencing meet the terms of paragraph (6). While the court normally has the discretion to impose a sentence “not to exceed the middle term” (unless the upper term may be imposed pursuant to paragraph (2)), if paragraph (6) applies, the court may only impose the low term of imprisonment.

2. Exception to the required imposition of the low term of imprisonment

The court is not required to impose the low term under paragraph (6) if “the court finds that the aggravating circumstances outweigh the mitigating circumstances that imposition of the lower term would be contrary to the interests of justice. . . .” While the language of the statute is somewhat awkward, the statute seems to say that the court is not required to impose the low term if such a sentence would not be in the interests of justice because the aggravating factors outweigh the mitigating factors.

Interests of justice

“Interests of justice” is not further defined by the statute. Presumably it will have the same meaning as applied by the courts in other contexts. Under section 1385, subdivision (a), for example, the court “in the furtherance of justice” may order an

action dismissed. In the context of a motion to dismiss a strike under the Three Strikes Law, *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), observed: “The trial court's power to dismiss an action under section 1385, while broad, is by no means absolute. Rather, it is limited by the amorphous concept which requires that the dismissal be “in furtherance of justice.” As the Legislature has provided no statutory definition of this expression, appellate courts have been faced with the task of establishing the boundaries of the judicial power conferred by the statute as cases have arisen challenging its exercise. Thus, in measuring the propriety of the court's action in the instant case, we are guided by a large body of useful precedent which gives form to the above concept. [¶] ‘From the case law, several general principles emerge. Paramount among them is the rule “that the language of [section 1385], ‘in furtherance of justice,’ requires consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People*, in determining whether there should be a dismissal. [Citations.]” [Citations.] At the very least, the reason for dismissal must be “that which would motivate a reasonable judge.” [Citations.]’ [Citation.] ‘Courts have recognized that society, represented by the People, has a legitimate interest in “the fair prosecution of crimes properly alleged.” [Citation.] “ ‘ [A] dismissal which arbitrarily cuts those rights without a showing of detriment to the defendant is an abuse of discretion. ‘ [Citations.]’ ‘ [Citation.]” [¶] From these general principles it follows that a court abuses its discretion if it dismisses a case, or strikes a sentencing allegation, solely ‘to accommodate judicial convenience or because of court congestion.’ [Citation.] A court also abuses its discretion by dismissing a case, or a sentencing allegation, simply because a defendant pleads guilty. [Citation.] Nor would a court act properly if ‘guided solely by a personal antipathy for the effect that the three strikes law would have on [a] defendant,’ while ignoring ‘defendant's background,’ ‘the nature of his present offenses,’ and other ‘individualized considerations.’ [Citation.]” (*Romero*, *supra*, 13 Cal.4th at pp. 530-531; italics in original.)

Aggravating and mitigating factors

In determining whether the aggravating factors outweigh the mitigating factors such that the imposition of the low term of custody would not be in the interests of justice, the court should consider the circumstances in aggravation or mitigation listed in California Rules of Court, rules 4.421 and 4.423, including “other factors . . . that reasonably relate to the defendant or circumstances under which the crime was committed.” (Rule 4.421, subd. (c), and rule 4.423, subd. (c).)

In the context of identifying aggravating factors and weighing them against any mitigating factors, the court will be exercising its discretion without the right to a jury determination. As observed in *People v. Black* (2007) 41 Cal.4th 799, 815-816 (*Black II*): “*Cunningham* requires us to recognize that aggravating circumstances serve two analytically distinct functions in California's current determinate sentencing scheme. One function is to raise the maximum permissible sentence from the middle term to the upper term. The other function is to serve as a consideration in the trial court's exercise of its discretion in selecting the appropriate term from among those authorized for the

defendant's offense. Although the DSL does not distinguish between these two functions, in light of *Cunningham* it is now clear that we must view the federal Constitution as treating them differently. Federal constitutional principles provide a criminal defendant the right to a jury trial and require the prosecution to prove its case beyond a reasonable doubt as to factual determinations (other than prior convictions) that serve the first function, but leave the trial court free to make factual determinations that serve the second function." (See *People v. Navarro* (2004) 124 Cal.App.4th 1175, 1182 ["*Blakely* does not require that the jury make the decision of whether or not an enhanced sentence should be imposed. *Blakely* requires that the facts underlying an enhanced sentence be found true beyond a reasonable doubt by the jury; it does not require that the jury be given the power to decide if, in fact, an enhanced sentence will be imposed. The trial court makes that decision."].)

The court's determination of the interests of justice

In determining whether imposition of a low term of imprisonment is not in the interests of justice, the court, with the foregoing authorities as a reference, should make its decision after *an individualized consideration* of the following nonexclusive factors:

- The constitutional rights of the defendant, and the interests of society represented by the People.
- The defendant's background and prospects, including the presence or absence of a significant criminal record.
- The nature and circumstances of the crime and the defendant's level of involvement, including the factors in mitigation or aggravation listed in the Rules of Court.
- The factors that would motivate a "reasonable judge" in the exercise of discretion.
- The specific mitigating factors identified by section 1170, subdivision (b)(6), *infra*.
- The court should not consider whether the defendant simply has pled guilty, calendar control, or because the court has an antipathy to the statutory scheme.

Consistent with the provisions of section 1170, subdivision (b)(5), "[t]he court shall set forth on the record the facts and reasons for choosing the sentence imposed."

3. The factors requiring imposition of the low term of imprisonment

Section 1170, subdivision (b)(6), requires the court to impose the low term of incarceration if any of the following “was a contributing factor in the commission of the offense:”

- (a) “The person has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence.” (§ 1170, subd. (b)(6)(A).)
- (b) “The person is a youth, or was a youth as defined under subdivision (b) of Section 1016.7 at the time of the commission of the offense.” (§ 1170, subd. (b)(6)(B).) Section 1016.7, subdivision (b), specifies “youth” “includes any person under 26 years of age on the date the offense was committed.”³
- (c) “Prior to the instant offense, or at the time of the commission of the offense, the person is or was a victim of intimate partner violence or human trafficking.” (§ 1170, subd. (b)(6)(C).) “Prior to the instant offense” is not time-qualified; likely it means at *any* time prior to the instant offense.

Other reasons justifying the imposition of the low term of imprisonment

Section 1170, subdivision (b)(7), provides: “Paragraph (6) does not preclude the court from imposing the lower term even if there is no evidence of those circumstances listed in paragraph (6) present.”

Proof of the factors specified in section 1170, subdivision (b)(6)

The statute does not specify how the parties are to prove or contest the existence of the specified mitigating factors. Presumably such factors may be established or challenged using traditional sources of information such as the probation report, the defendant’s record of conviction, presentation of evidence in a hearing conducted pursuant to section 1204, or offers of proof and argument of counsel.

4. The meaning of “contributing factor”

Section 1170, subdivision (b)(6), requires the imposition of the low term of imprisonment if any of three specified factors were “a contributing factor in the commission of the offense.” The statute does not further define the meaning of “contributing factor.” Likely it will be necessary for the court to find the factor had some connection, however slight, in the commission or circumstances of the crime.

³ Section 1016.7 was added by Assembly Bill No. 124 (2021-2022 Reg. Leg. Sess.)

In other legislation adopted in 2021, the Legislature used the phrase “substantially contributed” to the crime. (See, *e.g.*, § 1385, subdivision (c)(5) [The court may strike an enhancement “if the court concludes that the defendant’s mental illness *substantially contributed* to the defendant’s involvement in the commission of the offense]; italics added].) It seems clear the Legislature’s use of “contributing factor” implies a factor far less significant than one which “substantially contributed” to the crime.

5. Application of section 1170, subdivision (b)(6), to enhancements with triads

Section 1170.1, subdivision (d)(1), specifies “[i]f an enhancement is punishable by one of three terms, the court shall, in its sound discretion, order imposition of a sentence not to exceed the middle term, except as otherwise provided in paragraph (2).” Paragraph 2 of section 1170.1, subdivision (d), specifies the upper term of the enhancement may be imposed only if the aggravating factors have been stipulated to by the defendant or submitted to the trier of fact and proved beyond a reasonable doubt.

It is unlikely the mandatory low term sentencing provisions of section 1170, subdivision (b)(6), are applicable to sentencing of enhancements under section 1170.1. By its express terms, section 1170.1, subdivision (d), limits the discretion of the court in selecting the applicable term only in the context of section 1170.1, subdivisions (d)(1) and (2) – no mention is made of section 1170, subdivision (b)(6). A sentencing court, however, may wish to impose the low term on an enhancement for the reasons outlined in section 1170, subdivision (b)(6), simply as a matter of the exercise of judicial discretion. As made clear in section 1170.1, subdivision (d)(1), “[i]f an enhancement is punishable by one of three terms, the court shall, in its sound discretion, order imposition of a sentence not to exceed the middle term.”

E. Place of custody for service of sentence on enhancement follows the base term

People v. Vega (2014) 222 Cal.App.4th 1374 (*Vega*), holds if an enhancement specifies service of its term in state prison, the sentence for the entire crime is to be served in state prison, even though the underlying crime specifies punishment in the county jail under section 1170, subdivision (h). SB 257 adds section 1170, subdivision (h)(9), which provides: “Notwithstanding the separate punishment for any enhancement, any enhancement shall be punishable in county jail or state prison as required by the underlying offense and not as would be required by the enhancement.” The legislation declares its intent to abrogate *Vega*. Accordingly, although an enhancement may specify its term is to be served in state prison, the court must look to the place where the base term will be served – it, not the enhancement, will control defendant’s placement.

III. SENTENCING OF GANG CRIMES UNDER SECTION 186.22

Law applicable during 2022

Sentencing of gang crimes with triads is governed by section 186.22, subdivision (b)(3), which specifies “[t]he court shall select the sentence enhancement that, in the court’s discretion, best serves the interests of justice and shall state the reasons for its choice on the record at the time of the sentencing in accordance with the provisions of subdivision (d) of Section 1170.1” Under this rule the court may exercise its discretion in imposing an aggravated term without the need to have the aggravating factors either admitted by the defendant or proved to the trier of fact beyond a reasonable doubt. The provision avoids the application of the U.S. Supreme Court’s decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), and *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), when the court intends to impose the aggravated term on the enhancement. The Legislature expressly extended the existing provisions of section 186.22, subdivision (b)(3), to January 1, 2023. Accordingly, the contemporary changes made to sections 1170 and 1170.1 for the proof of the aggravating factors do not apply to gang crimes during 2022.

Law applicable in 2023

Effective January 1, 2023, however, section 186.22, subdivision (b)(3), has been amended to specify that “[t]he court shall order the imposition of the middle term of the sentence enhancement, unless there are circumstances in aggravation or mitigation. The court shall state its choice of sentencing enhancements on the record at the time of sentencing.” The change in the statute makes the middle term the presumptive term. It was the fact that under the Determinate Sentencing Law prior to 2007 the middle term was the presumptive term that caused the U.S. Supreme Court in *Cunningham* to find the statute in conflict with *Apprendi*. Accordingly, after January 1, 2023, because of the application of *Apprendi*, the court may not impose an upper term unless the aggravating factors are either admitted by the defendant or pled and proved to a trier of fact beyond a reasonable doubt.

In amending section 186.22, subdivision (b)(3), the Legislature made no specific reference to the procedures outlined in sections 1170 and 1170.1 for the proof of aggravating factors. Likely section 1170, subdivision (b)(2), should be utilized when considering the imposition of the upper term for a gang crime, such as section 186.22, subdivision (a). Similarly, section 1170.1 should be utilized if the court is considering the upper term for a gang enhancement with a triad, such as in section 186.22, subdivision (b)(1)(A). It is not clear whether the upper term of a gang enhancement may be imposed based on the record of conviction without an admission by the defendant or proof to a trier of fact beyond a reasonable doubt. Certainly, there is no *constitutional* violation in using such a factor without the defendant having admitted it or having it proved to a jury beyond a reasonable doubt – the exception was acknowledged in *Apprendi*. But the Legislature is free to allow the exception or not. The issue is whether in not mentioning the exception, the Legislature by *statute* has eliminated the prior record exception to *Apprendi* for gang enhancements - such will be a matter for future appellate determination.

IV. IMPOSITION OF SENTENCE UNDER SECTION 654

Prior to its amendment by Assembly Bill No. 518 (2021-2022 Reg. Leg. Sess.), section 654 provided, in relevant part, that “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the *longest potential term of imprisonment*, but in no case shall the act or omission be punished under more than one provision.” (Italics added.) Section 654 thus required the court to determine the maximum possible sentence for each of the crimes, select and impose a term from the triad for the crime with the longest possible term, then impose and stay the punishment for any other crime.

Section 654 now provides, in relevant part, that “[a]n act or omission that is punishable in different ways by different provisions of law may be punished under either of such provisions, but in no case shall the act or omission be punished under more than one provision.” The court is no longer required to impose a sentence based on the longest possible sentence but may impose a sentence on any one of the crimes. The sentence for any crime not selected by the court should have sentence imposed than “stayed under the provisions of section 654.”

Application of *Estrada*

The change in section 654 clearly will be applicable to any sentences imposed after January 1, 2022. Because the court is no longer required to impose the sentence on the crime with the longest possible term but has the option to impose sentence on a crime with a lesser punishment, likely *Estrada* will make the new law applicable to all cases not final as of January 1, 2022. To be entitled to reconsideration of a sentence structured by section 654 under the law prior to January 1, 2022, the defendant must show the court imposed a term from the triad for the crime with the longest possible sentence and stayed the punishment for any crime with a lesser term. In absence of any indication to the contrary, it may be presumed the court, in selecting a term from the triad for the crime with the longest possible sentence, was following the requirements of section 654, subdivision (a), as it then existed without consideration of the punishment for any crime with lesser punishment.

V. STRIKING OF ENHANCEMENTS UNDER SECTION 1385

Senate Bill No. 81 (2021-2022 Reg. Leg. Sess.) (SB 81) amends section 1385 to require the court, subject to certain exceptions, to dismiss pled and proved enhancements under specified circumstances. SB 81 adds subdivision (c) to section 1385.

A. Dismissal of an enhancement under section 1385, subdivision (c)

Section 1385, subdivision (c)(1), provides: “Notwithstanding any other law, the court shall dismiss an enhancement if it is in the furtherance of justice to do so, except if dismissal of that enhancement is prohibited by any initiative statute.” Subdivision (c)(1) establishes its

supremacy over any other law, other than an initiative statute,⁴ to mandate dismissal of an enhancement if the court finds such dismissal is in “furtherance of justice.”

Subdivision (c)(1) requires the court to dismiss *any* enhancement if it is in the furtherance of justice to do so. The subdivision is not limited to the circumstances outlined in subdivisions (c)(2) – (7). As specified in subdivision (c)(4): “The circumstances listed in paragraph (2) are not exclusive and the court maintains authority to dismiss or strike an enhancement in accordance with subdivision (a).” Accordingly, if the court determines it is in the furtherance of justice to dismiss a particular enhancement, the court must strike the enhancement even though the reasons are not based on subdivisions (c)(2) – (7).

B. Furtherance of justice

Although certain provisions in subdivision (c) severely limit the exercise of the court’s discretion in refusing to strike an enhancement, it is clear the court retains the overarching discretion to determine whether striking of an enhancement will be contrary to the furtherance of justice. That such discretion is retained by the court is made clear in the statute: “*In exercising its discretion under this subdivision, the court shall consider and afford great weight to evidence offered by the defendant to prove that any of the mitigating circumstances . . . are present. Proof of the presence of one or more of these circumstances weighs greatly in favor of dismissing the enhancement. . . .*” (§ 1385, subd. (c)(2); italics added.)⁵

“Furtherance of justice” in subdivision (c)(1), is not defined by the statute. Presumably it will have the same meaning as applied by the courts in other contexts. Under section 1385, subdivision (a), for example, the court “in the furtherance of justice” may order an action dismissed. In the context of a motion to dismiss a strike under the Three Strikes Law, *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), observed: “‘The trial court’s power to dismiss an action under section 1385, while broad, is by no means absolute. Rather, it is limited by the amorphous concept which requires that the dismissal be “in furtherance of justice.” As the Legislature has provided no statutory definition of this expression, appellate courts have been faced with the task of establishing the boundaries of the judicial power conferred by the statute as cases have arisen challenging its exercise. Thus, in measuring the propriety of the court’s action in the instant case, we are guided by a large body of useful precedent which gives form to the above concept. [¶] ‘From the case law, several general principles emerge. Paramount among them is the rule “that the language of [section 1385], ‘in furtherance of

⁴ For a discussion of the initiative exception, see the discussion, *infra*.

⁵ The intent of the Legislature to maintain the traditional discretion of the court is reflected in a letter from Senator Nancy Skinner dated September 10, 2021, to the Secretary of the Senate for placement in the Senate Daily Journal: “As the author of Senate Bill (SB) 81, I wish to provide some clarity on my intent regarding . . . the bill. [¶] {A}mendments taken on August 30, 2021 remove the presumption [in previous versions of the bill] that a judge must rule to dismiss a sentence enhancement if certain circumstances are present, and instead replaces that presumption with a ‘great weight’ standard where these circumstances are present. The retention of the word ‘shall’ in Penal Code § 1385(c)(3)(B) and (C) should not be read as a retention of the previous presumption language – *the judge’s discretion is preserved Penal Code § 1385(c)(2).*” (Italics added.)

justice,' requires consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People*, in determining whether there should be a dismissal. [Citations.]" [Citations.] At the very least, the reason for dismissal must be "that which would motivate a reasonable judge." [Citations.]" [Citation.] 'Courts have recognized that society, represented by the People, has a legitimate interest in "the fair prosecution of crimes properly alleged." [Citation.] " ' [A] dismissal which arbitrarily cuts those rights without a showing of detriment to the defendant is an abuse of discretion. ' [Citations.]" ' [Citation].'" [¶] From these general principles it follows that a court abuses its discretion if it dismisses a case, or strikes a sentencing allegation, solely 'to accommodate judicial convenience or because of court congestion.' [Citation.] A court also abuses its discretion by dismissing a case, or a sentencing allegation, simply because a defendant pleads guilty. [Citation.] Nor would a court act properly if 'guided solely by a personal antipathy for the effect that the three strikes law would have on [a] defendant,' while ignoring 'defendant's background,' 'the nature of his present offenses,' and other 'individualized considerations.' [Citation.]" (*Romero, supra*, 13 Cal.4th at pp. 530-531; italics in original.)

The court's determination of the furtherance of justice

In determining whether striking an enhancement is not in the furtherance of justice, the court, with the foregoing authorities as a reference, should make its decision after *an individualized consideration* of the following factors:

- The mitigating factors listed in section 1385, subdivision (c)(3)(A) through (I), including the specific evidence referenced in certain factors. (See discussion of the factors, *infra*.)
- The constitutional rights of the defendant, and the interests of society represented by the People.
- The defendant's background and prospects, including the presence or absence of a significant criminal record.
- The nature and circumstances of the crime and the defendant's level of involvement. , including the factors in mitigation or aggravation in the Rules of Court.
- The factors that would motivate a "reasonable judge" in the exercise of discretion.

The court should not consider whether the defendant simply has pled guilty, calendar control, or because the court has an antipathy to the statutory scheme.

C. Statement of reasons

Although section 1385, subdivision (a), speaks only to granting a motion to dismiss, "[t]he reasons for the [court's ruling] shall be stated orally on the record. The court shall also set forth

the reasons in an order entered upon the minutes if requested by either party or in any case in which the proceedings are not being recorded electronically or reported by a court reporter. ”

D. Weighing of certain mitigating factors

Section 1385, subdivision (c)(2) specifies: “In exercising its discretion under this subdivision, the court shall consider and afford great weight to evidence offered by the defendant to prove that any of the mitigating circumstances in subparagraphs (A) to (I) are present. Proof of the presence of one or more of these circumstances weighs greatly in favor of dismissing the enhancement, unless the court finds that dismissal of the enhancement would endanger public safety. ‘Endanger public safety’ means there is a likelihood that the dismissal of the enhancement would result in physical injury or other serious danger to others.”

Great weight

“Great weight” is not further defined in the statute. *People v. Martin* (1986) 42 Cal.3d 437 (*Martin*),⁶ considered the phrase in the context of whether the Board of Prison Terms properly found a sentence to be disparate. *Martin* directs the trial court to give the Board’s conclusions “great weight.” In defining the phrase, the court first drew an analogy to the decision of the Youth Authority to recommend a placement in the authority or state prison. “We said that such a recommendation was entitled to ‘great weight’ [citations] and went on to explain what that meant. Such a recommendation, we said, must be followed in the absence of ‘substantial evidence of countervailing considerations of sufficient weight to overcome the recommendation.’ [Citations.]” (*Martin, supra*, 42 Cal.3d at p. 447.) In the context of considering a recommendation by the Board of Prison Terms, the court observed that “giving ‘great weight’ to a finding of disparity in the first step of the analysis means that the trial court must accept the board's finding of disparity unless based upon substantial evidence it finds that the board erred in selecting the appropriate comparison group or in determining that defendant's sentence differs significantly from that imposed upon most members of that group. If there are unique elements in the case which render it unsuitable for comparison with other cases, or subjective factors which distinguish it from other cases, such matters can be considered in the second part of the analysis when the court considers whether a disparate sentence is justified. [¶] In the second stage, the trial court must again give great weight to the board's finding of disparity, a finding it upheld in the first stage of the analysis. That finding does not automatically require it to recall its sentence. Under the reasoning of [citations], however, giving great weight to the finding does require the court to recall its sentence unless there is substantial evidence of countervailing considerations which justify a disparate sentence. Such considerations can include subjective factors like those mentioned by the trial

⁶ Senator Nancy Skinner in a letter dated September 10, 2021, to the Secretary of the Senate for placement in the Senate Daily Journal, said: “As the author of Senate Bill (SB) 81, I wish to provide some clarity on my intent regarding . . . the bill. [¶] I wish to clarify that in establishing the ‘great weight’ standard in SB 81 for imposition or dismissal of enhancements [Penal Code § 1385(c)(2)] it was my intent that this great weight standard be consistent with the case law in California Supreme Court in *People v. Martin*, 42 Cal.3d 437 (1986).”

court - such as defendant's attitude and demeanor at the time of the crime, and the manner in which he threatened the victim." (*Martin, supra*, 42 Cal.3d at pp. 447-448; footnotes omitted.)

It appears the intent of the Legislature is to guide the court's discretion in considering a motion to strike if it is based on one of the factors listed in subdivision (c)(3)(A) through (I). Subdivision (c)(2) still operates under the umbrella provision in section (c)(1) to the extent it requires the dismissal of an enhancement to be in the furtherance of justice. The plain meaning of subdivision (c)(2), however, is that the court is directed to "consider and afford great weight to evidence" offered in support of the specified mitigating circumstances. The presence of one or more of the factors "weighs greatly in favor of dismissing the enhancement," unless public safety is endangered. The court is not directed to give *conclusive* weight to the mitigating factors.

Public safety exception

Section 1385, subdivision (c)(2), specifies that "[p]roof of the presence of one or more of [the specified circumstances of mitigation] weighs greatly in favor of dismissing the enhancement, unless the court finds that dismissal of the enhancement would endanger public safety." The statutory language affects the weight the mitigating factor is given by the court. In absence of a showing of a danger to public safety, the court is to afford the mitigating factor "great weight." If striking the enhancement would endanger public safety, the court is not to give the mitigating factor "great weight." If public safety would be endangered by the dismissal of the enhancement, the court is free to accord the mitigating factor whatever weight it deserves.

Given the foregoing plain meaning of the statute, the public safety exception also does not mean the court may deny a motion to strike an enhancement *only* if public safety is endangered. The court may still exercise its discretion under the umbrella of "furtherance of justice" required in section 1385, subdivisions (a), (b)(1), and (c)(1).

Subdivision (2) defines "endanger public safety" as "a likelihood that the dismissal of the enhancement would result in physical injury or other serious danger to others." The exception is not based on a generalized concern for public safety as provided in other statutory provisions. (See, *e.g.*, section 1170.126, subd. (f) [The defendant is entitled to resentencing "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety."].) Rather, it appears the court must find a "likelihood" that the act of dismissing an enhancement "would result in physical injury or other serious danger to others." The causal connection between the dismissal of the enhancement and danger to public safety will be quite difficult to establish, particularly as to the proof of physical injury.

E. Timing of the exercise of discretion under section 1385

Section 1385, subdivision (c)(3) confirms the ability of the court to exercise its discretion under subdivision (c) at the time of sentencing. It also provides “nothing in this subdivision shall prevent a court from exercising its discretion before, during, or after trial or entry of plea.”

While motions under section 1385 historically could be brought at any time during the criminal proceedings, the Supreme Court cautioned that it may be preferable to delay action on the motion until after the trial. “[I]t is well established that a court may exercise its power to strike under section 1385 ‘before, during or after trial,’ up to the time judgment is pronounced. [Citations.]. . . . Indeed, to strike a sentencing allegation after trial may in some cases be preferable to striking before trial, because the court after trial has heard the evidence relevant to the defendant’s culpability and, thus, is better prepared to decide whether the interests of justice make it advisable to exercise the power to strike under section 1385.” (*People v. Superior Court (Romero)* 13 Cal.4th 497, 524, fn. 11.)

When the motion is brought at sentencing, or at any other time during the proceedings, the court should consider all motions brought under section 1385 prior to expressing a tentative sentence. Section 1385 contains no provision directing the order of consideration of the various requests for dismissal. Each ground for dismissal should be considered independently on its merits. Indeed, Section 1385, subdivision (c)(2), directs the court to give great weight to evidence offered “to prove that *any* of the mitigating circumstances” are present. (Italics added.) Certainly, there is no provision limiting the dismissal only to one ground under section 1385 – the factors are non-exclusive. But the court should not grant relief without consideration of the context of the request in light of the ruling on one or more other grounds for dismissal. The court, for example, may find the dismissal under one ground is sufficient to meet the interests of justice without granting relief on other grounds. (See, *e.g.*, discussion of the timing of the decision if the enhancement causes the sentence to be longer than 20 years, *infra*.)

F. Mitigating factors justifying the striking of an enhancement

Section 1385, subdivision (c)(3), lists nine specific factors which, if found by the court, will strongly support the exercise of the court’s discretion to dismiss one or more enhancements.

1. “Application of the enhancement would result in a discriminatory racial impact as described in paragraph (4) of subdivision (a) of Section 745.” (§ 1385, subd. (c)(3)(A).)

Section 745, subdivision (a)(4), of the Racial Justice Act voids a sentence if “[a] longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for that offense on people that share the defendant’s race, ethnicity, or national origin than on defendants of other races,

ethnicities, or national origins in the county where the sentence was imposed.” (§ 745, subd. (a)(4)(A).) This provision seeks to address bias resulting in disparate sentencing based on the defendant’s group identity.

The violation has two elements: First, “[a] longer or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense.” (*Ibid.*) Although this provision is somewhat vague, in evaluating whether the element has been established, the court presumably will be required to compare the defendant’s sentence, crimes, circumstances and criminal backgrounds against the sentence imposed on defendants with similar crimes, circumstances and criminal backgrounds who are of a different race, ethnicity or national origin. The element will be satisfied if the defendant establishes their sentence is more severe than imposed on persons of other races, ethnicities or national origin who commit similar crimes under similar circumstances. Although not expressly provided in this portion of the act, it appears the comparison will be limited to cases in the county where the crime was sentenced.

Second, “longer or more severe sentences were more frequently imposed for that offense on people that share the defendant’s race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county where the sentence was imposed.” (*Ibid.*) The second element involves a county-wide comparison of all persons sentenced for the crime to determine whether persons of the defendant’s race, ethnicity or national origin received a more severe sentence than defendants of any other races, ethnicities, or national origin. This element is not confined to the sentences imposed by a particular judge but examines the sentencing practice of the entire court within the county. There is no indication of the relevant timeframe to be examined. Presumably the period must be sufficiently long to be statistically relevant. Because of the reference to sentences “more frequently imposed,” the court will be required to compare “similarly situated” defendants, by examining crimes, circumstances, and criminal backgrounds of each defendant, rather than simply doing a gross conviction-offense-to-sentence comparison.

“A defendant may share a race, ethnicity, or national origin with more than one group. A defendant may aggregate data among groups to demonstrate a violation of subdivision (a).” (§ 745, subd. (i).)

“ ‘[M]ore frequently imposed’ means that statistical evidence or aggregate data demonstrate a significant difference in . . . imposing sentences comparing individuals who have committed similar offenses and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity.” (§ 745, subd. (h)(1).) For statistical evidence to serve as a basis for relief under the Act, the data must demonstrate a “significant difference” in imposing sentences. “Significant difference” is not further defined in the statute. Likely the court will have discretion to make that

determination, based on testimony of experts and other evidence presented at the sentencing hearing.

“Race-neutral reasons for the disparity” is not further defined. It will be a question of fact whether such information is “race-neutral.” The Act does not address how the prosecution establishes “race-neutral reasons for the disparity.” It appears clear the prosecution has the initial burden of producing evidence of such reasons. Presumably, the prosecution would offer evidence in support of the reasons, and the defendant would have an opportunity to offer evidence in response. Likely it will be left to the discretion of the court to then determine, after considering the evidence offered by the prosecution, whether the defendant ultimately has met their burden of proof to establish the violation by a preponderance of the evidence.

2. “Multiple enhancements are alleged in a single case. In this instance, all enhancements beyond a single enhancement shall be dismissed.” (§ 1385, subd. (c)(3)(B).)

Although the subdivision specifies “all enhancements beyond a single enhancement *shall* be dismissed,” likely “shall” does not operate independently of the other provisions of section 1385. (Italics added.) The intent of the Legislature appears to require that the court “shall” dismiss excessive enhancements only if it is otherwise appropriate under all the provisions of section 1385.⁷

Nothing in the statute prohibits the court from exercising discretion in choosing the enhancements to be dismissed. The scope of the provision includes both count-specific conduct enhancements and status enhancements.

As discussed, *supra*, section 1385, subdivision (c)(3), permits the motion to dismiss at any time during the proceedings, including before trial. It may be prudent for the court, acting in the furtherance of justice, to defer any request under this subdivision until the exact nature of the defendant’s convictions has been determined.

⁷ Senator Nancy Skinner in a letter dated September 10, 2021, to the Secretary of the Senate for placement in the Senate Daily Journal, said: “As the author of Senate Bill (SB) 81, I wish to provide some clarity on my intent regarding . . . the bill. [¶] {A}mendments taken on August 30, 2021 remove the presumption [in previous versions of the bill] that a judge must rule to dismiss a sentence enhancement if certain circumstances are present, and instead replaces that presumption with a ‘great weight’ standard where these circumstances are present. The retention of the word ‘shall’ in Penal Code § 1385(c)(3)(B) and (C) should not be read as a retention of the previous presumption language – the judge’s discretion is preserved Penal Code § 1385(c)(2).”

3. “The application of an enhancement could result in a sentence of over 20 years. In this instance, the enhancement shall be dismissed.” (§ 1385, subd. (c)(3)(C).)

Likely the 20-year limitation applies to the aggregate sentence, including all base terms imposed for a consecutive sentence and all status and conduct enhancements. The court must determine whether there is any configuration of the sentence that “could result” in a sentence in excess of 20 years.

There will be no entitlement to relief unless it is the application of the term for the enhancement that results in a sentence of longer than 20 years. Accordingly, the right to relief under this provision will not be available to defendant’s sentenced under the Indeterminate Sentencing Law (ISL). It is the function of the sentence on the base term that results in the life sentence, not the enhancement.

Mechanics of determining whether the enhancement could result in a sentence in excess of 20 years

In determining whether the application of an enhancement could result in a sentence of over 20 years, the court should first calculate the maximum sentence that could be imposed on the underlying crimes and any enhancements other than the enhancement at issue.⁸ If the calculation does not exceed 20 years, the court must add the term for the enhancement at issue. If the addition of the term for the enhancement could result in a sentence in excess of 20 years, the defendant may be entitled to relief under this factor. For example, if the defendant is convicted of second degree robbery (§ 211/212.5, subd. (c)) [punishable by 2, 3 or 5 years], with the personal discharge of a firearm (§ 12022.53, subd. (c)) [punishable by an additional term of 20 years], the application of the enhancement could result in a sentence in excess of 20 years. In such circumstances, the court must dismiss the enhancement pursuant to section 1385, subdivision (c)(3)(C), unless to do so would be contrary to the furtherance of justice.

If there are multiple enhancements, any one of which could result in a sentence longer than 20 years, there is nothing in the statute prohibiting the court from exercising discretion in choosing the particular enhancement to be dismissed. (See discussion, *infra*, regarding the consideration of multiple enhancements.)

Likely the phrase “shall be dismissed” does not operate independently of the other provisions of section 1385. The intent of the Legislature appears to require that the court “shall” dismiss an enhancement pursuant to this subdivision only if it is otherwise appropriate under all the provisions of section 1385.⁹

⁸ The existence of multiple enhancements may trigger a request for dismissal of all but one enhancement under section 1385, subd. (c)(3)(B). The existence of multiple enhancements, however, does not determine whether section 1385, subd. (c)(3)(C) applies.

⁹ See footnote 7, *supra*.

Enhancement “could” result in a sentence over 20 years

Subdivision (c)(3)(C) requires the dismissal of an enhancement if “application of an enhancement *could* result in a sentence of over 20 years.” (Italics added.) Whether an enhancement “could” result in a sentence of over 20 years, at least in part, is a matter of timing – that is, what is the status of the defendant’s convictions, if any, when the court is considering the motion to dismiss. If, for example, the motion is considered before trial (as is authorized by section 1385, subdivision (c)(3)), the court must consider all potential sentencing configurations to determine if an enhancement “could” push the sentence over the 20-year mark. Under the plain meaning of subdivision (c)(3)(C), if there exists a configuration where the sentence “could” be longer than 20 years because of the application of the enhancement, unless the court finds the dismissal would not be in the furtherance of justice, the court must dismiss the enhancement. It is important to observe, however, that just because a court *could* dismiss an enhancement under these circumstances does not mean the court *should* grant such a motion. The court may exercise its discretion in the furtherance of justice by denying the motion without prejudice or deferring a ruling until the exact nature of the defendant’s convictions has been determined.

If the motion is made at sentencing, whether the enhancement “could” result in a sentence of over 20 years will depend on the crimes and enhancements of which the defendant has been convicted. Likely such a determination must be made after consideration of any other relief granted under section 1385. For example, if the defendant is convicted of second degree robbery (§ 211/212.5, subd. (c)) [punishable by 2, 3 or 5 years], with the personal use of a firearm (§ 12022.53, subd. (b)) [punishable by an additional term of 10 years], with a prior serious felony charged as a strike under the Three Strikes Law and as a prior serious felony conviction under section 667, subdivision (a), [punishable by a term of 5 years], the defendant “could” receive a prison sentence of 10 years for the base term, plus 10 years for the weapons enhancement and 5 years for the prior conviction, for an aggregate term of imprisonment of 25 years, thus triggering the potential application of section 1385, subdivision (c)(3)(C). If prior to ruling on the motion under subdivision (c)(3)(C), however, the court grants the defendant’s request to dismiss the strike under section 1385, subdivision (a), pursuant to a *Romero* motion, the application of the enhancements “could not” result in a sentence in excess of 20 years – the maximum sentence would be 5 years for the base term, plus 10 years for the weapons enhancement, and 5 years for the prior serious felony conviction, for a total of 20 years.

If the court bases its decision on the theoretical maximum sentence without consideration of the maximum sentence the court *actually could* impose after granting any other section 1385 relief, it potentially creates an absurd result – it has the court ruling on a request for dismissal based on facts that do not exist because of other decisions by the court regarding the potential sentence. The decision would be based on enhancements that have been dismissed – allegations which don’t result in a

conviction. It creates the possibility the court will be required to dismiss an enhancement even though the *actual* potential sentence is not in excess of 20 years.

Failure to consider the results of other motions to dismiss also creates a cumulative effect of section 1385 relief not justified by the statute. For example, if the defendant has been convicted of two enhancements, the application of both of which could result in a sentence in excess of 20 years, the court would be required to dismiss both enhancements, even though the dismissal of only one enhancement would be necessary under subdivision (c)(3)(C). For example, if the maximum base term is 12 years and the defendant has been convicted of two enhancements, each of which has a term of 5 years, if the court is not permitted to consider a motion for dismissal of one of the enhancements before applying subdivision (c)(3)(C) when considering the motion as to the other enhancement, the court would then be required to dismiss both enhancements, even though the dismissal of only one enhancement is necessary to avoid the sentence being longer than 20 years.

The court also should consider how section 654 may affect the calculation of the aggregate term. A finding by the court that section 654 applies requires the court to impose sentence on one crime, then impose and stay the sentence on any other crimes committed with the same intent or objective. (See § 654, subd. (a).) Accordingly, the stayed counts, as a matter of law, cannot factor into the calculation of the aggregate sentence.

Consideration of other sentencing decisions

Although the court may consider the results of other motions for dismissal in determining the actual convictions for the purposes of sentencing, the court should not base its ruling under this mitigating factor on how the court otherwise exercises sentencing discretion, such as selecting the term on the triad or whether multiple terms are to be sentenced consecutively or concurrently. Subdivision (c)(3)(C) requires the court to consider what the sentence on the enhancement “could” do, rather than on what the sentence “would” do.

Sentence imposed as a result of a plea bargain

Whether the defendant will have the right to relief under this subdivision after a plea likely depends on the terms of the plea bargain. If the plea agreement allows the court *discretion* to sentence the defendant to a term in excess of 20 years, likely the defendant may bring a motion to dismiss an enhancement under section 1385, subdivision (c)(3)(C). Subdivision (c)(3) clearly permits the motion after entry of a plea. However, if the plea agreement specifies a particular term in excess of 20 years, likely the court may not grant the motion to dismiss without giving the People the right to withdraw from the plea agreement if the motion is granted.

Dismissal of the enhancement or only the punishment for the enhancement

Subdivision (c)(3)(C) specifies “the *enhancement* shall be dismissed.” (Italics added.) Likely the court is required to dismiss the entire enhancement, not just the punishment for the enhancement, although in other instances the court has authority to strike solely the punishment for the enhancement. Section 1385, subdivision (b)(1), provides: “If the court has the authority pursuant to *subdivision (a)* to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a).” (Italics added.) On its face, subdivision (b)(1) relates to dismissals authorized by subdivision (a). The special rules related to the dismissal of an enhancement are outlined in subdivision (c). Indeed, subdivision (c)(2) expressly references exercising of the court’s discretion “under this subdivision” – meaning subdivision (c). Thus, for enhancements that come within subdivision (c), the court is required to dismiss the entire enhancement, not just the punishment for the enhancement.

4. “The current offense is connected to mental illness.” (§ 1385, subd. (c)(3)(D).)

The defendant’s mental illness may be grounds for dismissal of an enhancement if the crime is “connected” to a mental illness. Section 1385, subdivision (c)(4), provides: “For the purposes of subparagraph (D) of paragraph [3],¹⁰ a mental illness is a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder, borderline personality disorder, and pedophilia. A court may conclude that a defendant’s mental illness was connected to the offense if, after reviewing any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, statements by the defendant’s mental health treatment provider, medical records, records or reports by qualified medical experts, or evidence that the defendant displayed symptoms consistent with the relevant mental disorder at or near the time of the offense, the court concludes that the defendant’s mental illness *substantially contributed* to the defendant’s involvement in the commission of the offense.” (Italics added.)

The use of the phrase “substantially contributed” is unclear. Likely it is the intent of the Legislature that the factor plays some significant role in the commission of the crime or the defendant’s involvement. In other circumstances, the Legislature used the phrase “a contributing factor in the commission of the offense.” (See, *e.g.*, § 1170, subd. (b)(6) [Factor affecting imposition of the low term of imprisonment].) While “contributing factor” suggests the court must find the factor to have some connection, however slight,

¹⁰ Subdivision (c)(3)(5) erroneously cross-references “subparagraph (d) of paragraph (2);” clearly the Legislature meant to reference subparagraph (d) of paragraph (3).

in the commission or circumstances of the crime, the phrase “substantially contributed” clearly implies a factor more significant in weight from that of “contributing factor.”

5. “The current offense is connected to prior victimization or childhood trauma.” (§ 1385, subd. (c)(3)(E).)

The defendant’s prior victimization or childhood trauma may be grounds for dismissal of an enhancement if the crime is “connected” to that experience. Section 1385, subdivision (c)(6)(A), provides that “childhood trauma” means “that as a minor the person experienced physical, emotional, or sexual abuse, physical or emotional neglect. A court may conclude that a defendant’s childhood trauma was connected to the offense if, after reviewing any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, medical records, or records or reports by qualified medical experts, the court concludes that the defendant’s childhood trauma *substantially contributed* to the defendant’s involvement in the commission of the offense.” (Italics added.)

Section 1385, subdivision (c)(6)(B) provides “prior victimization” means “the person was a victim of intimate partner violence, sexual violence, or human trafficking, or the person has experienced psychological or physical trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence. A court may conclude that a defendant’s prior victimization was connected to the offense if, after reviewing any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, medical records, or records or reports by qualified medical experts, the court concludes that the defendant’s prior victimization *substantially contributed* to the defendant’s involvement in the commission of the offense.” (Italics added.)

The use of the phrase “substantially contributed” is unclear. Likely it is the intent of the Legislature that the factor plays some significant role in the commission of the crime or the defendant’s involvement. In other circumstances, the Legislature used the phrase “a contributing factor in the commission of the offense.” (See, *e.g.*, § 1170, subd. (b)(6) [Factor affecting imposition of the low term of imprisonment].) While “contributing factor” suggests the court must find the factor to have some connection, however slight, in the commission or circumstances of the crime, the phrase “substantially contributed” clearly implies a factor more significant in weight from that of “contributing factor.”

6. “The current offense is not a violent felony as defined in subdivision (c) of Section 667.5.” (§ 1385, subd. (c)(3)(F).)

An enhancement may be dismissed simply because the underlying crime is not listed as a violent felony under section 667.5, subdivision (c).

Subdivision (c)(3)(F) does not specify that if the underlying crime *is* a violent felony, the court cannot strike the enhancement. It only means that if the underlying crime is a violent felony, it is not presumptively proper to dismiss the enhancement.

Violent felonies created by an enhancement

Section 667.5, subdivision (c), lists crimes designated as violent felonies. Included in the list of violent offense are certain crimes which are committed with specified enhancements. (See, *e.g.*, § 667.5, subd. (c)(8) [crime committed with infliction of great bodily injury or defendant uses a firearm].) Section 1385, subdivision (b)(1), states “[i]f the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a).” On its face, subdivision (b)(1) relates to dismissal authorized by subdivision (a). Prior to the enactment of SB 81, if the court struck only the punishment for an enhancement but left the fact of the enhancement, the crime would still constitute a violent felony. (*In re Pacheco* (2007) 155 Cal.App.4th 1439, 1443–1436.)

The status of the violent felony is not clear if the enhancement is dismissed under the provisions of section 1385, subdivision (c). Subdivision (c)(3)(C), for example, specifies “the enhancement shall be dismissed.” Likely the court is required to dismiss the entire enhancement, not just the punishment for the enhancement, although in other instances the court has authority to strike solely the punishment for the enhancement. The special rules related to the dismissal of an enhancement are outlined in subdivision (c). Indeed, subdivision (c)(2) expressly references exercising of the court’s discretion “under this subdivision” – meaning subdivision (c). Thus, for enhancements that come within subdivision (c), the court is required to dismiss the enhancement, not just the punishment.

7. “The defendant was a juvenile when they committed the current offense or any prior juvenile adjudication that triggers the enhancement or enhancements applied in this case.” (§ 1385, subd. (c)(3)(G).)

It is not clear what the Legislature intends by the phrase “any prior juvenile adjudication that triggers the enhancement or enhancements applied in this case.” It appears the statute is focused on a juvenile adjudication that thereafter triggers an enhancement if the defendant is later convicted of an offense as an adult. The Legislature may have been considering juvenile adjudications which later constitute strikes under the Three Strikes Law. But one version of the Three Strikes Law was enacted by initiative (§ 1170.12) and the Three Strikes Law is considered an alternative sentencing scheme, not an enhancement. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 527.) SB 81 does not apply to alternative sentencing schemes. (See discussion, *infra*.)

Presumably this factor will be available to the defendant even if the defendant was a juvenile at the time the crime was committed but was certified to the general jurisdiction of the court under Welfare and Institutions Code, section 707.

8. “The enhancement is based on a prior conviction that is over five years old.” (§ 1385, subd. (c)(3)(H).)

Presumably the five years is measured from the date the current crime was committed.

9. “Though a firearm was used in the current offense, it was inoperable or unloaded.” (§ 1385, subd. (c)(3)(I).)

It seems the intent of the Legislature to authorize the dismissal of a firearm use or arming enhancement provided the weapon is inoperable or unloaded, even if the weapon was used to threaten a victim or used as a club in the commission of the offense.

G. Dismissal of enhancements prohibited by initiatives

Section 1385, subdivision (c)(1), provides: “ Notwithstanding any other law, the court shall dismiss an enhancement if it is in the furtherance of justice to do so, *except if dismissal of that enhancement is prohibited by any initiative statute.*” (Italics added.) It does not appear there are any enhancements which may not be dismissed under section 1385 because of a statute enacted by an initiative.

In discussing this portion of SB 81, the report of the Senate Committee on Public Safety, dated February 8, 2021, identified two initiatives that prohibited the dismissal of certain enhancements. The first was Proposition 83, enacted in 2006, relating to sex offenses, firearms and infliction of great bodily injury. Proposition 83 prohibits the striking of the factors triggering the application of section 667.61, the One Strike Law for violent sex offenses (§ 667.61, subd. (g)), prior convictions triggering section 667.71, the Two Strikes Law, relating to certain violent crimes (§ 667.71, subd. (d)), and findings that result in the denial of probation when the defendant inflicts great bodily injury for designated violent crimes (§ 1203.075, subd. (a)). The One Strike, Two Strike and Three Strikes Laws, however, are not enhancements, but are considered alternative sentencing schemes if their provisions apply. (*People v. Anderson* (2009) 47 Cal.4th 92, 102 [One Strike Law]; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 527 [Three Strikes Law]. As acknowledged by the Senate Safety Committee’s report, SB 81 concerns enhancements, not alternative sentencing schemes.

The second was Proposition 115, enacted in 1990, relating to special circumstances for murder. The initiative enacted section 1385.1, prohibiting a court from striking special circumstances

from death penalty cases. The courts generally have considered special circumstances and enhancements separately. (See *People v. Jones* (2020) 56 Cal.App.5th 474, 493.)

It does not appear an initiative has identified any of the commonly imposed enhancements as a enhancement that may not be dismissed by the court.

H. Application of *Estrada*

Section 1385, subdivision (c)(7), specifies: “This subdivision shall apply to sentencings occurring after the effective date of the act that added this subdivision.” The provision makes SB 81 effective only for sentencing proceedings occurring after January 1, 2022. Subdivision (c)(7) constitutes a “savings clause,” making *Estrada* inapplicable to the sentencing proceedings occurring prior to that date. (*Estrada, supra*, 63 Cal.2d at p. 747; *People v. Conley* (2016) 63 Cal.4th 646, 656.)

Although the provisions of SB 81 are not operative until January 1, 2022, nothing prohibits the court from considering its provisions in exercising its discretion under section 1385 prior to that date.

VI. CONDUCT CREDIT FOR PERSONS COMMITTED UNDER SECTIONS 1368, et seq.

Senate Bill No. 317 (2021-2022 Reg. Leg. Sess.)(SB 317) amends section 4019, subdivision (a)(8), to provide full conduct custody credit “[w]hen a prisoner is confined in or committed to a state hospital or other mental health treatment facility, or to a county jail treatment facility, as defined in Section 1369.1, in proceedings pursuant to Chapter 6 (commencing with Section 1367) of Title 10 of Part 2.” Previously conduct credit was allowed only for persons committed to a county jail-based competency program under section 1375.5, subdivision (c). The amendment extends full conduct credits to persons committed to the state hospital or other mental health treatment facility under sections 1367, *et seq.* No longer will the court be required to segregate the award of conduct credits between the time in jail awaiting treatment and the time the defendant is confined in a state hospital. Under the new provisions, presuming the defendant is in custody from arrest to sentencing, there will be a continuous entitlement to full actual custody and conduct credits, even though the defendant was housed in a mental health facility for a portion of that time.

A. Outpatient treatment

It is not clear whether the defendant will be entitled to full conduct credit for any time spent on outpatient status while in a conditional release program (CONREP). Historically, persons committed to a state hospital or placed on outpatient treatment were entitled only to actual time credit. (*In re Banks* (88 Cal.App.3d 864, 868-869.) Since persons previously committed to the state hospital system for restoration of competency were not entitled to conduct credit,

there was no issue as to entitlement if the defendant was on outpatient treatment. Now that full actual and conduct credit is being given such persons, the entitlement to conduct credit while on outpatient status may change. Likely the defendant's placement on outpatient status will be considered a function of the original placement in the state hospital, thus entitling the defendant to the award of conduct credits while in CONREP.

B. *Estrada* does not apply

The change to section 4019 clearly will be applicable to any time served in competency treatment after January 1, 2022. Whether the change should apply to any time served prior to January 1, 2022, is a matter of some disagreement between the appellate courts. The application of *In re Estrada* (1965) 63 Cal.2d 740, was discussed in *People v. Orellana* (2022) 74 Cal.App.5th 319 (*Orellana*). Based primarily on the Supreme Court's decision in *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*), *Orellana* concluded the amendment of section 4019 by SB 317 applies only prospectively to *future* custody periods. "In *Brown*, the Supreme Court considered whether a former version of section 4019 that increased the rate at which local prisoners could earn conduct credits applied retroactively to benefit prisoners who served time in custody before the date on which the former statute became operative. [Citation.] After concluding that neither the terms of the former statute nor any part of its legislative history supported a determination that increased conduct credits were to be awarded retroactively [citation], the court examined whether the rule of *Estrada* required retroactive application of the former statute providing increased conduct credits. [Citation.] [¶] The California Supreme Court answered in the negative. It wrote, 'This brings us to the question whether the rule of *Estrada* . . . , requires us to apply retroactively a statute increasing the rate at which prisoners may earn credit for good behavior. The question can properly be answered only in the negative. The holding in *Estrada* was founded on the premise that "[a] legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law' " [citation; italics in original], italics added) and the corollary inference that the Legislature intended the lesser penalty to apply to crimes already committed. In contrast, a statute increasing the rate at which prisoners may earn credits for good behavior does not represent a judgment about the needs of the criminal law with respect to a particular criminal offense, and thus does not support an analogous inference of retroactive intent.... [A] prisoner who earns no conduct credits serves the full sentence originally imposed. Instead of addressing punishment for past criminal conduct, the statute addresses *future conduct* in a custodial setting by providing increased incentives for good behavior.' [Citation; italics in original.]" (*Orellana, supra*, 74 Cal.App.5th at pp. 334-335.)

Orellana also rejected defendant's argument that denial of the credits would violate the Equal Protection clause. The argument was based on the premise that inmates being restored to competency in a jail-based treatment program were being given section 4019 conduct credit. *Brown* was found dispositive of the issue. "The California Supreme Court in *Brown* rejected an equal protection challenge to the denial of custody credits at the increased rate under review for individuals who had served their time before enactment of the changes to section 4019 at

issue there. Just as with retroactivity, the forward-looking incentive of custody credits was the decisive factor. The court in *Brown* held that individuals who had already been sentenced were not similarly situated to those who were in custody after the new legislation entered into force.” (*Orellana, supra*, 74 Cal.App.5th at p. 339.) “We recognize that Orellana frames his equal protection argument differently from the analysis in *Brown*. He focuses not on any temporal distinction between defendants who received competency treatment in state hospitals prior to and after the passage of legislation extending conduct credits to that group, but instead on the purported absence of any rational basis for distinguishing between defendants whose treatment for restoration to competence takes place in county jails versus state hospitals. Orellana's comparison framework might be persuasive were we writing on a clean slate. However, the Supreme Court's articulation in *Brown* of the operation of section 4019 conduct credits as an incentive to promote good conduct in custody is determinative here. We see nothing in the text of Senate Bill 317 or Senate Bill 1187 or the relevant legislative history that suggests the Legislature rejected the forward-looking nature of the incentive structure of section 4019 articulated by the Supreme Court in *Brown*.” (*Orellana, supra*, 74 Cal.App.5th at pp. 340-341.) *Orellana* has been denied review by the Supreme Court.

People v. Yang (2022) 78 Cal.App.5th 120, agrees with the conclusion in *Orellana* that the Supreme Court's decision in *Brown* forecloses the application of *Estrada* to cases not final as of January 1, 2022. *Yang*, however, concludes the denial of conduct credit to cases prior to January 1, 2022, is a denial of equal protection of the law. *Yang* concludes persons being held in a state hospital for competency treatment, who are denied conduct credit prior to January 1, 2022, are in the same circumstances as persons who are held in a jail-based competency program who *are* given conduct credit prior to January 1, 2022, under section 1375.5, subdivision (c). No petition for review has been filed and *Yang* is now final.

Even if the conflict in *Orellana* and *Yang* ultimately is resolved as discussed in *Orellana* and defendants are denied section 4019 credit under the new statute prior to January 1, 2022, such defendants nevertheless will be entitled to full conduct credit while in jail pending transfer to the state hospital. (§ 1375.5; *People v. Cowsar* (1974) 40 Cal.App.3d 578, 579.) Once the hospital staff has agreed that the defendant has recovered trial competence and has so stated in a report prepared under section 1370, subdivision (b)(1), the defendant is thereafter entitled to normal conduct credits. If there is some dispute between the treating therapists, the defendant will not be entitled to conduct credits until the certification of competence has been issued under section 1372, subdivision (a)(1). (*People v. Bryant* (2009) 174 Cal.App.4th 175, 184.) If the defendant is in treatment as of January 1, 2022, they will be entitled to full conduct credit under section 4019 only for any period on and after January 1, 2022.

VII. DIVERSION OF MENTALLY INCOMPETENT MISDEMEANOR OFFENDERS (§ 1370.01.)

Senate Bill No. 317 (2021-2022 Reg. Leg. Sess.) first repeals section 1370.01, then reenacts the section to address the treatment of mentally incompetent misdemeanor offenders. “It is the

intent of the Legislature that a defendant subject to the terms of this section receive mental health treatment in a treatment facility and not a jail.” (§ 1370.01, subd. (d).)

Section 1370.01, subdivision (e), provides that section 1370.01 applies only as specified in section 1367, subdivision (b): “Section 1370.01 applies to a person who is charged with a misdemeanor or misdemeanors only, or a violation of formal or informal probation for a misdemeanor, and the judge finds reason to believe that the defendant has a mental health disorder, and may, as a result of the mental health disorder, be incompetent to stand trial.”

A. Defendant found incompetent

If the defendant is found incompetent, the court must suspend the criminal proceedings and may do either of the following:

1. Conduct a hearing pursuant to sections 1001.35, *et seq.*, and, if the defendant is eligible, grant diversion pursuant to section 1001.36 “for a period not to exceed one year from the date the individual is accepted into diversion or the maximum term of imprisonment provided by law for the most serious offense charged in the misdemeanor complaint, whichever is shorter.” (§ 1370.01, subd. (b)(1)(A).)

The hearing must be held within 30 days after the finding of incompetence. If the hearing is delayed beyond 30 days, the defendant must be released on their own recognizance pending the hearing. (§ 1370.01, subd. (b)(1)(B).)

If the defendant performs satisfactorily on diversion, the court must dismiss the criminal charges. (§ 1370.01, subd. (b)(1)(C).)

If the court finds the defendant ineligible for diversion based on the circumstances set forth in section 1001.36, subdivisions (b) or (d), after notice to the parties, the court must hold a hearing to determine whether to do any of the following:

- Modify the treatment plan as recommended by the treatment provider. (§ 1370.01, subd. (b)(1)(D)(i).)
- Refer the defendant to assisted outpatient treatment pursuant to Welfare and Institutions Code, section 5346. Such a referral may be made only in a county where the services are available, and where the agency agrees to accept responsibility for treatment. The hearing to determine eligibility for assisted outpatient treatment must be held within 45 days of the date of the referral. If it is delayed beyond the 45 days, the court must order the defendant released on their own recognizance if the defendant is being held in the county jail. If the defendant is accepted into assisted outpatient treatment, the charges are to be dismissed under section 1385. (§ 1370.01, subd. (b)(1)(D)(ii).)

- Refer the defendant to the county conservatorship investigator for a possible conservatorship proceedings under Welfare and Institutions Code, sections 5350, *et seq.* The referral is permissible only if a qualified mental health expert has determined the defendant is gravely disabled as defined in Welfare and Institutions Code, section 5008, subdivision (h)(1)(A). If the petition is not filed within 60 days of the referral, the court must order the defendant released on their own recognizance pending the conservatorship proceedings. If the conservatorship proceedings are established, the court must dismiss the criminal charges under section 1385. (§ 1370.01, subd. (b)(1)(D)(iii).)
2. The court may dismiss the criminal charges pursuant to section 1385. A copy of the order is to be sent to the county mental health director. (§ 1370.01, subd. (b)(2).)

B. Persons on misdemeanor probation

If a mentally incompetent defendant is on misdemeanor probation, a petition alleging a violation must be dismissed. The court, however, may modify the terms and conditions of supervision to include mental health treatment. (§ 1370.01, subd. (c).)

C. Custody credits

Section 1370.01, subdivision (d), provides, in relevant part: “A term of four days will be deemed to have been served for every two days spent in actual custody against the maximum term of diversion. A defendant not in actual custody shall otherwise receive day for day credit against the term of diversion from the date the defendant is accepted into diversion. ‘Actual custody’ has the same meaning as in Section 4019.” Although the intent of the first sentence is not entirely clear, it seems to restate the entitlement to actual time and conduct credit required by section 4019. The effect of the statute is to give the defendant ordinary actual time and conduct credit earned under section 4019 while in actual custody pending the acceptance of the defendant into diversion – the credit applies to reduce the term of diversion. Once the defendant is accepted into the diversion program, however, they will be entitled only to actual time (day-for-day) credit against the period of diversion.

D. Application of *Estrada*

The changes to section 1370.01 offer a substantial reduction in how the court may respond to a misdemeanor violation if the defendant is incompetent. Under the reasoning of *Estrada*, the new misdemeanor procedure likely will be available to all cases not final as of January 1, 2022.

VIII. RECALL OF SENTENCE (§ 1170.03)

Historically, the authority of the court to recall a sentence and impose a new sentence was lodged in section 1170, subdivision (d). SB 567 deletes the sentence recall provisions from section 1170, subdivision (d). Assembly Bill No. 1540 (2021-2022 Reg. Leg. Sess.)(AB 1540) adds section 1170.03 as a stand-alone provision governing the recall of felony sentences. Many of the original provisions of section 1170, subdivision (d), are transferred to section 1170.03. AB 1540 also adds provisions assuring that any new ameliorative provisions of the sentencing law may be considered after a sentence is recalled, that a request for resentencing may not be denied without a hearing, and that requests for resentencing by certain public agencies are presumptively proper unless there is an unreasonable risk of danger to the public.

The primary intent of section 1170.03 is to provide the court with an opportunity to resentence a defendant when the original term no longer serves the interests of justice. Occasionally, however, the Department of Corrections and Rehabilitation (CDCR) has used the procedure for recalling a sentence to correct an unauthorized sentence. For that reason, these materials will also discuss the disposition of an unauthorized sentence.

Exception to loss of jurisdiction after notice of appeal

The filing of a notice of appeal ordinary divests the trial court of any jurisdiction to do anything that may affect the judgment. Section 1170.03, however, is an exception to that rule. The court retains limited jurisdiction under section 1170.03 to recall and modify the sentence. (See *Portillo v. Superior Court*, 10 Cal. App. 4th 1829, 1835–1836, 13 Cal. Rptr. 2d 709 (4th Dist. 1992), reh’g denied, (Dec. 14, 1992).) A trial court may not reduce a first-degree murder conviction to second degree murder and impose a corresponding lower sentence after defendant had already filed his notice of appeal. (*People v. Espinosa*, 229 Cal. App. 4th 1487, 177 Cal. Rptr. 3d 887 (2d Dist. 2014).)

A. Authority to recall a felony sentence

The authority to request a recall of a felony sentence to state prison or under section 1170.03, subdivision (a)(1), is with:

- The court on its own motion,
- The secretary of the Board of Parole Hearings for state prison commitments,
- The county correctional administrator for county jail commitments,
- The district attorney of the county in which the defendant was sentenced, and
- The Attorney General for cases prosecuted by that office.

Time limit on recall of sentence

The authority of the court to recall a sentence must be exercised within 120 days of commitment to prison or county jail; the authority of the other named agencies to request a recall may be exercised at any time. (§ 1170.03, subd. (a)(1).) The 120-day limitation only applies to the order entered by the court for the purpose of recalling the sentence; it does not apply to the hearing when the request for resentencing is actually considered. (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 464.)

The 120-day clock begins to run when the sentence is executed. “[A] judgment for imprisonment ordinarily is deemed executed when a certified copy of the minute order or abstract of judgment is ‘furnished to the officer whose duty it is to execute the probationary order or judgment.’ . . . (§ 1213; see [*People v. Karaman* (1992) 4 Cal.4th 335, 344–345](*Karaman*); *In re Black* (1967) 66 Cal.2d 881, 890 [Black].)” (*People v. Howard* (1997) 16 Cal.4th 1081, 1089–1090 (*Howard*).)

Reason for recall

The purpose of recalling the sentence must be “rationally related to lawful sentencing.” (*Dix v. Superior Court*, 53 Cal. 3d 442, 456, 279 Cal. Rptr. 834, 807 P.2d 1063 (1991).) For example, the recall of a sentence may not be for the purpose of allowing the defendant to file a late notice of appeal (*People v. Pritchett*, 20 Cal. App. 4th 190, 194–195, 24 Cal. Rptr. 2d 391 (1st Dist. 1993), reh’g denied, (Dec. 7, 1993) and related reference, 26 Cal. App. 4th 1754, 33 Cal. Rptr. 2d 296 (1st Dist. 1994)), or to allow the defendant to withdraw the plea (*People v. Alanis*, 158 Cal. App. 4th 1467, 71 Cal. Rptr. 3d 139 (6th Dist. 2008)).

Whether the defendant must be physically delivered to the Department of Corrections and Rehabilitation

Howard clearly requires the defendant to be “committed” to CDCR prior to the court having jurisdiction under section [1170.03] to recall the sentence. What is not clear is whether the defendant must be physically delivered to CDCR prior to the court having such jurisdiction.

As explained in *Howard*, the court loses jurisdiction to raise or lower the sentence as a matter of precommitment procedure once the sentence is ordered into execution. (*Howard* at pp. 1089–1090.) *Karaman* discusses the execution of a prison sentence: “If the judgment is for imprisonment, ‘the defendant must forthwith be committed to the custody of the proper officer and by him or her detained until the judgment is complied with.’ (§ 1215.) The sheriff, upon receipt of the certified abstract of judgment ‘or minute order thereof,’ is required to deliver the defendant to the warden of the state prison together with the certified abstract of judgment or minute order. (§ 1216.) ‘It is clear then that at least upon the receipt of the abstract of the judgment by the sheriff, the execution of the judgment is in progress.’ (*Black*, supra, 66 Cal.2d at p. 890; *People v. Heinold* [1971] 16 Cal.App.3d 958, 963; 6 Witkin & Epstein, Cal. Criminal Law, supra, § 3115, p. 3844.)” (*Karaman*, at p. 345.)

As *Karaman* further explains: “As a practical matter, to require a trial judge (who desires to resentence a defendant whose sentence has been stayed) to delay resentencing until the actual commencement of the defendant’s prison term generally would entail a considerable waste of time and expense. The Legislature, although limiting the resentencing provisions of section 1170, subdivision (d), to the postcommitment situation, has not otherwise imposed any such requirement, and we likewise decline to do so. Thus, we conclude that where the sentence is to a term of imprisonment, the trial court retains jurisdiction, during the period a stay is in effect and at any time prior to execution of the sentence, to reconsider the sentence and vacate it or impose any new sentence which is not greater than the initial sentence, just as it may do so on its own motion pursuant to section 1170, subdivision (d), within 120 days after the court has committed the defendant to the prison authorities.” (*Karaman*, at p. 353.)

Additional insight is provided by *People v. Superior Court (Cornelius)*, 31 Cal. App. 4th 343, 37 Cal. Rptr. 2d 156 (2d Dist. 1995). There, the defendant had been sentenced to state prison and committed to the custody of the sheriff to be delivered to CDCR. Immediately upon remand the defendant posted bail on appeal. The fact she was not physically delivered to CDCR did not stop the 120-day time period from running. “The fact that she served no time in prison and physically was not delivered to the custody of the Department of Corrections is not determinative. The controlling fact is the trial court’s surrender of its jurisdiction to the prison authorities. This was accomplished when the trial court remanded Cornelius forthwith to the Department of Corrections.” (*Id.* at p. 348.)

The most logical interpretation of *Karaman* and *Howard* is that although the defendant must be “committed” to CDCR prior to the exercise of discretion under section 1170.03, the condition is satisfied with the preparation of the abstract of conviction and the delivery of the defendant to the sheriff. At such point the court may issue its order of recall.

‡ **Practice Tip:** If the parties are agreeable, particularly if the recall and resentencing is part of a negotiated disposition, the court should request a stipulation that the procedure used complies with the provisions of section 1170.03. Such a stipulation likely will negate any issue related to the physical delivery of the defendant into the custody of CDCR.

Invitation by the defendant to recall the sentence

The defendant is not named as a person who has the right to request a recall of the sentence. The defendant has no standing to initiate a recall of his sentence. (*People v. Prichett* (1993) 20 Cal., App. 4th 190, 193-194; *Portillo v. Superior Court* (1992) 10 Cal. App. 4th 1829, 1833.) The defendant, however, may be able to “invite” the court’s consideration of the recall. Similar to section 1170.03, defendants have no standing to request dismissal of allegations in the furtherance of justice under section 1385. In that context, however, courts have held the defendant may “invite” the court to exercise such discretion. “A defendant has no right to make a motion, and the trial court has no obligation to make a ruling, under section 1385. But

he or she does have the right to ‘invite the court to exercise its power by an application to strike a count or allegation of an accusatory pleading, and the court must consider evidence offered by the defendant in support of his assertion that the dismissal would be in furtherance of justice.’ [Citation.] And ‘[w]hen the balance falls clearly in favor of the defendant, a trial court not only may *but should* exercise the powers granted to him by the Legislature and grant a dismissal in the interests of justice.’ [Citation.]” (*People v. Carmony* (2004) 33 Cal.4th 367, 375; italics in original; *Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 441.) Although the recall of a sentence is initiated by the court, the defendant having no independent right to request recall, the Supreme Court has held the denial of a request for recall made by the defendant is an “order made after judgment, affecting the substantial rights of the party,” and, as such, may be appealed. (§ 1237, subd. (b).) (*People v. Loper* (2015) 60 Cal.4th 1155, 1167.)

Recall of sentence at request of CDCR

Letters to the court from CDCR, signed by its secretary, provide: “[Section 1170, subdivision (d)] provides that, upon recommendation of the Secretary of the California Department of Corrections and Rehabilitation, the court may recall a previously ordered sentence and commitment, and resentence the defendant in the same manner as if he or she had not previously been sentenced, *provided the new sentence is no greater than the initial sentence.*” (Emphasis added.) In light of the case authority authorizing any legal sentence, the suggestion that the court may not impose a longer sentence than the original term may be misleading. If the letter simply raises equitable factors justifying the reduction of sentence (as, for example, there is a change in the law after the defendant’s case became final or the defendant has been an exemplary inmate), the court may not resentence the inmate to a term longer than the original sentence. However, if the original sentence was unauthorized, the court may impose any legal sentence, even if the term is longer than the one originally imposed.

It is immaterial that the unauthorized sentence is discovered as a result of a referral by CDCR under section 1170, subdivision (d). As observed in *People v. Hill* (1986) 185 Cal.App.3d 831, 834: “[U]nder other sentencing circumstances the trial court would have the authority to impose the sentence appellant challenges on appeal. When a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. (*People v. Savala* (1983) 147 Cal.App.3d 63, 68–69, disapproved by the same division on another ground in *People v. Foley* (1985) 170 Cal.App.3d 1039, 1044; see *People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1029, and *People v. Gutierrez* (1980) 109 Cal.App.3d 230, 233.) This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components. The invalidity of one component infects the entire scheme. (*Savala, supra.*, 147 Cal.App.3d at pp. 68–70.) We see no reason why this reasoning should not apply where, as here, the Department of Corrections rather than the Court of Appeal notifies the trial court of an illegality in the sentence. The trial court is entitled to rethink the entire sentence to achieve its original and

presumably unchanged goal. Furthermore, there is no contradiction between viewing an aggregate sentence as a whole and the language of section 1170, subdivision (d), which permits resentencing.”

Circumstances identified by CDCR for recall of sentence

CDCR has found six cases that identified problems with sentencing sufficient to justify a recall and resentencing under section 1170.03.

1. ***People v. Rodriguez* (2009) 47 Cal.4th 501**: In *Rodriguez*, defendant had been convicted of assault with a firearm. (§ 245, subd. (a)(2).) He was also found to have committed the crime with the personal use of a firearm (§ 12022.5, subd. (a)) and that the crime was a “violent” felony committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). In sentencing the defendant for the assault, the trial court imposed a sentence under both enhancements. The Supreme Court found the sentence violated the restrictions of section 1170.1, subdivision (f), which specifies: “When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense.” (*Rodriguez*, at pp. 508– 509.) The court found the proper remedy is to reverse the trial court’s judgment and remand the case for resentencing. “Remand will give the trial court an opportunity to restructure its sentencing choices in light of our conclusion that the sentence imposed here violated section 1170.1’s subdivision (f).” (*Rodriguez*, at p. 509.)

Although not expressly stated by *Rodriguez*, because the sentence was imposed in violation of section 1170.1, subdivision (f), it was an unauthorized sentence.

2. ***People v. Le* (2015) 61 Cal.4th 416**: The sentencing circumstances in *Le* are substantially similar to those of *Rodriguez*. In *Le*, defendant was convicted of assault with a semiautomatic firearm under section 245, subdivision (b). He was also found to have committed the violation with the personal use of a firearm under section 12022.5, subdivision (a)(1), and that the crime was committed for the benefit of a criminal street gang under section 186.22, subdivision (b)(1). The charging document did not specify whether the crime came within section 186.22, subdivision (b)(1)(B), as a “serious” felony, or section 186.22, subdivision (b)(1)(C), as a “violent” felony. Seeking to avoid the application of *Rodriguez*, the prosecution urged the court to use the enhancement under section 186.22, subdivision (b)(1)(B). The trial court, for the reasons expressed in *Rodriguez*, stayed the enhancement under section 186.22, subdivision (b)(1)(B). The Supreme Court agreed with the trial court’s analysis and affirmed the judgment.

Although not expressly stated by *Le*, if the sentence had been imposed in violation of section 1170.1, subdivision (f), it would be an unauthorized sentence.

3. ***People v. Gonzalez* (2009) 178 Cal.App.4th 1325**: In *Gonzalez*, the defendant was convicted of assault by means of force likely to inflict great bodily injury (§ 245, subd. (a)(1)), and that the crime was committed with the infliction of great bodily injury (§ 12022.7, subd. (a)), and for the

benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). The trial court sentenced the defendant on both enhancements. Based on the reasoning in *Rodriguez*, the court found the imposition of sentence on both enhancements violated the restrictions of section 1170.1, subdivision (g), which provides in relevant part: “[w]hen two or more enhancements may be imposed for the infliction of great bodily injury on the same victim in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense.” (*Gonzalez*, at pp. 1331– 1332.) The sentence was reversed and remanded to the trial court for resentencing within the limitations of section 1170.1, subdivision (g).

Although not expressly stated by *Gonzalez*, because the sentence had been imposed in violation of section 1170.1, subdivision (g), it was an unauthorized sentence.

4. *People v. Lopez* (2012) 208 Cal.App.4th 1049: In *Lopez*, the defendant was convicted of attempting to dissuade a witness (§ 136.1, subd. (a)(2)), and that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). Pursuant to the gang finding, the defendant was sentenced to an indeterminate term under section 186.22, subdivision (b)(4)(C). Imposition of the life term is permissible under section 186.22, subdivision (b)(4)(C), only if the defendant is convicted of “threats to victims and witnesses, as defined in Section 136.1.” Defendant was convicted under section 136.1, subdivision (a)(2), which prohibits “[k]nowingly and maliciously attempt[ing] to prevent or dissuade any witness or victim from attending or giving testimony at any trial” Section 136.1, subdivision (c)(1), however, applies to dissuasion “[w]here the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim” The court observed that “the information charged Lopez with violating section 136.1, subdivision (b)(2), knowingly and maliciously attempting to dissuade a witness from testifying. The information did not charge Lopez with using an express or implied threat of force. Nor did the instructions inform the jury it must find Lopez used an express or implied threat of force. Nor did the jury make a specific finding that Lopez used an express or implied threat of force.” (*Lopez*, at pp. 1064–1065.) “Lopez was not convicted of violating section 136.1, subdivision (c)(1). Nor did the jury find Lopez used an implied or express threat of force in committing the crime. Therefore, the trial court erred in imposing a sentence of seven years to life pursuant to section 186.22, subdivision (b)(4)(C) because the section did not apply to the crime of which Lopez was convicted and because the sentence was based on a fact not found true by the jury. We will vacate the sentence on count 5 and remand the matter to the trial court for resentencing on that count.” (*Lopez*, at p. 1065.)

Although not expressly stated by *Lopez*, the sentence imposed by the trial court was unauthorized.

5. *People v. McCart* (1982) 32 Cal.3d 338: In *McCart*, defendant had been sentenced to prison. While in prison, he committed an offense and received a full term consecutive sentence for that crime under section 1170.1, subdivision (b). Thereafter, he committed a second in-prison offense and was sentenced to a full term consecutive sentence for that crime. The Supreme Court, applying the provisions of section 1170.1, subdivision (b), determined that when a

defendant is convicted of multiple in-prison offenses, he should receive “a single term of imprisonment for all convictions of felonies committed in prison and sentenced consecutively, whether multiple convictions occur in the same court proceeding or in different proceedings. That this term is to commence when the person would otherwise have been released emphasizes that the new term is to be fully consecutive to the term already being served: i.e., that it must commence at the end of the longest of the prisoner’s previously imposed terms.” (*McCart*, at p. 343.) The matter was remanded to the trial court for recomputation of the term for the in-prison crimes. (*McCart*, at p. 346.)

Although not expressly stated by *McCart*, because the sentence was imposed in violation of section 1170.1, subdivision (b), it was an unauthorized sentence.

6. Recall of sentence for purpose of striking an enhancement: Effective January 1, 2018, sections 12022.5 and 12022.53 were amended to allow a court to dismiss the designated gun enhancements in the interests of justice under section 1385. (§§ 12022.5, subd. (c); 12022.53, subd. (h).) The amendments apply to all cases not final as of the effective date of the legislation. (*People v. Robbins* (2018) 19 Cal.App.5th 660; *People v. Woods* (2018) 19 Cal.App.5th 1080; *People v. Chavez* (2018) 21 Cal.App.5th 971; and *People v. Almanza* (2018) 21 Cal.App.5th 1308.) CDCR, however, is utilizing its authority under section 1170, subdivision (d)(1), in certain instances to recommend consideration of dismissal of the firearm enhancements for cases final as of January 1, 2018. Recalling of the sentence by the court under these circumstances would not be based on the original sentence being unauthorized; rather, it would be based on equitable considerations. The court has complete discretion as to whether the sentence is recalled and, if it is recalled, whether the sentence will be modified by striking either the enhancement in its entirety or the punishment for the enhancement. (§ 1385, subd. (c)(1).) The court could not impose a sentence longer than the original term. (§ 1170, subd. (d)(1).)

B. Authority of the court in granting relief

The discretion of the court in resentencing a defendant under section 1170.03 will depend, at least in part, on whether the court is exercising its equitable authority to make adjustments to the sentence under subdivision (a)(1), or whether the court is correcting an unauthorized sentence.

Equitable authority under section 1170.03, subdivision (a)(1)

Section 1170.03, subdivision (a)(1), provides the court may “resentence the defendant in the same manner as if they had not previously been sentenced, whether or not the defendant is still in custody, and provided the new sentence, if any, is no greater than the initial sentence.”

“The court, in recalling and resentencing under this subdivision, shall apply the sentencing rules of the Judicial Council and apply any changes in law that reduce sentences or provide for

judicial discretion so as to eliminate disparity of sentences and to promote uniformity of sentencing.” (§ 1170.03, subd. (a)(2).)

“The resentencing court may, in the interest of justice and regardless of whether the original sentence was imposed after a trial or plea agreement, do the following:

- (A) Reduce a defendant’s term of imprisonment by modifying the sentence.
- (B) Vacate the defendant’s conviction and impose judgment on any necessarily included lesser offense or lesser related offense, whether or not that offense was charged in the original pleading, and then resentence the defendant to a reduced term of imprisonment, with the concurrence of both the defendant and the district attorney of the county in which the defendant was sentenced or the Attorney General if the Department of Justice originally prosecuted the case.”

(§ 1170.03, subd. (a)(3).)

Presumably the court’s ability to “reduce a defendant’s term” includes exercising such sentencing discretion as changing the term on a triad, changing the concurrent/consecutive structure of a multiple count case, and the dismissal of enhancements as now authorized in section 1385.

Unauthorized sentence

Where the sentence is unauthorized the court may reconsider the entire sentence and impose whatever term could be legally imposed at the original sentencing proceedings, even if the resentencing results in a longer term of imprisonment. “ ‘When a court pronounces a sentence which is unauthorized by the Penal Code, that sentence must be vacated and a proper sentence imposed whenever the mistake is appropriately brought to the attention of the court.’ (*People v. Massengale* (1970) 10 Cal.App.3d 689, 693.) ‘When an illegal sentence is vacated, the court may substitute a proper sentence, even though it is more severe than the sentence imposed originally’. (*People v. Grimble* (1981) 116 Cal.App.3d 678, 685, citing *People v. Serrato* (1973) 9 Cal.3d 753, and *In re Sandel* (1966) 64 Cal.2d 412.)” (*People v. Hunt* (1982) 133 Cal.App.3d 543, 564.)

In vacating the illegal portion of the sentence, the court is entitled to reconsider the entire sentence. It is immaterial that the unauthorized sentence is discovered as a result of a referral by CDCR under section 1170, subdivision (d). As observed in *People v. Hill* (1986) 185 Cal.App.3d 831, 834: “[U]nder other sentencing circumstances the trial court would have the authority to impose the sentence appellant challenges on appeal. When a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. [Citations.] This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components.

The invalidity of one component infects the entire scheme. [Citation.] We see no reason why this reasoning should not apply where, as here, the Department of Corrections rather than the Court of Appeal notifies the trial court of an illegality in the sentence. The trial court is entitled to rethink the entire sentence to achieve its original and presumably unchanged goal. Furthermore, there is no contradiction between viewing an aggregate sentence as a whole and the language of section 1170, subdivision (d), which permits resentencing.”

C. Factors affecting the grant or denial of recall or resentencing

In exercising its resentencing discretion, the court is directed to consider specified pre- and postconviction sentencing factors

Pre-conviction factors

“The court *shall consider* if the defendant has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence, if the defendant was a victim of intimate partner violence or human trafficking prior to or at the time of the commission of the offense, or if the defendant is a youth or was a youth as defined under subdivision (b) of Section 1016.7 at the time of the commission of the offense, and whether those circumstances were a contributing factor in the commission of the offense.” (§ 1170.03, subd. (a)(4); italics added.) Section 1016.7, subdivision (b), specifies “youth” “includes any person under 26 years of age on the date the offense was committed.

Subdivision (a)(4), requires the court to consider whether any of the designated pre-conviction circumstances were “a contributing factor in the commission of the offense.” The statute does not further define the meaning of “contributing factor.” Likely it will be necessary for the court to find the factor had some connection, however slight, to the commission or circumstances of the crime. In other legislation adopted in 2021, the Legislature used the phrase “substantially contributed” to the crime. (See, *e.g.*, § 1385, subdivision (c)(5) [the court may strike an enhancement “if the court concludes that the defendant’s mental illness *substantially contributed* to the defendant’s involvement in the commission of the offense; italics added].) It seems clear the Legislature’s use of “contributing factor” implies a factor far less significant than one which “substantially contributed” to the crime.

Postconviction factors

The court is given broad discretion to consider postconviction factors. “In recalling and resentencing pursuant to this provision, the court *may consider* postconviction factors, including, but not limited to, the disciplinary record and record of rehabilitation of the defendant while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the defendant’s risk for future violence, and evidence that reflects that circumstances have changed since the original sentencing so that continued incarceration is no longer in the interest of justice.” (§ 1170.03, subd. (a)(4); italics added.)

D. Credit for time served

If the resentencing is granted, the court is to accord the defendant credit for time served. (§ 1170.03, subd. (a)(5).) Likely the calculation of the custody credit will be in accordance with *People v. Buckhalter* (2001) 26 Cal.4th 20. The trial court has the duty to calculate all presentence actual and conduct credit, the actual time spent in state prison or in county jail under section 1170, subdivision (h), and all actual and conduct credit while housed in the county jail during the resentencing process. The Department of Corrections and Rehabilitation or local custody administrator has the duty to calculate the defendant's conduct credit while under their jurisdiction.

E. Statement on the record

Section 1170.03, subdivision (a)(6), requires the court to state its reasons for granting or denying the request for resentencing on the record. The statement can be made orally or in writing. Although not required by the statute, the proper procedure would be to serve the statement on the parties if they were not present in court to hear it.

F. Granting of resentencing without a hearing

"Resentencing may be granted without a hearing upon stipulation by the parties." (§ 1170.03, subd. (a)(7).) Where the parties have resolved the resentencing by mutual agreement, there is no need to conduct a formal hearing. The court should reflect the agreement of the parties in a stipulated order and assure that the order is served on the appropriate custody authority.

G. No denial of resentencing without a hearing

Section 1170.03, subdivision (a)(8), prohibits the denial of a request for resentencing without a hearing: "Resentencing shall not be denied, nor a stipulation rejected, without a hearing where the parties have an opportunity to address the basis for the intended denial or rejection. If a hearing is held, the defendant may appear remotely and the court may conduct the hearing through the use of remote technology, unless counsel requests their physical presence in court."

Clearly the court is not permitted to summarily reject any request for resentencing made by the correctional administrators or the prosecuting attorney. The legislative right to have a hearing is in response to *People v. McCallum* (2020) 55 Cal.App.4th 202 (*McCallum*). "We conclude the statutory language of section 1170, subdivision (d)(1), read in the context of section 1170 as a whole, shows the Legislature did not intend to require a trial court to hold a hearing before acting on a recommendation by the Secretary for recall and resentencing. It is up to the Legislature to address in the first instance whether an inmate should be afforded a hearing in response to a recommendation by the Secretary for recall and resentencing. [¶] However, in

light of McCallum's substantial right to liberty implicated by the Secretary's recommendation to recall McCallum's sentence [citation], the trial court abused its discretion in denying McCallum an opportunity to present information relevant to the Secretary's recommendation. . . . We reverse and remand for the trial court to allow McCallum and the People an opportunity to present additional information relevant to the Secretary's recommendation, and for the trial court in light of this information and any briefing provided by the parties to exercise its discretion whether to recall McCallum's sentence. If the court recalls McCallum's sentence, he would have a right to be present at a resentencing hearing." (*McCallum, supra*, 55 Cal.App.5th at pp. 206-207.)

What is not clear from the statute is whether the court is required to hold a hearing before summarily denying a request for resentencing made by the defendant. The issue is whether a request by a defendant "inviting" the court's consideration of resentencing is a request contemplated by section 1170.03, subdivision (a)(8). The prudent court may choose to grant a hearing when the request comes from counsel for the defendant. A request made by counsel presumes a level of seriousness and appropriateness that certainly fits within the spirit of section 1170.03 if not its letter. However, even a request written by the defendant outlining legitimate sentencing concerns may warrant the appointment of counsel and an initial hearing on the request.

H. Presumption favoring resentencing if requested by custody administrator or prosecuting attorney

If the request for recall and resentencing comes from the Secretary of the Department of Corrections and Rehabilitation, the Board of Parole Hearings, a county correctional administrator, a district attorney, or the Attorney General, there is as strong presumption favoring the granting of the request. Section 1170.03, subdivision (b)(2) provides: "There shall be a presumption favoring recall and resentencing of the defendant, which may only be overcome if a court finds the defendant is an unreasonable risk of danger to public safety, as defined in subdivision (c) of Section 1170.18." Section 1170.18, subdivision (c), defines "unreasonable risk of danger to public safety" as "an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667."

The list of crimes in section 667, subdivision (e)(2)(C), commonly referred to as the "super strikes," includes:

- A "sexually violent offense" as defined in Welfare and Institutions Code, section 6600(b) [Sexually Violent Predator Law]: " 'Sexually violent offense' means the following acts when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person, and that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason

of insanity, as defined in subdivision (a): a felony violation of Section 261, 262, 264.1, 269, 286, 288, 288a, 288.5, or 289 of the Penal Code, or any felony violation of Section 207, 209, or 220 of the Penal Code, committed with the intent to commit a violation of Section 261, 262, 264.1, 286, 288, 288a, or 289 of the Penal Code.”

- Oral copulation under section 288a, sodomy under section 286, or sexual penetration under section 289, if these offenses are committed with a person who is under 14 years of age, and who is more than 10 years younger than the defendant.
- A lewd or lascivious act involving a child under 14 years of age, in violation of section 288.
- Any homicide offense, including any attempted homicide offense, defined in sections 187 to 191.5, inclusive.
- Solicitation to commit murder as defined in section 653f.
- Assault with a machine gun on a peace officer or firefighter, as defined in section 245(d)(3).
- Possession of a weapon of mass destruction, as defined in section 11418(a)(1).
- Any serious or violent offense punishable in California by life imprisonment or death.

Procedure if section 1170.03, subdivision (b), applies

If the request for recall of a sentence comes from the persons specified in subdivision (b)(a) (custody administrator or prosecuting attorney), “[t]he court shall provide notice to the defendant and set a status conference within 30 days after the date that the court received the request. The court’s order setting the conference shall also appoint counsel to represent the defendant.” It clearly is the intent of the Legislature that if the court receives a request for resentencing from the custody facility or prosecutor that the court treat it seriously and expeditiously. The 30-day requirement for the status conference is to assure the matter gets into the court system within a reasonable time.

The statutory obligation to appoint counsel appears to be at least partially in response to *People v. Frazier* (2020) 55 Cal.App.5th 858 (*Frazier*), which held the defendant is not entitled as a matter of due process to appointed counsel simply upon the filing of a request for resentencing by the Department of Corrections and Rehabilitation. (*Frazier, supra*, 55 Cal.App.5th at pp. 865-866.)

Sequence of analysis if section 1170.03, subdivision (b), applies

The intent of section 1170.03, subdivision (b), is not entirely clear. On the one hand, it certainly is the intent of the Legislature that if the request for resentencing comes from the correctional institutions or the prosecution, the court should grant the request absent serious overriding circumstances. On the other hand, merely because the correctional institution or the prosecution is requesting a sentence modification does not mean the court must automatically grant it – the court must still review the request under the overarching principle of “interests of justice.” (§ 1170.03, subd. (a)(3).) Subdivision (b)(2) specifies “[t]here shall be a presumption *favoring* recall and resentencing” [italics added] – it does not say that if the presumption exists, the court *shall*, without exception, grant the recall and resentencing. Merely because the presumption of subdivision (b)(2) applies does not end the court’s duty to find that it is in the interests of justice to grant the resentencing.

It is suggested the following sequence of analysis be used in determining whether to grant resentencing when the request is made pursuant to section 1170.03, subdivision (b):

- The court should first review the request for resentencing against the factors listed in section 1170.03, subdivision (a)(4), and any other relevant factors presented by the parties. The purpose of the review is to determine whether it is in the interests of justice to resentence the defendant.
- If the request for resentencing comes from one of the entities listed in subdivision (b), the court should apply the presumption in section 1170.03, subdivision (b)(2), favoring the granting of the resentencing; *i.e.*, to the extent possible, the court should weigh the factors in a manner favorable to the granting of the resentencing. If the court finds the defendant is an unreasonable risk to public safety as defined in section 1170.18, subdivision (c), the court may disregard the presumption – under such circumstances there is no presumption. However, merely because the defendant is an unreasonable risk of danger does not mean the request for resentencing must be denied – it merely means there is no presumption under section 1170.03(b)(2).
- Whether or not the presumption of subdivision (b)(2) applies, in its final analysis the court must determine whether granting the motion for resentencing is in the interests of justice.

I. Suggested procedure for handling a request for resentencing by specified persons

Based on the requirements of section 1170.03, it is suggested the following procedure may be used by the court in addressing a request for resentencing.

1. Identify the proper judge for ruling on the request

In most circumstances the original sentencing judge should handle the request for resentencing. (See, generally, *People v. Jacobs* (2007) 156 Cal.App.4th 728, 737, and *People v. Arbuckle* (1978) 22 Cal.3d 749, 756.) There is at least a possibility the sentencing judge will remember the case, understand some of its complexities, and be in the best position to assist in resolving any sentencing issues. If the original judge is not reasonably available, however, the matter may be referred to any judge for review.

2. Review by the court

The judge should review the request for resentencing and the entire file to determine the nature of the request and how best it may be resolved. The court should verify the circumstances of any alleged error and determine the proper means for addressing the issue.

Clerical error

If the problem is merely clerical error, such as a mathematical mistake in the calculation of custody credits or an error in the preparation of the abstract of judgment, the court should prepare a tentative response, with copies of all correspondence to counsel for comment within a designated number of days. If no objection is received to the tentative response, the court should send the custody facility an amended abstract of judgment, as may be appropriate. If there is an objection to the tentative response, the matter should be set for hearing.

Request for recall and resentencing on grounds other than clerical error

If the request involves a request for substantive resentencing, the court should not handle the matter administratively, but proceed as outlined, *infra*.

3. Setting the matter for a status hearing

If the request for recall and resentencing comes from the custody facility or the prosecution, section 1170.03, subdivision (b)(1), requires the setting of a status hearing within 30 days of the court's receipt of the request.

Some care should be exercised in crafting the court's order setting the status conference. At this initial stage of the process the court should *not recall* the sentence but should merely set the matter for a hearing to determine whether the court *should recall* the sentence. If the court actually recalls the sentence, there will be no existing commitment of the defendant to the custody facility, and he must be returned to the court pending further proceedings. Consequently, the defendant likely will forfeit his existing housing status and opportunities for participation in programs. Since in some

cases the resentencing will not result in the defendant's actual release from custody, the proper course is to keep him in the physical custody of the facility pending the procedure for resentencing, unless the defendant actually requests his personal appearance in the proceedings. It may be possible for the defendant to appear by remote communication as provided by subdivision (a)(8). A suggested form of order setting the matter for a status hearing is attached as Attachment A at the end of this section.

4. Appointment of counsel and notice to the parties

Section 1170.03, subdivision (b)(1), requires the court to appoint counsel for the defendant if the request for resentencing comes from the custody facility or the prosecution.

The court should send notice of the application, appointment of counsel, and the setting of the status conference to the defendant (as required by subdivision (b)(1)) and all counsel.

5. Conducting the status conference

The initial appearance at the status conference is an opportunity for the court and counsel to discuss the sentencing problem and for consideration of any proposed disposition. Section 1170.03, subd. (a)(3), provides: "The resentencing court may, in the interest of justice and *regardless of whether the original sentence was imposed after a trial or plea agreement,*" grant specified relief. (Italics added.) Sentences imposed after jury trials likely will be easier to resolve because the court has total control over the structure of the final sentence. Sentences imposed as a result of a plea, however, may raise additional concerns because either or both of the parties likely will end up with something different than their bargain. The negotiations likely will involve a discussion of the resentencing authority under subdivision (a)(3), including the charges (dismissed, admitted, lesser included or lesser related), available custody credits, and the potential revision of the consecutive/concurrent structure of the sentence. The discussion also may involve the waiver of certain sentencing limitations, such as the prohibition against double punishment under section 654. If the status conference produces an agreed modification, the court should follow the applicable procedures outlined in paragraphs 8 and 9, *infra*.

6. Setting the matter for formal hearing

If the parties cannot reach an informal resolution, the court should set the matter for a contested hearing. Defense counsel will be required to determine whether the defendant wants to be present for the hearing. The defendant has the due process right to be present at the resentencing hearing. (*People v. McCallum* (2020) 55 Cal.App.5th 202, 215.) The defendant may choose to appear remotely as authorized by subdivision

(a)(8). Unless there are any major factual questions, likely the defendant will waive his presence because absence from prison may cost him a place in a program or a particular housing unit. If the defendant's appearance is to be waived, a formal written waiver should be filed in the general format as provided by section 977.

In determining whether to reduce the sentence under the general authority of section 1170.03, subdivision (a), and not because of an unauthorized sentence, "[t]he court may consider postconviction factors, including, but not limited to, the disciplinary record and record of rehabilitation of the defendant while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the defendant's risk for future violence, and evidence that reflects that circumstances have changed since the original sentencing so that continued incarceration is no longer in the interest of justice. . . ." (§ 1170.03, subd. (a)(4).) In any event, for proceedings under subdivision (a)(1), "the new sentence, if any, [may be] no greater than the initial sentence."

Such factors would be irrelevant in determining whether to vacate an unauthorized sentence – if the sentence is unauthorized, it must be vacated regardless of any mitigating or aggravating factors. However, once the court determines the original sentence is unauthorized, such factors would be relevant in determining the length of the new sentence. The court also may consider factors that existed at the time of the original sentencing.

If the resentencing is being done to correct an unauthorized sentence, the court may impose any authorized sentence, even if the new sentence is longer than the term originally imposed. (*People v. Hunt* (1982) 133 Cal.App.3d 543, 564, discussed, *supra*.) The court is not bound by the terms of any plea agreement. Section 1170.03, subdivision (a)(3), clearly authorizes the court to grant relief by altering a sentence based on a plea agreement. "Indeed, section 1170, subdivision (d)(10) [now § 1170.03, subd. (a)(4)] expressly contemplates that the trial court may take into account postconviction factors such as a prisoner's record of rehabilitation, age, diminished physical condition, or other factors suggesting that the prisoner's term of imprisonment should be reduced or 'the inmate's continued incarceration is no longer in the interest of justice.' [Citation.] Such considerations would prove meaningless if the trial court were constrained by the dictates of an earlier plea agreement." (*People v. Arias* (2020) 52 Cal.App.5th 213, 221.)

If the request for resentencing comes from the custody facility or the prosecution, the court must observe the presumption specified in subdivision (b)(2): "There shall be a presumption favoring recall and resentencing of the defendant, which may only be overcome if a court finds the defendant is an unreasonable risk of danger to public safety, as defined in subdivision (c) of Section 1170.18." (See discussion of the presumption, *supra*.)

Regardless of the source of the request for resentencing, the court should ask the custody facility for additional information about the defendant, if such information is needed. The admission of such information in the resentencing proceeding should be discussed with counsel if the court is initiating the request.

Previously there was a question whether the trial court, in granting a resentencing, must consider changes in the law occurring between the finality of the case and the resentencing proceeding. (See, e.g., *People v. Federico* (2020) 50 Cal.App.5th 318, granted review.) Section 1170.03, subdivision (a)(2), resolves the issue: “The court, in recalling and resentencing under this subdivision, shall apply the sentencing rules of the Judicial Council and *apply any changes in law that reduce sentences or provide for judicial discretion* so as to eliminate disparity of sentences and to promote uniformity of sentencing.” (Italics added.)

7. No change in the sentence

If the court determines to make no change in the sentence, an order should be made to that effect and entered in the minutes. A copy of the order should be sent to all counsel. A copy of the order and a copy of the original request for recall of the sentence should be sent to the requesting agency and custody facility. The entry of the order is necessary to clearly trigger any appeal period.

8. Modification of the sentence

If the court determines modification of the sentence is appropriate, the form of order will depend on the nature of the change. If the change is being made because the original sentence was not authorized, the court should not utilize the provisions of section 1170.03. The suggested order should state:

The court finds the sentence imposed by this court on ____ (date) is not authorized and is hereby vacated. The reason the court finds the sentence is unauthorized is [state the reasons – the court may draw its reasons from the letter requesting resentencing, if appropriate]. The following sentence is hereby imposed by the court: [the new sentence may be any sentence authorized at the time of the original sentencing, even if the term is longer than the original sentence].

If the change is being made for equitable reasons such as a change in the law after the defendant’s conviction became final or defendant’s exemplary conduct in prison, the court should order the recall of the sentence under section 1170.03, subdivision (a):

Upon recommendation of [name of agency], the court hereby recalls the sentence ordered on ____ (date) under the provisions of Penal Code, section 1170.03, subdivision (a), for the following reasons: [state the reasons]. The

following sentence is hereby imposed by the court: [the new sentence may not be longer than the original sentence].

The forgoing orders should be stated verbally on the record and included in the minutes.

The court should impose the new sentence, observing all of the appropriate formalities of an original sentence to state prison or county jail. If reasons are required for a particular sentencing choice, they should be expressed on the record.

9. Documentation to CDCR or custody facility

If the court modifies the sentence, it must send CDCR or other custody facility an amended abstract of judgment and a copy of the original letter requesting modification. The custody credits must be updated to the date of the new sentence. Since the court is correcting only the sentence, the defendant remains under the jurisdiction of CDCR or other custody facility, even though he may be temporarily housed in the county jail. The responsibility to calculate the custody credits is governed by *People v. Buckhalter* (2001) 26 Cal.4th 20 – the court must calculate the actual time in jail and the actual time in prison from the date of arrest to the date of resentencing, and all of the conduct credits while in county jail. The custody facility is responsible for calculating conduct credits earned in the facility.

10. Appeal of the denial of relief

The denial of resentencing is reviewable on appeal, applying an abuse of discretion standard. (*People v. Arias* (2020) 52 Cal.App.5th 213 218-220 (*Arias*).

Because the denial of relief is based on post-sentencing conduct by the trial court, the defendant need not obtain a certificate of probable cause to appeal the trial court's decision. (*Arias, supra*, 52 Cal.App.4th at pp. 218-220.)

11. Retroactive application of section 1170.03

People v. McMurray (2022) 76 Cal.App.5th 1035 (*McMurray*), holds the new procedure for recall of a sentence in section 1170.03 applies to crimes committed prior to January 1, 2022. Avoiding the need to address the application of *Estrada*, *McMurray* observed AB 1540 simply was a clarification of applicable law. “[T]he Legislature repeatedly indicated that Assembly Bill 1540 was intended to ‘make clarifying changes’ to former section 1170(d)(1), including specifying the required procedure and guidelines when the CDCR recommends recall and resentencing. [Citation.] These changes were adopted in 2021, thereby promptly addressing appellate decisions from 2020 that had interpreted the Legislature's intent regarding former section 1170(d)(1). Under the

circumstances, the appropriate remedy is to reverse and remand the matter, so that the trial court can consider the CDCR's recommendation to recall and resentence defendant under the new and clarified procedure and guidelines of section 1170.03. [Citation.] This is especially true here, given that the trial court failed to provide defendant with notice of the recommendation from the CDCR, appoint counsel for defendant, hold a hearing, or state its reasons for declining to recall and resentence defendant." (*McMurray*, *supra*, 76 Cal.App.5th at p. 1041.)

ATTACHMENT A: FORM OF ORDER SETTING MATTER FOR STATUS CONFERENCE

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff,

vs.

JOHN DOE,
Defendant.

No.

**SETTING OF STATUS CONFERENCE TO
DETERMINE WHETHER SENTENCE SHOULD
BE RECALLED; APPOINTMENT OF COUNSEL
(Pen. Code, § 1170.03(a)(1))**

The court has received a request dated _____ from [name of agency] recommending that defendant's sentence imposed on _____ be recalled pursuant to Penal Code, section 1170.03, subdivision (a)(1). A copy of such recommendation is attached hereto as Exhibit A.

The court hereby sets this matter for an initial status conference to determine whether the court should exercise its discretion to recall defendant's sentence, such conference to be held on _____ (date) at _____ (time) in Department ___ of this court. The court expressly declines to recall the sentence until further hearing. The defendant is not to be transferred from state prison to county jail and shall not be produced for future hearings unless expressly so ordered by this court.

[If needed] _____ (counsel) is hereby appointed to represent the defendant in connection with the potential recall of sentence and any resentencing.

Dated: _____

JUDGE OF THE SUPERIOR COURT

IX. REMOVAL OF INVALID SENTENCE ENHANCEMENTS (§§ 1171 and 1171.1)

Senate Bill No. 483 (20021-2022 Reg. Leg. Sess.) (SB 483) adds sections 1171 and 1171.1 to authorize and require the court to resentence a defendant if he is currently serving a sentence based on specified enhancements that are no longer valid.

Prior to January 1, 2018, Health and Safety Code, section 11370.2, required the court to impose an enhancement of three years on certain narcotics offenses because of prior convictions of specified controlled substances crimes. Effective January 1, 2018, the statute was amended to eliminate this enhancement in most circumstances. (Senate Bill 180 [Stats. 2017, ch. 677].) Prior to January 1, 2020, section 667.5, subdivision (b), required the imposition of an enhancement of one year for any prior prison term given the defendant. Effective January 1, 2020, the statute was amended to limit the prior prison term enhancement to specific violent sex crime prior convictions. (Senate Bill 136 [Stats. 2019, ch 590].) Sections 1171 and 1171.1 are parallel provisions declaring the excluded enhancements invalid and requiring the court, within a prescribed period, to resentence the defendant without the enhancements.

Section 1 of SB 483 states the intent of the Legislature: “The Legislature finds and declares that in order to ensure equal justice and address systemic racial bias in sentencing, it is the intent of the Legislature to retroactively apply Senate Bill 180 of the 2017–18 Regular Session and Senate Bill 136 of the 2019–20 Regular Session to all persons currently serving a term of incarceration in jail or prison for these repealed sentence enhancements. It is the intent of the Legislature that any changes to a sentence as a result of the act that added this section shall not be a basis for a prosecutor or court to rescind a plea agreement.”¹¹

A. Applicable code sections

Section 1171 applies to “[a]ny sentence enhancement that was imposed prior to January 1, 2018, pursuant to Section 11370.2 of the Health and Safety Code, except for any enhancement imposed for a prior conviction of violating or conspiring to violate Section 11380 of the Health and Safety Code.” (§ 1171, subd. (a).) Such enhancements are now legally invalid. (*Ibid.*)

Section 1171.1 applies to “[a]ny sentence enhancement that was imposed prior to January 1, 2020, pursuant to subdivision (b) of Section 667.5, except for any enhancement imposed for a prior conviction for a sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code.” (§ 1171.1, subd. (a).) Such enhancements are now legally invalid. (*Ibid.*)

¹¹ The intent to prevent the court or prosecution from rescinding a plea agreement based on the resentencing pursuant to SB 483 is not expressly stated in either of the new sections.

B. Identification of eligible inmates

The Department of Corrections and Rehabilitation and the county correctional administrator “shall identify those persons in their custody currently serving a term for a judgment that includes an enhancement described in subdivision (a) and shall provide the name of each person, along with the person’s date of birth and the relevant case number or docket number, to the sentencing court that imposed the enhancement.” (§§ 1171, subd. (b), and 1171.1, subd. (b).) The information must be provided to the court in accordance with the following timeline:

- “By March 1, 2022, for individuals who have served their base term and any other enhancements and are currently serving a sentence based on the enhancement. For purposes of this paragraph, all other enhancements shall be considered to have been served first.” (§§ 1171, subd. (b)(1), and 1171.1, subd. (b)(1).)

The meaning of the phrase “all other enhancements shall be considered to have been served first” is ambiguous. Likely it means that in determining whether the defendant is then serving the term for the enhancement, the custody facility is to first apply all custody credit to the base term and other enhancements, leaving any remaining time for service of the enhancement at issue. Such a method of calculation will assure the maximum amount of custody time will be charged against the invalid enhancement, thus giving the defendant the benefit of a greater reduction in the remaining sentence.

- By July 1, 2022, for all other individuals. (§§ 1171, subd. (b)(2), and 1171.1, subd. (b)(2).)

C. Review and resentencing by the court

“Upon receiving the information described in subdivision (b), the court shall review the judgment and verify that the current judgment includes a sentence enhancement described in subdivision (a). If the court determines that the current judgment includes an enhancement described in subdivision (a), the court shall recall the sentence and resentence the defendant.” (§§ 1171, subd. (c), and 1171.1, subd. (c).)

The review and resentencing by the court are to be completed as follows:

- “By October 1, 2022, for individuals who have served their base term and any other enhancement and are currently serving a sentence based on the enhancement.” (§§ 1171, subd. (c)(1), and 1171.1, subd. (c)(1).) Presumably the court is to consider that the defendant first serves the base term and any other enhancements when considering whether a defendant is then serving the sentence on the enhancement at issue.
- By December 31, 2023, for all other individuals. (§§ 1171, subd. (c)(2), and 1171.1, subd. (c)(2).)

D. Mechanics of resentencing

Sentencing hearing

Although not expressly so stated, it may be implied from the structure of the statute that the defendant will be entitled to a hearing on the resentencing. The court must provide counsel for the defendant (§§ 1171, subd. (d)(5), and 1171.1, subd. (d)(5).) As a matter of due process, the defendant is entitled to be present at the hearing. (See *People v. McCallum* (2020) 55 Cal.App.5th 202, 215.) The hearing, however, may be waived by stipulation of the parties. (§§ 1171, subd. (e), and 1171.1, subd. (e).) Such a stipulation may be appropriate when the parties have come to an uncontested resolution of the resentencing. “If the hearing is not waived, the resentencing hearing may be conducted remotely through the use of remote technology, if the defendant agrees.” (*Ibid.*)

Rules governing resentencing

In resentencing the defendant, the court is to observe a number of conditions:

- “Resentencing pursuant to this section shall result in a lesser sentence than the one originally imposed as a result of the elimination of the repealed enhancement, unless the court finds by clear and convincing evidence that imposing a lesser sentence would endanger public safety.” (§§ 1171, subd. (d)(1), and 1171.1, subd. (d)(1).) The intent of the statute is to give the defendant an actual benefit from the elimination of the enhancement. The court may not adjust the sentence on the base term or other enhancements to re-impose the original length of the sentence unless the court finds by clear and convincing evidence that a lesser sentence would endanger public safety.
- “Resentencing pursuant to this section shall not result in a longer sentence than the one originally imposed.” (§§ 1171, subd. (d)(1), and 1171.1, subd. (d)(1).)
- “The court shall apply the sentencing rules of the Judicial Council and apply any other changes in law that reduce sentences or provide for judicial discretion so as to eliminate disparity of sentences and to promote uniformity of sentencing.” (§§ 1171, subd. (d)(2), and 1171.1, subd. (d)(2).)
- “The court may consider postconviction factors, including, but not limited to, the disciplinary record and record of rehabilitation of the defendant while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the defendant’s risk for future violence, and evidence that reflects that circumstances have changed since the original sentencing so that continued incarceration is no longer in the interest of justice.” (§§ 1171, subd. (d)(3), and 1171.1, subd. (d)(3).) This list of postconviction factors is the same as for the court’s

consideration of a recall of a sentence pursuant to section 1170.03, subdivision (a)(4), discussed, *supra*.

- “Unless the court originally imposed the upper term, the court may not impose a sentence exceeding the middle term unless there are circumstances in aggravation that justify the imposition of a term of imprisonment exceeding the middle term, and those facts have been stipulated to by the defendant, or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial.” (§§ 1171, subd. (d)(4), and 1171.1, subd. (d)(4).) The addition of this requirement clearly is intended to bring the resentencing into compliance with *Apprendi* and its progeny, including the changes made to sections 1170 and 1170.1, *supra*. Unlike section 1170, sections 1171 and 1171.1 do not provide for a prior conviction exception to the requirement that aggravating factors be submitted to the trier of fact and proven beyond a reasonable doubt. Because of the difficulties attendant to the retrial of an aggravating sentencing factor, this provision will have the general effect of shortening the length of the sentence.

2022 SENTENCING LAWS

WHAT EVERY LAWYER NEEDS TO KNOW

J. RICHARD COUZENS

Placer County Superior Court (Ret.)

WHAT'S ON THE MENU....

× *Presentence Issues*

- + *Apprendi* and *Cunningham* are alive!
- + Required imposition of low term
- + Service of enhancement term
- + Sentence under PC§ 654
- + Striking of enhancements
- + Conduct credit for competency commitment
- + Diversion of misdo mentally incompetent

WHAT'S ON THE MENU....

× *Postsentence Issues*

- + Recall of sentence
- + Removal of invalid enhancements

PC §§ 1170 and 1170.1
Apprendi, Blakely, and Cunningham

PC §§ 1170 AND 1170.1 – UPPER TERM

× **Highlights:**

- + Restores *Apprendi/Blakely/Cunningham* to process of determining upper term
 - × Except prior record, aggravating factors tried by jury, proved beyond a reasonable doubt
- + Bifurcated proceedings if requested by def

PC §§ 1170 AND 1170.1 – UPPER TERM

- × **Prior to 2007** § 1170(b): “When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, **the court shall order imposition of the middle term**, unless there are circumstances in aggravation or mitigation of the crime. . . . The court shall set forth on the record **the facts and reasons for imposing the upper or lower term.**”

PC §§ 1170 AND 1170.1 – UPPER TERM

- × *Apprendi v. New Jersey* (2000) 530 U.S. 466: “[O]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed **statutory maximum** must be submitted to a jury and proved beyond a reasonable doubt.” (*Id.* at p. 490.)

PC §§ 1170 AND 1170.1 – UPPER TERM

- × *Blakely v. Washington* (2004) 542 U.S. 296: “Statutory maximum” means “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” (*Id.* at p. 303.)
- × *Cunningham v. California* (2007) 549 U.S. 270, applied *Apprendi* and *Blakely* to § 1170(b)
 - + Legislature enacted current version of § 1170(b) – but with sunset provisions

PC §§ 1170 AND 1170.1 – UPPER TERM

- × **Law enacted 2007** § 1170(b): “When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, **the choice of the appropriate term shall rest within the sound discretion of the court** . . . The court shall select the term which, in the court’s discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected. . . .”

PC §§ 1170 AND 1170.1 – UPPER TERM

- × *Estrada* applies
- × Where def received upper term based on discretion of court
- × Where not based on prior record
- × Raging dispute over “harmless error” test
 - × *Lopez*, 78 CA5 459
 - × *Flores*, 75 CA5 495

PC §§ 1170 AND 1170.1 – UPPER TERM

- × **Effective 1-1-22** § 1170(b)(1): “When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall, in its sound discretion, order imposition of a sentence not to exceed the middle term, except as otherwise provided in paragraph (2).”
 - + Discretion to impose lower or middle term
 - + No discretion to impose upper term unless aggravating factors proved

PC §§ 1170 AND 1170.1 – UPPER TERM

- × **Effective 1-1-22** § 1170(b)(2): “The court may impose a sentence exceeding the middle term only when there are circumstances in aggravation of the crime that justify the imposition of a term of imprisonment exceeding the middle term, and the facts underlying those circumstances have been stipulated to by the defendant, or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial.”

PC §§ 1170 AND 1170.1 – UPPER TERM

- × **Effective 1-1-22** § 1170(b)(2) procedure:
- × Hold bifurcated proceeding if requested by def
- × Exception to bifurcation:
 - + Where evidence is “admissible to prove or defend against charged offense or enhancement”
- × Jury not to be informed of allegations until after conviction

PC §§ 1170 AND 1170.1 – UPPER TERM

- × **Exception to need for trial on aggravating factor**
 - + “The court may consider the defendant’s prior convictions in determining sentencing based on a certified record of conviction without submitting the prior convictions to a jury.”
 - + The exception does not apply to “enhancements imposed on prior convictions”
 - + RPO is not “certified record”: **Zabelle**, C093173

PC §§ 1170 AND 1170.1 – UPPER TERM

- × **Effective 1-1-22** § 1170.1(d):
 - + If enhancement has triad, discretion to impose lower or middle term
 - + Upper term permitted only if aggravating factors admitted by the def or submitted to jury or court and proved beyond a reasonable doubt
 - + Similar procedure to base term?

PC §§ 1170 AND 1170.1 – UPPER TERM

- × Factors based on “prior record” exception– *Apprendi/Blakely* not applicable:
- × Fact of prior convictions– *Cardenas*, 155 CA4 1468 [record must show cactually relied on fact of prior convictions –cf. *Stuart*, 159 CA4 312]
- × Record of increasing seriousness– *Black II*, 41 C4 799

PC §§ 1170 AND 1170.1 – UPPER TERM

- × Def on parole – *Capistrano*, 59 C4 830
- × Poor performance on probation or parole– *Towne*, 44 C4 63 [if based on conviction]
- × Prior juvenile adjudication – *Nguyen*, 46 C4 1007
- × Crime committed while out on bail– *Johnson*, 208 CA4 1092

PC §§ 1170 AND 1170.1 – UPPER TERM

- × *Apprendi/Blakely* inapplicable:
- × Consecutive sentencing– *Black II*, 41 C4 799
- × Application of § 654 – *Cleveland*, 87 CA4 263
- × Eligibility for probation – *Benitez*, 127 CA4 1274
- × Whether aggravating factors outweigh other factors – *Black II*, 41 C4 799
- × Whether credit limits under PC 2933.1 apply– *Garcia*, 121 CA4 271

PC §§ 1170 AND 1170.1 – UPPER TERM

- ✘ Whether drugs held for personal use– *Dove*, 124 CA4 1
- ✘ Motions under PC§ 1385 – *Coley*, 55 C4 524
- ✘ Setting restitution – *Urbano*, 128 CA4 396
- ✘ Violation of *Cruz* waiver – *Vargas*, 148 CA4 644
- ✘ Application of One Strike law [c/s sentence for separate offenses] – *Retanan*, 154 CA4 1219
- ✘ Facts justifying sex registration – *Presley*, 156 CA4 1027

PC §§ 1170 AND 1170.1 – UPPER TERM

- ✘ Indeterminate terms – *Blakely*, 542 U.S. 296
- ✘ Three Strikes Law
 - + Likely applies to 2nd strike sentencing
 - + Not clear as to 3rd strike sentencing– may be required if aggravated term used as basis of sentence
- ✘ Misdemeanor sentences– sentencing range is always known

PC §§ 1170 AND 1170.1 – UPPER TERM

- ✘ *Apprendi/Blakely* do apply:
- ✘ Vulnerable victim – *Black II*, 41 C4 799
- ✘ Crime involved great violence – *Sandoval*, 41 C4 825
- ✘ Cruel and callous behavior – *Sandoval*
- ✘ Position of trust – *French*, 43 C4 36
- ✘ Planning and sophistication – *Ybarra*, 166 CA4 1069

PC §§ 1170 AND 1170.1 – UPPER TERM

- ✘ Unsatisfactory performance on probation or parole other than conviction – *Towne*, 44 C4 63
- ✘ Inducing others to participate – *Hamlin*, 170 CA4 1412

PC §§ 1170 AND 1170.1 – UPPER TERM

- ✘ Must aggravating factors be pled and proved at preliminary hearing?
 - + *Barragan*, 148 CA4 1478
 - ✘ Include in pleadings
 - ✘ Not required to be proved at prelim because not a crime
 - + *Brooks*, 159 CA4 1 – no requirement to plead factors – strike from pleadings

PC § 1170(b)(6)

Required Imposition of Low Term

PC §§ 1170 AND 1170.1 – LOWER TERM

× Highlights:

- + Required imposition of low term in specified cases unless “contrary to interests of justice”
 - × If following a “contributing factor in commission of the crime”
 - × Def victim of specified abuse or neglect
 - × Def under 26 years old
 - × Def victim of intimate partner violence or human trafficking

PC §§ 1170 AND 1170.1 – LOWER TERM

- × Ct must impose low term in specified circumstances unless
 - + Low term “would be contrary to interests of justice” because
 - + Aggravating factors outweigh mitigating factors

PC §§ 1170 AND 1170.1 – LOWER TERM

- × Determining factors in aggravation
 - + If court considering whether to impose **middle or low base term**
 - × Existence of the factors and relative weight likely within discretion of court
 - + If considering whether to impose **upper base term**
 - × Existence of the factors likely must be by trier of fact – proved beyond a reasonable doubt
 - + Weight of factors determined by the court

PC §§ 1170 AND 1170.1 – LOWER TERM

- ✘ Any of the following “was a contributing factor in the commission of the crime”
- ✘ Because determining eligibility for lower punishment, likely court, not jury, makes the finding

PC §§ 1170 AND 1170.1 – LOWER TERM

- ✘ Factors:
 - + “The person has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence”
 - + “The person is a youth, or was a youth as defined under subdivision (b) of Section 1016.7 [new] at the time of the commission of the offense” – any person under 26 at time crime committed

PC §§ 1170 AND 1170.1 – LOWER TERM

- ✘ Factors:
 - + Prior to the instant offense, or at the time of the commission of the offense, the person is or was a victim of intimate partner violence or human trafficking
- ✘ Ct may impose low term even without any evidence of the factors being present– § 1170(b)(7)

PC § 1170(h)(9)
Service of Enhancement Term

SERVICE OF ENHANCEMENT

- ✦ PC § 1170(h)(9): “Notwithstanding the separate punishment for any enhancement, any enhancement shall be punishable in county jail or state prison as **required by the underlying offense and not as would be required by the enhancement**.”
- ✦ Abrogates **Vega**, 222 CA4 1374

PC § 654
Sentence Any Qualified Offense

PC § 654

- ✘ **Prior law:** Ct must sentence crime with “longest possible term”
 - + Irrespective of actual term
- ✘ **New law:** An “act or omission that is punishable in different ways by different provisions of law may be punished under either of such provisions”
- ✘ **Estrada:** applies to amendment – *Mani*, 74 CA5 343

PC § 1385

Striking of Enhancements

PC § 1385 – STRIKING ENHANCEMENTS

- ✘ **Highlights:**
 - + Ct shall dismiss enhancements if in interests of justice
 - + “Great weight” to one or more specific factors – unless dismissal would likely result in physical injury or other serious injury to others
 - + **Applies only to crimes sentenced after 11-22 – Estrada does not apply**

PC § 1385 – STRIKING ENHANCEMENTS

- ✘ § 1385(c)(1): “Notwithstanding any other law, the court shall dismiss an enhancement if it is in the furtherance of justice to do so. . . .”
 - + Will apply to all crimes and cases unless dismissal of enhancement is prohibited by initiative
 - + Not limited to the existence of the listed factors [§ 1385(c)(4)]

PC § 1385 – STRIKING ENHANCEMENTS

- ✘ § 1385(c)(2): “In exercising its discretion . . . The court shall consider and afford great weight to evidence offered by the defendant to prove” presence of specified mitigating circumstances.
- ✘ Presence of one or more of the circumstances “weighs greatly in favor of dismissing the enhancement”
 - + Unless ct finds dismissal would “endanger public safety”

PC § 1385 – STRIKING ENHANCEMENTS

- ✘ “Endanger public safety” means there is a likelihood that the dismissal of the enhancement would result in physical injury or other serious danger to others”
- ✘ Discretion may be exercised
 - + Before, during or after trial or plea
 - + At sentencing

PC § 1385 – STRIKING ENHANCEMENTS

- ✘ § 1385(c)(3): (A) Application of enhancement would result in discriminatory racial impact– § 745(a)(4) – **Racial Justice Act**
 - + A longer sentence imposed on def than imposed on persons similarly situated from other races
- ✘ (B) Multiple enhancements are alleged in a single case – all enhancements beyond a single enhancement **shall** be dismissed

PC § 1385 – STRIKING ENHANCEMENTS

- ✘ (C) Application of an enhancement “could result in a sentence of over 20 years”
 - + The enhancement **shall** be dismissed
- ✘ (D) The current offense is “connected to mental illness”
 - + Mental disorder identified in the DSM– excluding antisocial personality disorder, borderline personality disorder, and pedophilia

PC § 1385 – STRIKING ENHANCEMENTS

- + Ct may conclude mental illness was connected to crime if, after reviewing relevant evidence, the ct concludes the illness “substantially contributed to the def’s involvement” in the crime
- ✘ (E) Crime “is connected to prior victimization or childhood trauma”
 - + Childhood trauma means physical, emotional, or sexual abuse, physical or emotional neglect
 - + The trauma “substantially contributed to the def’s involvement in” the crime

PC § 1385 – STRIKING ENHANCEMENTS

- + “Prior victimization” means “the person was a victim of intimate partner violence, sexual violence, or human trafficking, or the person has experienced psychological or physical trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence”
 - ✗ The prior victimization “substantially contributed to the def’s involvement in the” crime

PC § 1385 – STRIKING ENHANCEMENTS

- ✗ (F) The current offense is not a violent felony
- ✗ (G) The def was a juvenile when committing the current offense or any prior juvenile adjudication that triggers the enhancement
- ✗ (H) The enhancement is based on a prior conviction that is over 5 yrs old
- ✗ (I) The firearm used in the crime was inoperable or unloaded

PC § 1385 – STRIKING ENHANCEMENTS

- ✗ SB 81 applies only to crimes sentenced after January 1, 2022 – § 1385(c)(7)
 - + *Estrada* does not apply because of the express savings clause

PC § 1385 – STRIKING ENHANCEMENTS

- ✘ SB 81 does not apply to enhancements which may not be dismissed because of initiative
- ✘ **Are there any such enhancements?**
 - + Legislative analysis suggested Propositions 83 and 115 contain such restrictions
 - + Prop 83 prohibits striking
 - ✘ Factors triggering § 667.61 One Strike Law [§ 667.61(g)]

PC § 1385 – STRIKING ENHANCEMENTS

- ✘ Prior convictions triggering § 667.71 Two Strikes Law [PC § 667.71(d)]
- ✘ Finding prohibiting probation for infliction of GBI for designated violent crimes – § 1203.075(a)
- + One Strike Law is not an enhancement, but an “alternative sentence- *Jones*, 58 CA4 693
- + See also *Romero*, 13 C4 497 – Three strikes law is alternative sentence

PC § 1385 – STRIKING ENHANCEMENTS

- + Prop 115 added § 1385.1
 - ✘ Prohibits court from striking special circumstances under death penalty law
 - ★ These are not enhancements
- ✘ **CONCLUSION: SB 81 likely applies to all existing enhancements**

PC § 4019
Conduct Credit for Competency Commitments

PC § 4019

- × Section 4019(a)(8): full credit to section 1368 commitments to state hospital
 - + Still includes JBC programs in county jail per § 1375.5(c)
 - + Outpatient status not clear
- × Credit effective 1-1-22
 - + Not retroactive per *Brown*, 54 C4 314-*Orellana*, 74 CA5 319, *Yang*, 78 CA5 120

PC § 4019

- × Cts disagree on denial of equal protection
 - + *Orellana* - no denial of equal protection - decided by Supreme Ct in *Brown* - rev denied
 - + *Yang* - is a denial of equal protection
 - + Compared to credit in jail for JBC programs
 - + Pet for rev not filed - case final

PC § 4019

- ✘ New rule allows seamless conduct credit from arrest to sentencing
- ✘ Transition def
 - + Conduct credit in hospital after 11-22
 - + Full conduct credit pending transfer to hospital
 - PC § 1375.5, *Cowsar*, 40 CA3 578
 - + Full credit when restored and waiting for transfer back - See *Bryant*, 174 CA4 175
 - + Possibly full credit per *Yang*

PC § 1370.01

Diversion of Mentally Incompetent Misdemeanor Offenders

MISDEMEANOR MENTAL HEALTH DIVERSION

- ✘ PC § 1367(b): applies to:
 - + Def charged with misdo(s) only, or
 - + Misdo VOP, **and**
 - + Ct “finds reason to believe that the defendant has a mental health disorder,” **and**
 - + Ct finds def “may, as a result of the mental health disorder, be incompetent to stand trial”

MISDEMEANOR MENTAL HEALTH DIVERSION

- ✘ PC § 1370.01(d): “It is the intent of the Legislature that a defendant subject to the terms of this section receive mental health treatment in a treatment facility and not a jail.”
- ✘ **Trigger:** Misdo def found incompetent
 - + If competent, normal procedures apply, even if def has “issues”
 - + If not competent, two choices

MISDEMEANOR MENTAL HEALTH DIVERSION

- ✘ 1. Conduct hearing under PC§§ 1001.35, et seq. for diversion
 - + Not to exceed one year from acceptance, or max term, whichever is less
 - + Hearing within 30 days of finding of incompetence, or release on O.R.
 - + If def “performs satisfactorily,” then dismissal

MISDEMEANOR MENTAL HEALTH DIVERSION

- ✘ If not eligible for m/h diversion under PC§ 1001.36(b) or (d),ct may:
 - + Modify treatment plan
 - + Refer def to assisted outpatient treatment (AOT) – if services available and agency accepts
 - + Ref def for possible conservatorship– if def gravely disabled – if conservatorship established, charges are dismissed

MISDEMEANOR MENTAL HEALTH DIVERSION

- ✘ 2. Dismiss the charges per PC§ 1385

- ✘ If def on misdo probation, ct may modify terms of probation to include m/h treatment- must dismiss the petition

MISDEMEANOR MENTAL HEALTH DIVERSION

- ✘ Custody credit applied to term of diversion
- ✘ PC § 1370.01(d):“A term of four days will be deemed to have been served for every two days spent in actual custody against the maximum term of diversion. A defendant not in actual custody shall otherwise receive day for day credit against the term of diversion from the date the defendant is accepted into diversion. ‘Actual custody’ has the same meaning as in Section 4019.”

MISDEMEANOR MENTAL HEALTH DIVERSION

- ✘ Apparent intent of Legislature:
 - + Give equivalence of PC § 4019 credit against max diversion term if def is in actual custody pending acceptance
 - + Once accepted, def gets dayfor-day credit against max term of diversion

PC § 1170.03 [formerly PC§
1170(d)]

Recall of Sentence

PC § 1170.03 – RECALLING SENTENCE

× **Highlights:**

- + Any resentencing to include changes that reduce sentence or provide for discretion of ct
- + Ct may reduce sentence
- + Ct may resentence based on lesser included or related offense (by stip)
- + Ct may consider specified post-conviction factors
- + Request may not be denied without hearing
- + If request by prosecution or custody admin, presumption to grant unless def unreasonable risk of danger

PC § 1170.03 – RECALLING SENTENCE

× Request for recall of sentence [§ 1170.03(a)(1)]

- + Within **120 days** of judgment if by the court
- + **At any time** if by
 - × The secretary of the Board of Parole Hearings for prison cases
 - × The county correctional administrator for jail sentences
 - × The district attorney of the county of conviction
 - × The Attorney General if the AG prosecuted the case

PC § 1170.03 – RECALLING SENTENCE

- ✘ Ct is to resentence in accordance with § 1170.03(a)(2)
 - + Rules of the Judicial Council
 - + Any changes in law that reduce sentences or provide for judicial discretion

PC § 1170.03 – RECALLING SENTENCE

- ✘ Ct “may, in the interest of justice and regardless of whether the original sentence was imposed after a trial or plea agreement, do the following [§ 1170.03(a)(3)]
 - + (A) Reduce the term of the sentence by modification

PC § 1170.03 – RECALLING SENTENCE

- + (B) Vacate the conviction; ‘Impose judgment on any necessarily included lesser offense or lesser related offense, whether or not that offense was charged in the original pleading; resentence to a reduced term
 - ✘ Def and prosecutor must concur

PC § 1170.03 – RECALLING SENTENCE

- ✘ Ct may consider the following factors § 1170.03(a)(4)
 - + Postconviction factors, including
 - ✘ disciplinary and rehab record in custody
 - ✘ whether age, time served and diminished physical condition has reduced def’s risk
 - ✘ Any change of circumstances that indicates continued custody is “no longer in the interest of justice”

PC § 1170.03 – RECALLING SENTENCE

- + Whether the def “ has experienced psychological, physical, or childhood trauma, including, ... abuse, neglect, exploitation, or sexual violence, if the defendant was a victim of intimate partner violence or human trafficking prior to or at the time of the commission of the offense, or if the defendant is a youth or was a youth as defined under subdivision (b) of Section 1016.7 [under 26] at the time of the commission of the offense, and whether those circumstances were a contributing factor in the commission of the offense”

PC § 1170.03 – RECALLING SENTENCE

- ✘ Resentencing may be granted without a hearing by stipulation § 1170.03(a)(7)
- ✘ Resentencing may not be denied without a hearing “where the parties have an opportunity to address the basis for the intended denial or rejection” [§ 1170.03(a)(8)]
 - + Def may appear remotely unless physical presence requested by counsel
 - + Application to requests by def?

PC § 1170.03 – RECALLING SENTENCE

- ✦ If request comes from DA, AG or corrections
 - + Ct must give notice to def
 - + Set status conference within 30 days of the receipt of the request
 - + Ct shall appoint counsel for the def
 - + **There is a presumption favoring recall and resentencing unless ct finds def is an unreasonable risk of danger to public safety as defined in § 1170.18(c)**

PC § 1170.03 – RECALLING SENTENCE

- ✦ The ct must state its reasons on the record for granting or denying recall and resentencing § 1170.03(a)(6)]
 - + Statute does not specify whether the statement must be orally or in writing

PC §§ 1171 and 1171.1
Removal of Invalid Sentence
Enhancements

PC § 1171 AND 1171.1– REMOVE ENHANCEMENT

× Highlights:

- + Process for removing enhancements based on changes to law relating to prior prison terms and prior narcotics convictions
- + Time limits imposed on courts for action
- + Ct must appoint counsel

PC § 1171 AND 1171.1– REMOVE ENHANCEMENT

× Any enhancement imposed prior to 11-20 under § 667.5(b) “is legally invalid”[§ 1171.1(a)]

- + Except prior convictions for a sexually violent offense defined in W&I§ 6600(b)
- × CDCR and local corrections must identify persons currently serving a term that includes an invalid enhancement [§ 1171.1(b)]
 - + Name, DOB, case number to the sentencing court

PC § 1171 AND 1171.1– REMOVE ENHANCEMENT

× Compliance date [§ 1171.1(b)]

- + By March 1, 2022, for anyone who has served the base term and is now serving the enhancement
 - × “All other enhancements shall be considered to have been served first”
 - × Apply custody credit to base term and any other enhancements first
- + By July 1, 2022, for everyone else

PC § 1171 AND 1171.1– REMOVE ENHANCEMENT

- ✘ Ct must review judgment for qualification– if qualifies, recall sentence and resentence the def [§ 1171.1(c)]
 - +By 10-1-22 – complete review of all persons who have served base term and are now serving the enhancement
 - +By 12-31-22 – all others

PC § 1171 AND 1171.1– REMOVE ENHANCEMENT

- ✘ “Resentencing pursuant to this section shall result in a lesser sentence than the one originally imposed as a result of the elimination of the repealed enhancement, unless the court finds by clear and convincing evidence that imposing a lesser sentence would endanger public safety” [§ 1171.1(d)(1)]
- ✘ May not impose a longer sentence

PC § 1171 AND 1171.1– REMOVE ENHANCEMENT

- ✘ Ct must impose new sentence in accordance with Judicial Council rules and “apply any other changes in law that reduce sentences or provide for judicial discretion” [§ 1171.1(d)(2)]
- ✘ Court may consider designated postconviction factors – record in custody; age, time served or diminished physical condition reduces risk; changed circumstances[§ 1171.1(d)(3)]

PC § 1171 AND 1171.1– REMOVE ENHANCEMENT

- ✘ “Unless the court originally imposed the upper term, the court may not impose a sentence exceeding the middle term unless there are circumstances in aggravation that justify the imposition of a term of imprisonment exceeding the middle term” and def either tips to factors or found by judge or jury beyond a reasonable doubt [§ 1171.1(d)(4)]

PC § 1171 AND 1171.1– REMOVE ENHANCEMENT

- ✘ The ct must appoint counsel for the def [§ 1171.1(d)(5)]
- ✘ The parties may waive a resentencing hearing or it may be conducted remotely with the def’s agreement [§ 1171.1(e)]

PC § 1171 AND 1171.1– REMOVE ENHANCEMENT

- ✘ PC § 1171 –identical procedure for priors under H&S § 11370.2 imposed prior to 11-18
 - + Except for a prior conviction for violating or conspiring to violate H&S § 11380

TRUST INCOME TAXATION

SATURDAY, SEPTEMBER 10

1:15PM - 2:45PM

PRESENTED BY

REBECCA VAN LOON, ESQ.

SOLOMAN WARD SEIDENWURM & SMITH



Rebecca L. Van Loon
rvanloon@swsslw.com
(t) 619.238.4837
(f) 619.615.7937

Rebecca L. Van Loon | Partner

Rebecca Van Loon is an established leader in the estate planning community and an asset to the clients she represents. With a practice focusing in the areas of estate planning, trust and probate administration and taxation law, Ms. Van Loon assists families and individuals with all aspects of their estate planning needs, including wills, trusts, advance health care directives and financial powers of attorney. She also assists clients with estate, gift and property tax planning, including charitable gift planning.

Uniquely, Ms. Van Loon is certified as a Specialist in Estate Planning, Trust & Probate by the State Bar of California Board of Legal Specialization. Only approximately five percent of California's attorneys are certified as specialists by the State Bar.

Ms. Van Loon received her Bachelor of Arts degree, *cum laude*, from Gonzaga University in 2007. She earned her Juris Doctor, *cum laude*, from Willamette University College of Law in 2010. While in law school, Ms. Van Loon participated in the Trusts and Estates Legal Clinic and competed in the Jessup International moot court competition. She also studied abroad in Spain, Italy, and Germany. Ms. Van Loon also holds an LL.M in Taxation, *magna cum laude*, from the University of San Diego School of Law, which she earned in 2011.

Recently, Ms. Van Loon's practice has grown to incorporate international estate planning (inbound/outbound for citizens/residents and non-citizen residents), as well as the representation of individuals, private professional fiduciaries and corporate trustees as fiduciaries through trust and estate administrations.

The mother of a toddler, Ms. Van Loon is an avid fan of the San Diego Symphony and enjoys running, golfing, traveling and college basketball.

Practice Areas

- Taxation
- Estate Planning
- Trust & Estate Administration

Noteworthy Experience

- Estate planning, including drafting wills, revocable trusts, advance health care directives, and financial powers of attorney
- Gift and estate tax planning, including drafting irrevocable trusts, life insurance trusts, grantor retained annuity trusts, qualified personal residence trusts, qualified subchapter S trusts, and electing small business trusts
- Charitable gift planning, including outright gifts, drafting charitable remainder trusts, charitable lead trusts, and testamentary private foundations
- Property tax planning, including parent-child exclusion transfers, spousal transfers, and transfers of real property to or from an entity
- Trust administration, including representing trustees during inter vivos trust administration and administration of a decedent's revocable trust
- Estate administration and probate proceedings, including representing executors and administrators during administration
- Estate, gift, and generation skipping tax, including portability elections and estates and gift tax return preparation
- Representation of trustees, executors, administrators, fiduciaries, and beneficiaries, including preparation of settlement agreements and modifications or terminations of irrevocable trusts

Education

- University of San Diego School of Law, LL.M in taxation, *magna cum laude*, 2011
- Willamette University College of Law, *cum laude*, 2010
- Gonzaga University, undergraduate degree in political science and government, *cum laude*, 2007

Professional Achievements and Affiliations

- *San Diego Metro* Top Attorneys, 2022
- San Diego County Bar Association, Estate Planning, Trust & Probate Section Leadership, Member at Large 2021 and Vice Chair in 2022
- *San Diego Business Journal's* Leaders in Law Award Finalist, 2020
- *The Daily Transcript's* Influential Women Award, 2020
- *The Daily Transcript's* 40 under 40 Award, 2019
- Super Lawyers Rising Star (Estate & Probate), 2019
- Certified Specialist – Estate Planning, Trust & Probate Law, State Bar of California Board of Legal Specialization, 2017
- Member of the State Bar of California (Trusts & Estates Taxation Section)
- Member of the San Diego County Bar Association (Trust & Estates Taxation Section)
- Member of North County Bar Association
- Member of Lawyers Club of San Diego
- Member of San Diego Blood Bank Financial Resource Development Committee
- President of Gonzaga University's Alumni Association

Publications and Lectures

- Presenter at the 27th Annual Professional Fiduciary Association of California Educational Conference, May 2022
- Presenter at Placer County Women's Bar Association, October 2021
- Presenter at San Diego County Bar Association Trust & Estate Section, August 2021
- Navigating Increased Probate Thresholds Under Assembly Bill 47, *Daily Journal*, September 30, 2020
- Contributing author of *California Trusts and Estates Quarterly*, California Lawyers Association Trusts and Estates Section
- Presenter at Hawaii State Bar Association, August 2020
- Presenter at the 24th Annual Professional Fiduciary Association of California Educational Conference, May 2019

**PLACER COUNTY BAR ASSOCIATION'S 31ST ANNUAL
2022 MCLE CONFERENCE**

Roseville, California

September 10, 2022

TRUST INCOME TAXATION

Rebecca L. Van Loon, Esq.

SOLOMON WARD SEIDENWURM & SMITH LLP

San Diego, CA

Trust Income Taxation*

* Rebecca L. Van Loon, Esq.
Solomon Ward Seidenwurm & Smith LLP

I. INTRODUCTION.

The below outline is intended to be a high level overview, update, and summary of some of the federal income taxes associated with trusts and estates that fiduciaries may encounter while acting as trustee, executor, conservator, and/or attorney-in-fact. This is a general overview of selected tax issues.

II. INCOME TAX BASIS

- a. **Gift - “Carry Over” Income Tax Basis.** In general, the income tax basis of property in the hands of the donee is the same as in the hands of the donor. IRC § 1015(a). However, if the donor’s income tax basis at the time of the gift is greater than the fair market value of the gifted property (built-in-loss), then for purposes of determining loss in the hands of the donee, the income tax basis is the fair market value as of the date of the gift. IRC § 1015(a).
- b. **Estate - Income Tax Basis Adjustment (“Step-Up”).** In general, the income tax basis of assets acquired from a decedent will be adjusted to fair market value. IRC § 1014(b). However, the income tax basis of property constituting income in respect of decedent (“IRD”) will not be adjusted to fair market value. IRC § 1014(c). Common examples of IRD are installment notes, qualified retirement plans, and IRAs. If an estate tax return is required to be filed, IRS Form 8971 must be given to beneficiaries to report basis (IRC §§ 6035(a) and 1014(f)(2)).

III. INCOME TAXATION OF ESTATES AND TRUSTS.

A. Death of Decedent – Final Income Tax Reporting.

- a. **Reporting.** Following a decedent’s death, the personal representative of the decedent’s estate is tasked with preparing and filing the decedent’s final income tax returns. This may include tax years for which the decedent had not yet filed returns and/or the decedent’s final tax return for the year of death (beginning 1/1 through date of death). Note that a surviving spouse may file a final joint return, provided the surviving spouse has not remarried before the end of the taxable year. Preliminarily, the fiduciary should file IRS Form 56 to give notice to the IRS that a fiduciary will be filing tax returns on behalf of the decedent.
- b. **Income Included on Final Return.** Examples of income included and excluded on the decedent’s final income tax return:
 - i. **Compensation.** Wages received before the decedent’s date of death are included on the final income tax return. Wages for

services rendered before date of death but received after date of death are not included on decedent's final return (note that this will be an IRD item as discussed above).

- ii. Sales Proceeds.** Sale proceeds received by the decedent are reportable on the final income tax return. However, if the sale is an installment sale, then generally only the amount of the proceeds that the decedent would have normally reported through the date of death will be reported on the final income tax return with the balance taxed to the recipient of the installment obligation (note that this will be an IRD item as discussed above).
- iii. Interest.** Interest actually received by the decedent will be reported on the final income tax return.
- iv. Dividends.** Dividends received prior to death will be included on the final income tax return. Look at record date to determine if dividends paid after date of death constitute IRD.
- v. Rents.** Any rents received prior to death (even advance rental payments) are included on the final income tax return. No part of advance rent payment paid prior to death are treated as IRD.
- vi. Income from Trusts/Estates.** Distributions made to the deceased beneficiary will be included on the final income tax return to the extent the distribution was paid from distributable net income ("DNI") of the estate or trust. DNI is discussed in more detail below.

B. Trust and Estate Income Taxation.

a. Estate: Generally refers to property held subject to the provisions of a decedent's Will or intestate succession in which a personal representative is appointed by the probate court (executor, administrator, administrator with will annexed). Property typically excluded from an estate includes property held by revocable trusts, jointly held property, life insurance proceeds paid to a beneficiary other than the estate, IRAs or other retirement assets paid to a beneficiary other than the estate, pay-on-death or transfer-on-death accounts paid to a beneficiary other than the estate, and property passing to beneficiaries without administration.

b. Estate Duration. The tax year of the estate begins at the decedent's date of death and terminates at the close of the estate administration. Treas. Reg. 1.641(b)-3(a).

c. Trusts.

- i. Grantor Trusts.** Grantor trusts are trusts that are disregarded for income tax purposes. The grantor is deemed to be the owner of the trust assets and continues to be subject to any income tax liability with respect to the trust assets at the grantor's income tax rate. The most typical grantor trust is a revocable trust. IRC § 676). An irrevocable trust may also be treated as a grantor trust if the grantor retains certain controls over the trust. Some examples of retained powers that cause an irrevocable trust to be treated as a grantor trust for income tax purposes include the grantor's retained power to control the distribution of income (even when subject to an ascertainable standard) (IRC § 674(d)), the power to add or change allocations among charitable beneficiaries (IRC § 674(b)(4)); the power to borrow from the trust without adequate interest or security (IRC § 675(2)); and the power to substitute assets of the trust with assets of equivalent value (IRC § 675(4)). This is a non-exhaustive list and there are numerous retained powers that can cause grantor trust status intentionally and inadvertently. The entirety of the grantor trust rules are set forth at IRC §§ 671-678. Grantor trusts are not subject to the trust income tax and trust reporting requirements described in this outline. Instead, any income of a grantor trust is reported by the grantor on the grantor's personal income tax return (IRS Form 1040). Note that the trustee of an irrevocable grantor trust has a few reporting options, but again no income tax is due at the trust level. A discussion of the grantor trust rules and various reporting options of the trustee is beyond the scope of this outline. A grantor trust options filing chart is attached at the end of this outline.
- ii. Non-Grantor Trusts.** A trust that is not treated as owned by the grantor for income tax purposes as described above is generally referred to as non-grantor trusts. An individual's revocable trust is treated as a grantor trust during the individual's lifetime and upon the individual's death, the trust becomes irrevocable and is now treated as a non-grantor trust. A non-grantor trust is further classified as a "simple trust" or as a "complex trust."

 - a. Simple Trust.** A simple trust is a trust which: (1) requires that all net fiduciary income be distributed currently; (2) no distributions from principal are made during the tax year; (3) there are no charitable beneficiaries. IRC § 651(a).

b. Complex Trust. A complex trust is a trust that: (1) allows for the accumulation of fiduciary income; (2) principal distributions are made during the tax year; or (3) there are charitable beneficiaries. IRC § 661(a).

d. Fiduciary Accounting Income. The term “income” as used in a trust instrument or will (and not preceded by the words “taxable,” “distributable net,” “undistributed net,” or “gross”) means fiduciary accounting income as determined by the terms of the governing instrument or applicable local law. IRC § 643(b). The applicable local law is generally the principal and income act of the applicable state jurisdiction. In California, the Uniform Principal and Income Act (“UPIA”) is set forth at California Probate Code §§ 16320-16375. The UPIA sets forth the default rules as to whether a receipt or disbursement of the trust is allocated to fiduciary income or principal. For example, interest, dividends, and rent are typically allocated to fiduciary accounting income and capital gain is typically allocated to fiduciary accounting principal. Income tax is typically allocated to income, estate tax allocated to principal, and trustee/fiduciary/accounting fees allocated one-half to income and one-half to principal. A complete discussion of the UPIA is beyond the scope of this outline.

e. Reporting.

i. Notice of Fiduciary Relationship. A separate Form 56 should be filed to notice the IRS of the fiduciary relationship regarding the filing of the estate/trust income tax return IRC § 6903.

ii. IRS Form 1041. Income of an estate/trust is reported on IRS Form 1041. Form 1041 must be filed for an estate of a U.S. decedent that has gross income of \$600 or more or there is an NRA beneficiary and a domestic non-grantor trust must file Form 1041 if the trust has any taxable income, gross income of \$600, or there is an NRA beneficiary. *See* 2021 Instructions for Form 1041. The estate income tax return is due April 15th or if the estate elects to file on a fiscal year basis the return is due the 15th day of the fourth month following the close of the tax year. IRC § 6072(a). Adopting a fiscal year-end for estate reporting can offer tax deferral benefits. A trust, other than a Qualified Revocable Trust (“QRT”) subject to a 645 election described below or certain charitable trusts, must report on a calendar year basis. IRC § 644. An extension of time may be granted to file the estate or trust income tax return for a period up to five and one-half months. Temporary Treas. Reg. § 1.6081-6T.

iii. Qualified Revocable Trusts – 645 Election. An election may be made on an estate income tax return to treat a qualified revocable trust (“QRT”) as part of the estate in order to report on a fiscal year basis (IRC § 645). A QRT is a trust that is revocable by the grantor and treated as a grantor trust for income tax purposes as a result of the retained power to revoke the trust. IRC §§ 645(b)(1) and 676. Some advantages of making this election allow income shifting and tax deferral opportunities and allow for longer holding periods of S Corporation stock (IRC § 1361(b)(1)(B)). Disadvantages of making this election include losing a potentially higher personal exemption for the trust, potential conflicts among beneficiaries and allocation of tax attributes as a result of the election, and potentially increased administrative costs to tracking income during election period. The maximum election period is the later of the date the estate/QRT are distributed or two years from the decedent’s death if an estate tax return is not required or six months after the date of final determination of estate tax liability. IRC § 645(b)(2) and Treas. Reg. § 1.645-1(f).

iv. Tax Brackets. The 2022 income tax rates and brackets for estates and non-grantor trusts are as follows (Rev. Proc. 2021-45)

If Taxable Income Is:	The Tax Is:
Not over \$2,750	10% of the taxable income
Over \$2,750 but not over \$9,850	\$275 plus 24% of the excess over \$2,750
Over \$9,850 but not over \$13,450	\$1,979 plus 35% of the excess over \$9,850
Over \$13,450	\$3,239 plus 37% of the excess over \$13,450

In addition – net investment income tax of 3.8% under the Affordable Care Act applies to estates/trusts (effective 1/1/2013) if AGI above dollar amount of highest tax bracket. IRC § 1411(a)(2)

Note than individual does not reach the highest tax bracket until income exceeds \$539,900 and married individuals filing jointly do not reach the highest tax bracket until income exceeds \$647,850. The 3.8% NIIT does not apply until individual (\$200,000) or married filing jointly (\$250,000) meet threshold amounts.

v. Deductions. Deductions available to estates and trusts may include personal exemptions (IRC § 642(b)); amounts paid or

permanently set aside for charitable purposes (IRC § 642(c)); net operating losses ((IRC § 642(d)); depreciation (IRC § 642(e)); estate tax attributable to IRD items (IRC § 691(c)); income distributions (IRC §§ 651 and 661); state and local taxes (IRC §§ 164(b)(6)(B) and 641(b)); administrative expenses (IRC § 642(g)), and qualified business income 199A (IRC § 199A). Some of the above referenced deductions are described in more detail below.

- vi. **Personal Exemptions.** The 2017 Tax Act generally suspended personal exemptions for tax years 2018 through 2025. IRC § 151(d)(5). The suspension of personal exemptions under the 2017 Tax Act does not extend to estates and trusts. The personal exemption: for an estate (and QRT subject to 645 election) is \$600 (IRC § 642(b)(1)); for a simple trust is \$300 (IRC § 642(b)(2)(B)); and for a complex trust is \$100 (IRC § 642(b)(2)(A)).

- vii. **Miscellaneous Itemized Deductions; and Allocation of Administrative Expenses Between Estate Income Tax Return and Estate Tax Return.** With respect to estates (and trusts subject to the 645 election), the executor may allocate estate administration expenses between the estate tax return and the income tax return to maximize deductions. IRC § 642(g). Note that the administrative expenses cannot be deducted on both returns. The 2017 Tax Act added IRC § 67(g), which generally suspended miscellaneous itemized deductions for tax years 2018 through 2025. However, the IRS issued Notice 2018-61 and Treas. Reg. § 1.67-4, which provide that estate/trust administration expenses may continue to be deductible provided the costs are paid or incurred in connection with the administration and would not have been incurred if the property were not held by the estate or trust. Examples of expenses that likely continue to be deductible by estates and trusts are trustee/executor fees, accountant and attorneys fees, appraisal costs, court costs, accounting costs, etc. Investment management fees/commissions are likely non-deductible.

- viii. **Limitation on Deduction of State and Local Taxes.** Under the 2017 Tax Act, the deduction for state and local taxes is limited to \$10,000 for tax years 2018 through 2025. IRC §§ 164(b)(6)(B) and 641(b).

- ix. **Net Operating Losses.** An estate or trust may deduct net operating losses (“NOLs”) under IRC § 172. IRC § 642(d). Under the 2017 Tax Act, NOLs are limited to 80% of taxable income, but may now be carried forward indefinitely. Any carryover NOLs of

the estate or trust may be passed through to the beneficiaries only in the year of termination of the estate or trust. IRC § 642(h).

- x. **IRD Deduction.** If as a result of the inclusion of an IRD item in the decedent's gross estate for estate tax purposes as described above, the recipient of such IRD item (including a trust or estate if no distribution is made to a beneficiary) may deduct for income tax purposes the estate tax attributable to such IRD item. IRC § 691(c). If an IRD item is distributed in part to a beneficiary, the IRD deduction is shared and allocated between the beneficiary(ies) and the estate/trust. IRC § 691(c)(1)(B).
- xi. **Charitable Deduction.** An estate or trust generally is able to deduct, without limitation, amounts paid to or permanently set aside for charity during the tax year. IRC § 691(c)(1). A distribution to a qualified charitable organization (IRC § 170(c)) will qualify for the deduction provided the payment is required pursuant to the terms of the governing instrument. IRC § 642(c)(2).
- xii. **Distribution Deductions.** Trusts and estates may take deductions for amounts distributed to beneficiaries. The amount of the deduction depends on whether the trust is a simple or complex trust and the nature of the beneficiary's interest in the trust. IRC §§ 651 and 662. For simple trusts, the distribution deduction is limited to the lesser of the fiduciary income required to be distributed or distributable net income ("DNI"). IRC § 651(b). For complex trusts, the distribution deduction is limited to the lesser of fiduciary income required to be distributed plus any other amounts properly paid or DNI. IRC §§ 661(a) and 661(c). As described below, to the extent the estate or trust takes a distribution deduction, the beneficiary must typically include such amounts in the beneficiary's gross income. IRC §§ 652 and 662. DNI is generally the estate/trust taxable income plus net tax exempt income and less any distribution deductions, personal exemption deductions, capital gains or losses (except in certain circumstances in which capital gains are required to be distributed or the fiduciary consistently treats capital gain as distributable, see Treas. Reg. § 1.643(a)-3), extraordinary dividends. IRC § 643(a).
- xiii. **Gain and Loss; Satisfaction of Pecuniary Gift.** In general, a trust or estate will not recognize gain or loss when distributions of property are made to beneficiaries. However, the executor or trustee may elect to recognize gain or loss in the same manner had the property been sold to the distributee for fair market value. IRC § 643(e)(3). Note that an estate may be able to recognize loss (IRC

§ 267(b)(13)), but trusts and beneficiaries may not (IRC § 267(b)(6)) due to the disallowance of the recognition of loss on sales/exchanges between related parties. This difference may be another reason to consider making a 645 election with respect to a QRT described above. Note, however, that if an executor or trustee satisfies a pecuniary gift (for example a gift of a specific dollar amount) with appreciated property, the estate/trust is required to recognize gain. Treas. Reg. § 1.661(a)-2(f).

- xiv. 65 Day Rule.** An executor or trustee may elect to treat distributions made within the first 65 days of the following tax year as having been paid on the last day of the prior tax year. IRC § 663(b).
- f. Termination of Estate or Trust.** In the year of termination, every trust is treated as a complex trust. In the year of distribution, any net operating loss carryover, capital loss carryover, and excess deductions (excluding the personal exemption and charitable deduction) may be passed through to the beneficiaries. IRC § 642(h).
- g. Liability of Personal Representative.** A personal representative may have personal liability to the extent of unpaid tax if the personal representative pays any part of a debt before paying tax liability. 31 USCA § 3713(b). Personal liability is to the extent of the amount improperly distributed to other creditors. A personal representative should proceed with caution if property holdings of decedent are not explained on prior income tax returns, the decedent made transfers/gifts which were not reported on a federal gift tax return, or there are missing tax returns. A personal representative may request an early determination of estate tax liability and personal liability for estate taxes under IRC § 2204. A personal representative may make a written request for discharge of personal liability for income and gift taxes of the decedent under IRC § 6905 (IRS Form 5495). The personal representative may also request a current assessment of income and gift taxes (prompt assessment) of the decedent to limit the statute of limitations to 18 months under IRC § 6501(d). To reduce exposure to liability, the fiduciary should retain a sufficient reserve to cover anticipated tax liabilities and/or consider an indemnification agreement from the beneficiaries.

III. BENEFICIARY TAXATION.

- A. Inheritance.** Property received as an inheritance is generally excluded from the gross income of the beneficiary. IRC § 102(a). However, recall that the receipt of an IRD item may be subject to an income tax in the hands of the beneficiary. In addition, distributions of estate or trust income realized after a decedent's death may carry out gross income to the beneficiary as described below. IRC § 102(b).
- B. Specific Gifts.** Specific gifts of property and pecuniary devises (which are paid in not more than three installments and not payable from income according to the trust instrument) do not carry out DNI to the beneficiary and is therefore not subject to income tax at the beneficiary level. IRC § 663(a)(1).
- C. Basis of Assets Distributed In-Kind.** The income tax basis of property received by the beneficiary is the adjusted basis of the property in the hands of the trust/estate (carryover) as adjusted by any gain or loss recognized by the estate/trust on the distribution. Recall that a trustee/executor may elect to recognize gain on distribution of an appreciated asset to the beneficiary and gain recognition is automatic if appreciated property is used to satisfy a pecuniary bequest.
- D. Reporting:** Beneficiaries will receive an IRS Form K-1 from the executor or trustee which will indicate the items of income attributable to the beneficiary in the particular tax year. Any income that is attributable to the beneficiary must be included in the beneficiary's gross income. IRC §§ 652 and 662.

IV. CONCLUSION.

Income taxation of trusts, estates, and beneficiaries is extremely complex. There are numerous elections, filing requirements, and deadlines to consider. This outline only touches the surface of some of the intricacies. In addition, this outline only touches on the federal income tax issues. State income taxation of trusts, estates, and beneficiaries adds additional complexity and should not be ignored.

	<u>First Alternative</u> EIN & Form 1041	<u>Second Alternative</u> EIN & Form 1099	<u>Third Alternative</u> No EIN & No Reporting
Statutory Authority	Treas. Reg. § 1.671-4(a) Treas. Reg. § 301.6109(a)(2)(i)(A)	Treas. Reg. § 1.671-4(b)(2)(i)(B) Treas. Reg. § 1.671-4(b)(iii) Treas. Reg. § 301.6109(a)(2)(i)(A)	Treas. Reg. § 1.671-4(b)(2)(i)(A) Treas. Reg. § 1.671-4(b)(ii) Treas. Reg. § 301.6109(a)(2)(i)(A)
Excluded Trusts	None.	<ul style="list-style-type: none"> - Common trust fund defined in section 584(e) - Foreign trust - QSST - Fiscal year trust or fiscal year grantor - Foreign grantor - Trust owned by 2 or more grantors¹² - Non-grantor trusts <p><i>Treas. Reg. § 1.671-4(b)(6)</i></p>	<ul style="list-style-type: none"> - Common trust fund defined in section 584(e) - Foreign trust - QSST - Fiscal year trust or fiscal year grantor - Foreign grantor - Trust owned by 2 or more grantors¹³ - Non-grantor trusts <p><i>Treas. Reg. § 1.671-4(b)(6)</i></p>
EIN Requirement	Yes.	Yes.	No.
Form 1041	Yes. However, items of income, deduction, and credit attributable to a grantor of a grantor trust are not reported on Form 1041, but are shown on a separate statement to be attached to Form 1041.	No.	No.
Form 1099	No.	Yes. Trustee is required to file appropriate Forms 1099, reporting the income or gross proceeds paid to the trust during the taxable year, showing the trust as the payor and the grantor as the payee. <i>Treas. Reg. § 1.671-4(b)(2)(iii)(A)</i>	No.

¹² Note: a husband and wife who make a single return jointly are considered one grantor for purposes of the regulations.

¹³ Note: a husband and wife who make a single return jointly are considered one grantor for purposes of the regulations.

	<u>First Alternative</u> EIN & Form 1041	<u>Second Alternative</u> EIN & Form 1099	<u>Third Alternative</u> No EIN & No Reporting
Furnish Statement to Grantor (provided Trustee is someone other than the grantor)		Furnish Statement to Grantor: <ul style="list-style-type: none"> - Show all items of income, deduction, and credit for the trust - Provide information necessary to take items into account in computing grantor's taxable income - Inform grantor that the items shown on statement must be included in computing taxable income and credits of grantor <i>Treas. Reg. § 1.671-4(b)(2)(iii)(B)(1)</i>	Furnish Statement to Grantor: <ul style="list-style-type: none"> - Show all items of income, deduction, and credit for the trust - Identifies payor of each item of income - Provide information necessary to take items into account in computing grantor's taxable income - Inform grantor that the items shown on statement must be included in computing taxable income and credits of grantor <i>Treas. Reg. § 1.671-4(b)(2)(ii)(A)</i>
W-9	No.	No.	Yes. Grantor must provide complete Form W-9 to trustee and indicate whether grantor is subject to backup withholding. <i>Treas. Reg. § 1.671-4(e)</i> <i>Treas. Reg. § 1.672-4(b)(1)</i>
K-1	Yes, in the case of non-grantor trust.	No.	No.
Penalties	<i>See IRC §§ 6721-6724</i> <u>IRC §6721</u> Failure to file information return results in penalty of \$100/return for each failure <u>IRC § 6722</u> Failure with respect to a payee statement results in penalty of \$100/ failure <u>IRC § 6723</u> Failure to comply with information reporting requirement on or before time prescribed, results in penalty of \$50/failure	<i>See IRC §§ 6721-6724</i> <u>IRC §6721</u> Failure to file information return results in penalty of \$100/return for each failure <u>IRC § 6722</u> Failure with respect to a payee statement results in penalty of \$100/ failure <u>IRC § 6723</u> Failure to comply with information reporting requirement on or before time prescribed, results in penalty of \$50/failure	<i>See IRC §§ 6721-6724</i> <u>IRC §6721</u> Failure to file information return results in penalty of \$100/return for each failure <u>IRC § 6722</u> Failure with respect to a payee statement results in penalty of \$100/ failure <u>IRC § 6723</u> Failure to comply with information reporting requirement on or before time prescribed, results in penalty of \$50/failure

Placer County Bar Association's
31st Annual 2022 MCLE Conference

TRUST INCOME TAXATION

September 10, 2022

Rebecca L. Van Loon, Esq.
Solomon Ward Seidenwurm & Smith LLP

Trust
income
taxation
overview

Income Tax Basis
Considerations

Income Taxation of
Estates and Trusts

Beneficiary
Taxation

INCOME TAX BASIS

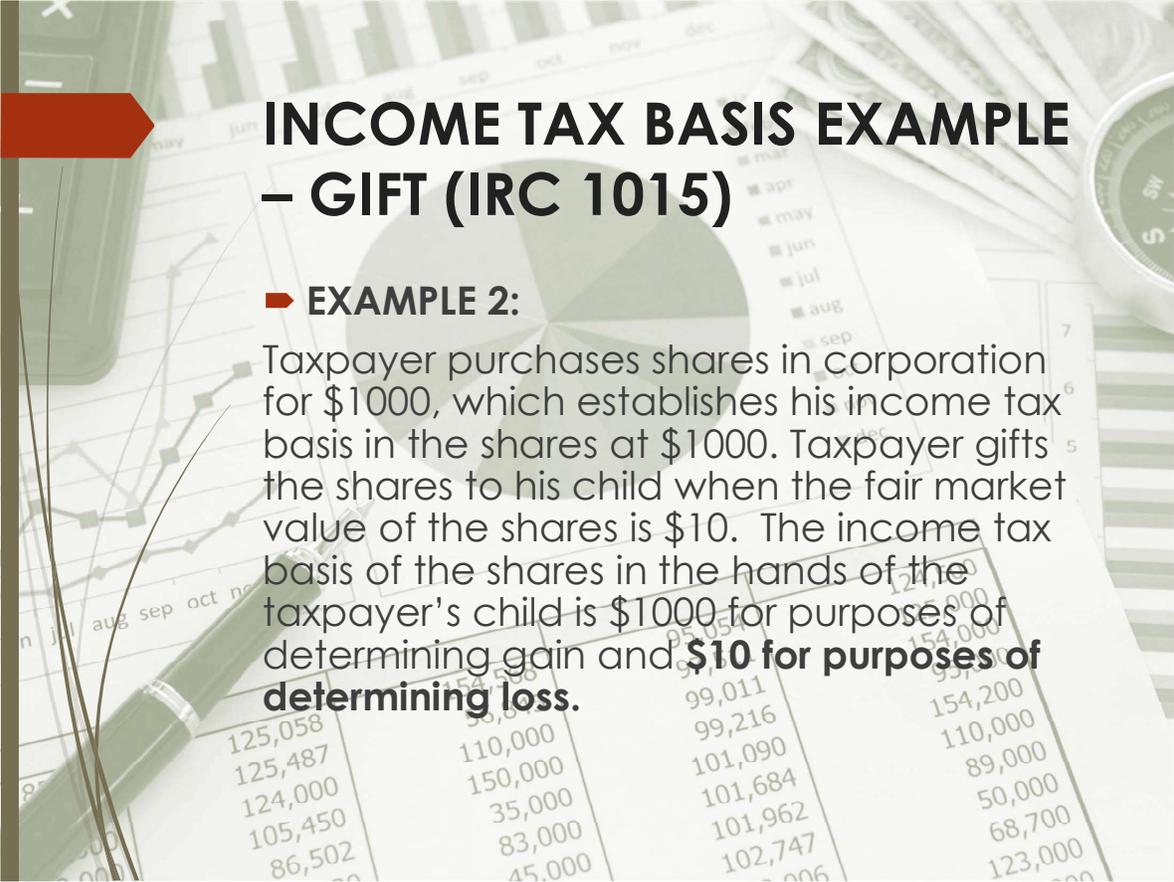
- ▶ **Gift – “Carry-over” Income Tax Basis**
 - ▶ Loss Exception
 - ▶ IRC 1015(a)

- ▶ **Estate – “Step-Up” Income Tax Basis Adjustment** – general rule that basis is adjusted to fair market value as of date of death. Exception – Income in Respect of Decedent (IRD)
 - ▶ IRC 1014(b)

INCOME TAX BASIS EXAMPLE – GIFT (IRC 1015)

- ▶ **EXAMPLE 1 – gift of appreciated asset:**

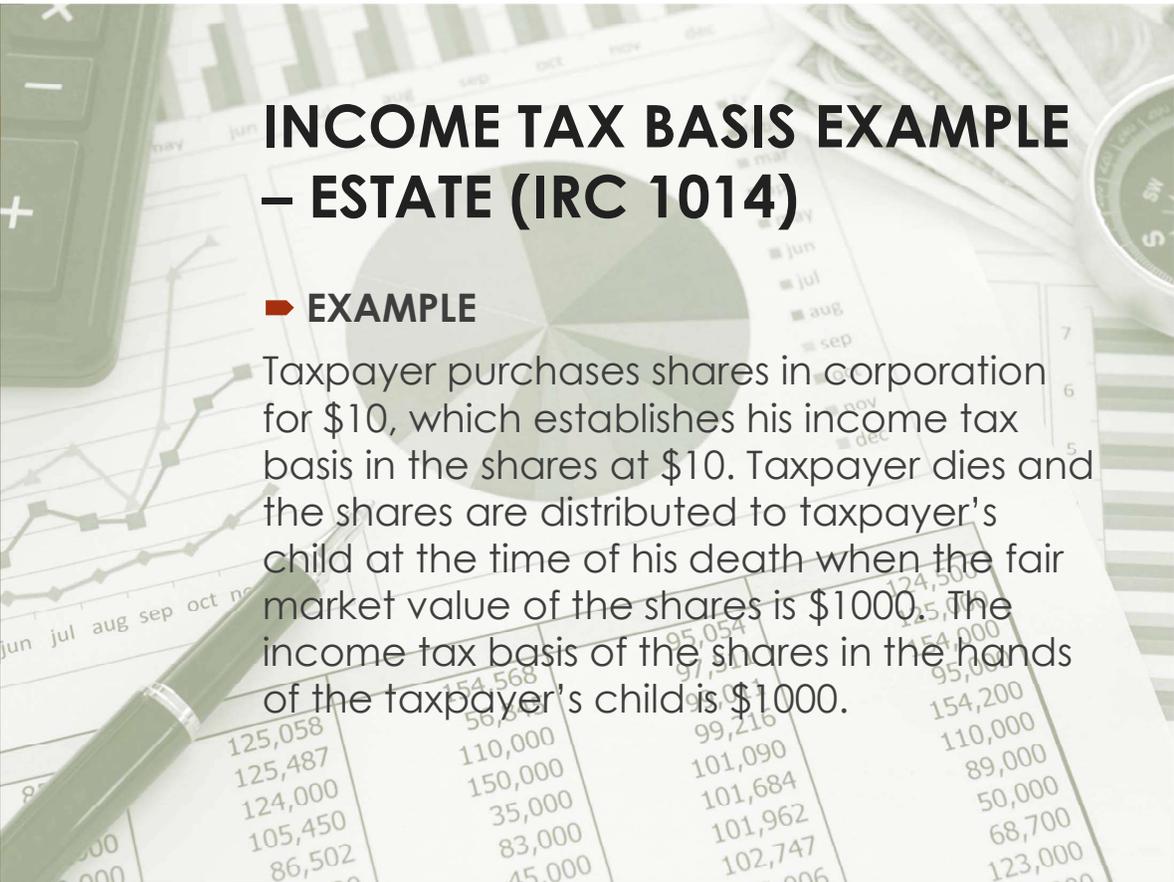
Taxpayer purchases shares in corporation for \$10, which establishes his income tax basis in the shares at \$10. Taxpayer gifts the shares to his child when the fair market value of the shares is \$1000. The income tax basis of the shares in the hands of the taxpayer’s child is \$10.



INCOME TAX BASIS EXAMPLE – GIFT (IRC 1015)

EXAMPLE 2:

Taxpayer purchases shares in corporation for \$1000, which establishes his income tax basis in the shares at \$1000. Taxpayer gifts the shares to his child when the fair market value of the shares is \$10. The income tax basis of the shares in the hands of the taxpayer's child is \$1000 for purposes of determining gain and **\$10 for purposes of determining loss.**



INCOME TAX BASIS EXAMPLE – ESTATE (IRC 1014)

EXAMPLE

Taxpayer purchases shares in corporation for \$10, which establishes his income tax basis in the shares at \$10. Taxpayer dies and the shares are distributed to taxpayer's child at the time of his death when the fair market value of the shares is \$1000. The income tax basis of the shares in the hands of the taxpayer's child is \$1000.

Income Taxation of Estates and Trusts

➤ Death of Decedent – Final Income Tax Reporting

- Income on Final Return
- IRD

➤ Trusts and Estates Income Taxation

- Grantor Trust vs. Non-Grantor Trust
- Non-Grantor Trusts: Simple vs. Complex
- Reporting, Tax Brackets, Deductions

Death of Decedent – Final Income Tax Reporting

➤ Reporting

- IRS Form 56
- Final 1040 (1/1 to date-of-death)
- Due April 15th (or 15th day of fourth month following close of taxable year if fiscal year elected)
- Marital Status and Joint Returns

➤ Income Included on Final Return

- Compensation, sale proceeds, interest, dividends, rents, income from trusts/estates
- Timing is everything!!

Death of Decedent – Final Income Tax Reporting

▶ EXAMPLE:

“A” dies on 3/25/22. Decedent's wages were paid as follows: \$1,500 on 3/15/22 and \$1,000 on 3/31/22. Interest in the amount of \$100 was paid on 2/28/22 and \$100 on 3/31/22. Decedent also received rent from rental real property in the amount of \$500 on 3/1/22 and \$500 on 4/1/22.

What income is reportable on A's final income tax return?

By A's estate?

Death of Decedent – Final Income Tax Reporting

▶ Income reported on A's final income tax return

- ▶ \$1,500 wages received on 3/15/22
- ▶ \$100 interest received on 2/28/22
- ▶ \$500 rent received on 3/1/22

▶ Income reportable by A's estate

- ▶ \$1,500 wages received on 3/31/22
- ▶ \$100 interest received on 3/31/22
- ▶ \$500 rent received on 4/1/22

Trust and Estate Income Taxation – Some Definitions

- ▶ **Estate:** property held subject to decedent's will or intestate succession, **generally excluding:**
 - ▶ assets held by a trust
 - ▶ jointly held property
 - ▶ life insurance proceeds, IRA or retirement assets payable to a beneficiary other than an estate
 - ▶ pay-on-death/transfer on death accounts.
- ▶ **Estate Duration:** date of decedent's death to termination of estate administration. Treas. Reg. 1.641(b)-3(a)

Trust and Estate Income Taxation – More Definitions

- ▶ **Grantor Trusts**
 - ▶ Revocable trusts
 - ▶ Some irrevocable trusts over which the grantor has retained certain distributive and/or administrative powers
 - ▶ Grantor treated as the owner of the trust assets for income tax purposes
- ▶ **Non-Grantor Trusts**
 - ▶ Generally irrevocable trusts which are not considered grantor trusts (exceptions!)
 - ▶ **Simple trusts:** (1) all net income required to be distributed; (2) no distribution of principal made during the taxable year; and (3) no charitable beneficiaries
 - ▶ **Complex trusts:** (1) allows for accumulation of income; (2) principal distributions are made in taxable year; or (3) charitable beneficiaries

Trust and Estate Income Taxation

- **EXAMPLE 1:** A establishes irrevocable trust for the lifetime benefit of B. The trust requires that net income be distributed to B annually and also gives the trustee discretion to distribute principal to B for B's health, education, maintenance, and support. In year 1, the trustee distributes to B all of the net income and makes no principal distributions.

- **Is the trust simple or complex?**

SIMPLE TRUST

Trust and Estate Income Taxation

- **EXAMPLE 2:** A establishes irrevocable trust for the lifetime benefit of B. The trust requires that net income be distributed to B annually and also gives the trustee discretion to distribute principal to B for B's health, education, maintenance, and support. In year 2, the trustee distributes to B all of the net income and makes a \$10,000 principal distribution to B.

- **Is the trust simple or complex?**

COMPLEX TRUST

Trust and Estate Income Taxation

- **Fiduciary Accounting Income:** See California Uniform Principal and Income Act – More to Come
- **Reporting**
 - Form 56
 - Form 1041
 - **Fiscal year option:** estates and qualified revocable trusts (“QRTs”) subject to 645 election
 - **Calendar year:** required for trusts (except QRTs subject to 645 election)
- **645 Election:** allows a QRT to be treated as part of an estate for income tax purposes

Trust and Estate Income Taxation

- 2022 Tax Rates and Brackets for Estates and Trusts (Rev. Proc. 2021-45)

If Taxable Income Is:	The Tax Is:
Not over \$2,750	10% of the taxable income
Over \$2,750 but not over \$9,850	\$275 plus 24% of the excess over \$2,750
Over \$9,850 but not over \$13,450	\$1,979 plus 35% of the excess over \$9,850
Over \$13,450	\$3,239 plus 37% of the excess over \$13,450

Trust and Estate Income Taxation

■ Compare Income Tax Brackets for Individuals

- Individual (\$539,900)
- Married Filing Jointly (\$647,850)

■ Net Investment Income Tax – IRC 1411

- Trust/estate threshold (\$13,450)
- Individual threshold (\$200,000)
- Married Filing Jointly threshold (\$250,000)

Trust and Estate Income Taxation

Personal Exemptions (2017 Tax Act suspended for individuals, but still available for trusts and estates)

- Estate/645 election trust – \$600
- Simple trust – \$300
- Complex trust – \$100

Administrative Expenses/Miscellaneous Itemized Deductions

- Some expenses deductible on either estate tax return or income tax return – but not both. IRC 642(g)
- 2017 Tax Act eliminated miscellaneous itemized deductions. IRC 67(g)
- BUT... IRS Notice 2018-61 and Treas. Reg. § 1.67-4 allows estates and trusts to deduct administrative expenses (examples – fiduciary fees, attorney fees, accountant fees, appraisal costs, court costs, accounting costs, etc.)
- No deduction for investment management fees/commissions

Trust and Estate Income Taxation

- ▶ **State and Local Tax Deduction:** limited to \$10,000 under 2017 Tax Act. IRC 164(b)(6)(B) and 641(b)
- ▶ **199A Qualified Business Income**
- ▶ **Net Operating Losses.** IRC 642(d)
- ▶ **Disallowance of Loss Between Related Parties.** IRC 267
- ▶ **IRD Deduction:** if an IRD item is subject to estate tax (i.e. decedent's IRA), the recipient of the IRD item may deduct for income tax purposes the estate tax amount attributable to such IRD item, IRC 691(c)
- ▶ **Charitable Deduction:** estates vs. trusts, IRC 642(c)
- ▶ **65 Day Rule:** distributions made within the first 65 days of next tax year treated as made on the last day of the prior tax year

Trust and Estate Income Taxation

- ▶ **Gain/Loss on Distribution**
 - ▶ Election by fiduciary, IRC 243(e)
 - ▶ Loss (IRC 267 but special rule for estates and trusts subject to 645 election)
 - ▶ Required recognition in satisfaction of pecuniary bequest, Treas. Reg. 1.661(a)-2(f)

EXAMPLE:

A leaves \$20,000 under his trust to B upon A's death. Trustee distributes to B property with a fair market value of \$20,000 and an income tax basis of \$5,000. The trust will realize gain of \$15,000 (\$20,000 - \$5,000).

CAUTION: pecuniary funding formulas!! (i.e. pecuniary devise of estate tax exemption amount to fund Bypass Trust)

Trust and Estate Income Taxation

► Distribution Deductions

- Simple trusts – lesser of income required to be distributed or DNI, IRC 651
- Complex trusts – lesser of income required to be distributed plus any other amounts distributed or DNI, IRC 661

► Distributable Net Income (“DNI”)

- Generally excludes capital gain, IRC 643

► Trust and Estate Income Taxation

► Termination of Estate/Trust

- Every trust is a complex trust in year of termination
- NOL capital loss carry overs passed through to beneficiary
- Excess deductions (excluding personal exemption and charitable deduction) passed through to beneficiary – but IRC 67(g)

Beneficiary Taxation

► Inheritance

- Generally excluded from gross income, IRC 102(a)
- Exceptions: IRD (IRAs, installment notes, etc.) and gifts of income, IRC 102(b)
- **Form K-1** – used to report income carried out to beneficiary
- **Character of Income:** character of income in the hands of the beneficiary is the same as in the hands of the trust

Beneficiary Taxation

■ Specific and Pecuniary Gifts

- Gifts of specific property or pecuniary amounts (3 installment rule!) do not carry out taxable income to the beneficiary, IRC 663(a)(1)
- **EXCEPTION:** gift directed to be paid from income
- **Example:** Trust leaves \$10,000 to A (pecuniary gift) and trust leaves Blackacre to B (specific gift)

Beneficiary Taxation

■ Basis

- Specific gift or residuary gift (carry over basis unless fiduciary elects to recognize gain/loss)
- Property in satisfaction of pecuniary devise (step-up basis because estate/trust required to recognize gain or loss)

Beneficiary Taxation

- **Simple Trusts:** beneficiary subject to income tax equal to the lesser of net income required to be distributed or DNI

EXAMPLE 1: Trust provides that all net income is to be distributed to A. Assume during the tax year there is net income of \$10,000, which is distributed to A, and DNI is \$20,000.

A is subject to tax on \$10,000.

EXAMPLE 2: Trust provides that all net income is to be distributed to A. Assume during the tax year there is net income of \$10,000, which is distributed to A, and DNI is only \$5,000.

A is subject to tax on \$5,000.

Beneficiary Taxation

- ▶ **Complex Trusts:** beneficiaries will fall into one of three tiers, which will determine taxability of a distribution
 - ▶ **Tier 1:** beneficiary required to receive net fiduciary income (allocated DNI first and taxed on lesser of DNI or net income distribution)
 - ▶ **Middle Tier:** charitable beneficiaries
 - ▶ **Tier 2:** beneficiary entitled to discretionary distributions of income or distributions of principal (allocated DNI to the extent not allocated to Tier 1 beneficiary and taxed on lesser of DNI or distribution)

What is “INCOME”?

- ▶ **Trust Accounting or Fiduciary Income (“Net Income” in Trust/Will).** Uniform Principal and Income Act (CA Probate Code 16320-16375)
 - ▶ IRC 643(b)
 - ▶ Review trust/will!!
 - ▶ Trustee discretion to make adjustments PC 16336
 - ▶ See next slides for examples
- ▶ **Gross Income.**
- ▶ **Taxable Income.**
- ▶ **Distributable Net Income (DNI).**
 - ▶ Limits distribution deduction
 - ▶ Limits taxation of distribution to beneficiary
 - ▶ Character of income
- ▶ **Undistributed Net Income.**

UPIA – Receipts Schedule

Receipts (PC §§ 16355-16367)

Receipt	Income	Principal	Probate Code
Money or property rec'd in liquidation/sale		100% (but see entity receipt rules)	§ 16355(b)
Rent	100% (but not security deposit)		§ 16356
Interest	100%		§ 16357(a)
Life Insurance		100%	§ 16358(a)
Annuity, IRA, ...	10% (required to be made)	90% (**other rules may apply)	§ 16361(c)
Leasehold, patent, copyright, royalty....	10%	90%	§ 16362

UPIA – Receipts Schedule

Receipts cont. (PC §§ 16355-16367)

Receipt	Income	Principal	Probate Code
Mineral, water interests, other natural resources	Varies (10%)	Varies (90%)	§ 16363
Timber	Varies	Varies	§ 16364

UPIA – Disbursements Schedule

Disbursements (PC §§ 16370-16375)

Disbursement	Income	Principal	Probate Code
Trustee Fees and Investment Advisory Fees	50%	50% (**but see § 16371(a)(2))	§ 16370(a)
Accountings and Court Proceedings	50%	50%	§ 16370(b)
Ordinary Administrative Expenses	100% (interest, repairs, management of asset, tax)		§ 16370(c)
Insurance Premiums	100% (insurance covering loss)		§ 16370(d)
Principal Payments on Debt		100%	§ 16371(a)(3)

UPIA – Disbursements Schedule

Disbursements (PC §§ 16370-16375)

Disbursement	Income	Principal	Probate Code
Title Insurance or Life Insurance Premiums		100%	§ 16371(a)(5)
Estate, inheritance, or transfer tax		100%	§ 16371(a)(6)
Environmental Matters (removing contamination, remedial, prevention)		100%	§ 16371(a)(7)
Taxes	100% attributable to income receipt	100% attributable to principal	§ 16374 (**entity rules)

UPIA – Entity Receipts

- Probate Code §§ 16350-16352
- Receipts from “entity” – corporation, partnership, LLC, REIT

UPIA – Entity Receipts

- Entity Receipts (PC §§ 16350-16352)

Receipt	Income	Principal	Probate Code
Money received from entity	100%		§ 16350(b)
Property other than money		100%	§ 16350(c)(1)
Money received in redemption or liquidation of entity interest		100%	§ 16350(c)(2)
Return of Capital		100%	§ 16350(c)(3)
General Trustee Discretion -			§§ 16350(d)-(h)

UPIA – Entity Receipts

- Receipts from Estate/Trust (apportioned based on income/principal distribution - Probate Code § 16351)
- Trustee may separately account for business (Probate Code § 16352)

EXAMPLES

Receipt	TAI	Taxable Income	DNI
Interest, Dividend, Net Rental Income	TAI Income	Generally	Yes
Tax Exempt Interest	TAI Income	No	Yes
Extraordinary Dividend	TAI Principal	Generally	No
LTCG	TAI Principal (unless allocated to income – IRC 643(a)(3) and PC 16355(b))	Generally	No

Beneficiary Taxation

EXAMPLE: Trust provides that the trustee is required to distribute $\frac{1}{2}$ of all net income to A and the trustee may distribute as much of the remaining net income and principal to B for B's health, education, maintenance, and support. Assume net fiduciary income is \$10,000 and DNI is \$8,000. The trustee distributes \$5000 to A and makes a discretionary distribution of \$10,000 to B.

Is A a Tier 1 or Tier 2 Beneficiary? Tier 1

A's distribution is allocated \$5000 of DNI and the entire \$5000 distribution is taxable to A.

Beneficiary Taxation

EXAMPLE: Trust provides that the trustee is required to distribute $\frac{1}{2}$ of all net income to A and the trustee may distribute as much of the remaining net income and principal to B for B's health, education, maintenance, and support. Assume net fiduciary income is \$10,000 and DNI is \$8,000. The trustee distributes \$5000 to A and makes a discretionary distribution of \$10,000 to B.

Is B a Tier 1 or Tier 2 Beneficiary? Tier 2

B's distribution is allocated the residual DNI of \$3000, which means \$3000 of B's distribution is taxable and \$7000 is not taxable.

EXAMPLE

Grandma ("G") establishes Trust, which remains revocable during G's lifetime. At G's death, the trust becomes irrevocable and the trustee is instructed to distribute \$10,000 to grandchild ("GC"), \$10,000 to G's sibling ("S"), and Blackacre to G's child ("C"). The residue of the trust is distributable one-half (1/2) to a trust for C's lifetime (the "C Trust"), under which C is entitled to receive all of the net income. The remaining one-half (1/2) to a trust for the benefit of GC until GC attains age 35 (the "GC Trust"). The trustee has discretion to distribute income and principal to GC.

EXAMPLE

G dies. The trustee distributes \$10,000 cash to GC, stock worth \$10,000 with an income tax basis of \$5,000 to S, and Blackacre worth \$100,000 with income tax basis of \$50,000 to C.

The balance of the trust is \$200,000 and the trustee allocates \$100,000 to the C Trust and \$100,000 to the GC Trust.

EXAMPLE

G Revocable Trust



- While G is living, the trust is a grantor trust (revocable)
- All trust assets are deemed owned by G for income tax purposes

EXAMPLE

G Trust Irrevocable



- At G's death, the trust becomes irrevocable
- Trust is now taxable as a non-grantor trust (or estate if 645 election is made)
- Complex Trust

EXAMPLE

► Pecuniary Gift - \$10,000 cash to GC

**G Trust
Irrevocable**

\$10,000
cash to GC



Trust

- No distribution deduction

Beneficiary

- Inheritance – not included in gross income of GC
- Specific pecuniary gift - distribution does not carry out income (DNI) to GC

EXAMPLE

► Pecuniary Gift Satisfied with Appreciated Property - \$10,000 stock with basis of \$5,000 to S

**G Trust
Irrevocable**

\$10,000 worth of
stock (basis \$5,000)
to S



Trust

- No distribution deduction
- Realize gain on distribution (satisfy pecuniary gift with appreciated property)

Beneficiary

- Inheritance – not included in gross income of S
- Specific pecuniary gift - distribution does not carry out income (DNI) to S
- Step-up or adjusted basis for gain realized by trust

EXAMPLE

► Specific Gift – Blackacre to C

**G Trust
Irrevocable**

Blackacre to C
FMV \$100,000
Basis \$50,000



Trust

- No distribution deduction
- No gain realized

Beneficiary

- Inheritance – not included in gross income of C
- Specific gift - does not carry out income (DNI) to C
- Carry-over basis

EXAMPLE

**Residuary
Distributions**

**G Trust
Irrevocable**

**C Trust
\$100,000**

**GC Trust
\$100,000**

EXAMPLE

C Trust Irrevocable

Net income
to C



Trust

- simple trust
- distribution deduction

Beneficiary

- Funding of C Trust is Inheritance – not included in gross income of C
- Distributions from the C Trust may carry out income to C (lesser of net income or DNI)

EXAMPLE

Trust Taxable Income

- \$5,000 LTCG
- \$500 interest
- \$500 dividends

Fiduciary Income (UPIA)

- \$500 interest
- \$500 dividends
- Less \$300 of disbursements allocated to fiduciary income
- NET INCOME required to be distributed to C = \$700

C Trust Irrevocable

Trust Taxation

- \$5,000 LTCG taxed at trust level
- Distribution deduction lesser of DNI or \$700



Beneficiary Taxation

- Form K-1
- Taxable to the extent of DNI

EXAMPLE

GC Trust Irrevocable

Discretionary
income and
principal to GC



Trust

- complex trust
- distribution deduction

Beneficiary

- Funding of GC Trust is Inheritance – not included in gross income of GC
- Distributions from the GC Trust may carry out income to GC (lesser of net income required to be distributed plus other distributions or DNI)

EXAMPLE

Trust Taxable Income

- \$5,000 LTCG
- \$500 interest
- \$500 dividends

Fiduciary Income (UPIA)

- \$500 interest
- \$500 dividends
- Less \$300 of disbursements allocated to fiduciary income
- NET INCOME = \$700

Trustee Distributes \$100

GC Trust Irrevocable

Trust Taxation

- \$5,000 LTCG taxed at trust level
- Distribution deduction lesser of DNI or \$100

\$100



Beneficiary Taxation

- Form K-1
- Taxable to the extent of DNI



THANK YOU AND QUESTIONS

Rebecca L. Van Loon, JD, LLM Taxation
Solomon Ward Seidenwurm & Smith LLP
401 B. Street, Suite 1200
San Diego, CA 92101
(619) 238-4837
rvanloon@swsslaw.com