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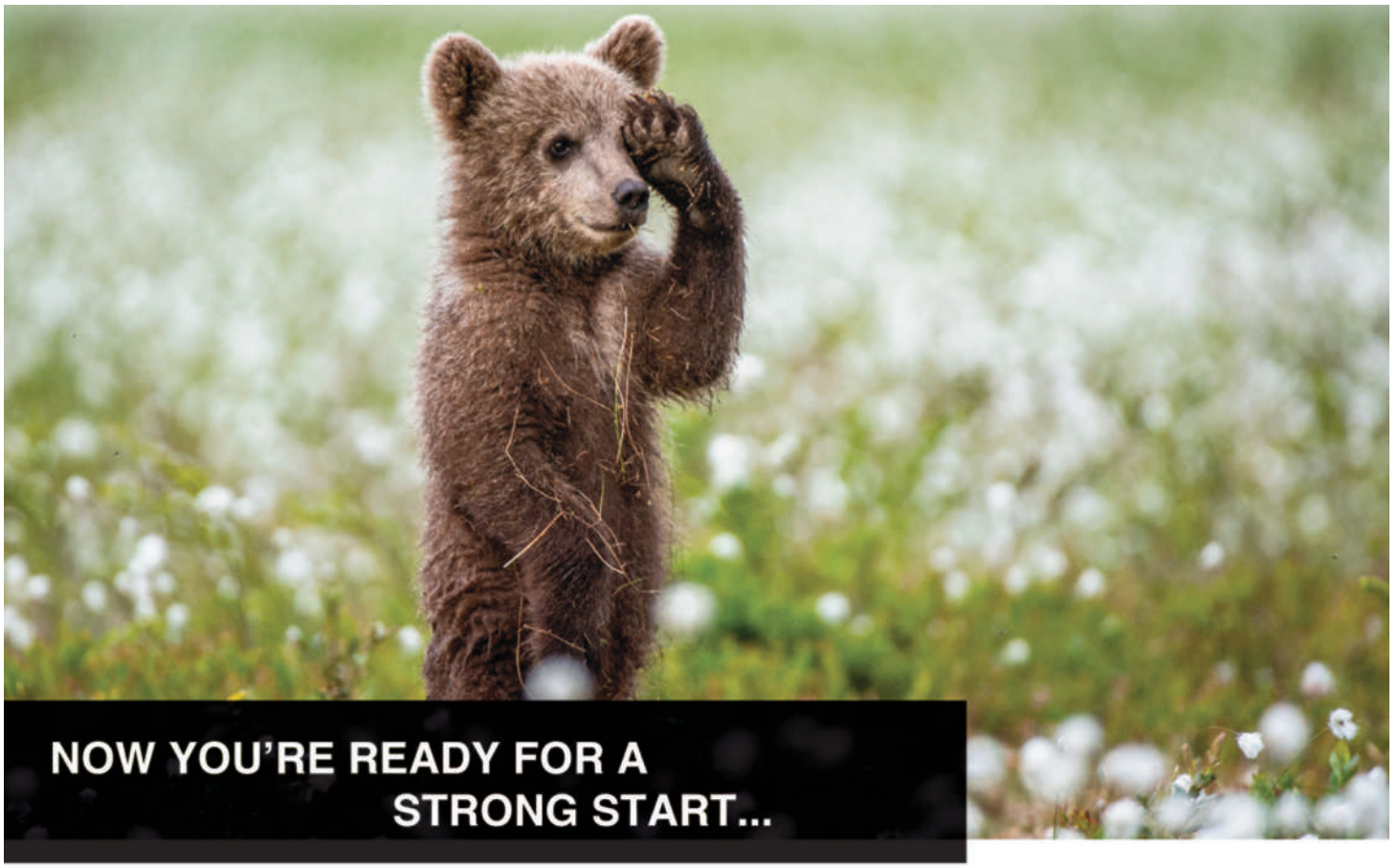

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FROM THE CHAIR

by Carmela T. Pagay

While days during the pandemic seem to mirror each other, the weeks go by, and now we are in November, the pivotal month of this election year. This year also marks the centennial of the Nineteenth Amendment, which finally gave women the right to vote. Sadly, it is also the year that we mourn the passing of a great icon and trailblazer for women's rights, U.S. Supreme Court Justice Ruth Bader Ginsburg.

Justice Ginsburg's legacy in promoting gender equality cannot be overstated. Her important work began by overcoming her own hurdles, from having to prove she did not wrongfully take a man's spot at Harvard Law School to overcoming the difficulty of finding a job as a female attorney despite her exceptional academic credentials. She showed early on that being female should not be a deterrent to achieving one's goals.

Shaped by her own experiences, Justice Ginsburg's career focused on fighting gender discrimination, and her legal prowess quickly resulted in changes to the law. As a volunteer attorney for the American Civil Liberties Union (ACLU), she wrote the appellant's brief in *Reed v. Reed*,[1] arguing that a state law's preference for one gender over another was a violation of the Fourteenth Amendment. By agreeing with the appellant, the U.S. Supreme Court applied for the first time the Equal Protection Clause to a law that discriminated based on gender.

In the first case she argued before the Supreme Court, *Frontiero v. Richardson*,[2] Justice Ginsburg successfully convinced the Court that a benefit policy placing additional requirements for men was discriminatory. In ruling for the Frontieros, the Court had to consider for the first time the appropriate standard of judicial scrutiny for laws that used sex as a classification.

At the ACLU, Justice Ginsburg argued five other cases before the Supreme Court and over 300 gender discrimination cases. She also co-founded the ACLU's Women's Rights Project, which has continuously aimed to strike down gender inequality.

Justice Ginsburg's dedication to equality never wavered when she became a jurist. Three years after joining the Supreme Court, she wrote the majority opinion in *United States v. Virginia*,[3] which held that state-funded Virginia Military Institute must admit women. Her dissents were just as noteworthy. Her scathing dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*,[4] in which the majority disallowed a time-barred pay gap claim, eventually led to the passage of the Lilly Ledbetter Fair Pay Act of 2009, which amended the Civil Rights Act of 1964 to reset the statute of limitations on equal-pay lawsuits with every paycheck.

Justice Ginsburg remained committed to equal justice under law throughout her 27 years at the highest court, despite serious illnesses that probably would have sidelined others. She once said, "So often in life, things that you regard as an impediment turn out to be great, good fortune." She certainly earned her nickname, the Notorious R.B.G. Her passing creates a massive void on the U.S. Supreme Court and raises serious questions about the direction that future jurisprudence will take in this country. In moving forward, may we continue to honor Justice Ginsburg's legacy and her fighting spirit that inspired so many of us. ■

[1] Reed v. Reed, 404 U.S. 71 (1971).
[2] Frontiero v. Richardson, 411 U.S. 677 (1973).
[3] United States v. Virginia, 518 U.S. 515 (1986).
[4] Ledbetter v. Goodyear, 550 U.S. 618 (2007).

A partner at Levene, Neale, Bender, Yoo & Brill L.L.P., a boutique insolvency firm in Los Angeles, Carmela T. Pagay is the 2020-21 chair of the Los Angeles Lawyer Editorial Board.

PRESIDENT'S PAGE

Tamila C. Jensen

As we know from Homer's *Iliad*,[1] in the Bronze Age, fighting was done with swords, spears, bows, and chariots. Defenses were dirt embankments, strong walls, and beautiful armor (if one could afford it). The Trojan War dragged on for years and spread beyond Troy (also known as Ilium) to its allies. Patroclus died in Achilles' armor, proving for the first time that in battle it is best not to be noticed. Troy was destroyed, and its survivors carried into slavery. The 10,000 ships amassed by Agamemnon at last sailed home.

Although war always has been a brutal affair, it took modern man to really ramp up the carnage. World War I is known for its incredible destructiveness. It left scars on the land in the countries where it was fought, which are still visible today. It left scars on the hearts of the men and women who lived through it, and on their heirs, which are remembered a century later. The total deaths among military personnel alone have been estimated somewhere between 9 and 11 million, and those among civilians are estimated to be as high as 6 to 13 million.[2] Moreover, there is speculation that the total casualties (death and injury) may have amounted up to 40 million people.[3] A third of the deaths were caused by abuse (in prisoner of war camps), privation, and disease (the Spanish Flu epidemic, among others).

There is little wonder that the end of the war was greeted with relief. While the Treaty of Versailles was signed June 28, 1919, an armistice was agreed on November 11, 1918, and thus was born Armistice Day.[4] Not only did Armistice Day celebrate the peace after World War I, but it also stood as a declaration of hope for peaceful relations among peoples. On October 8, 1954, President Dwight D. Eisenhower issued the first Veterans Day Proclamation, and Armistice Day became Veterans Day, which honors all American veterans from all wars.[5]

On Veterans Day, November 11, we will celebrate and honor veterans of all the service branches. Veterans Day is a day of remembrance that touches so many families. Indeed, who can say anyone is untouched? Recently, a friend was telling me about his uncle and cousin who served in World War II and bore the psychic scars for the rest of their lives. My own uncle was killed on Wake Island where he was a civilian engineer in World War II. Wake is now a largely forgotten bit of land in the Pacific. My aunt's husband came back from the Pacific Theater with a pistol he insisted belonged to a Japanese admiral, and I never had the courage to suggest that the admiral must have had an enormous gun collection because there were a lot of those pistols around.

I am a scion of the Vietnam era and lost a friend there. That was a time of conscription and anti-war protests. In this era of a voluntary military, nevertheless, many families still serve. My cousin is a Marine (now reserve), and my nephew is in the Navy stationed in Virginia. However, many things have changed over all these years. Vietnam has most-favored-nation status, and the United States has avoided a major conflagration for 70 years. Fighting lingers on in places with unfamiliar names, though, that have become all too familiar, and the losses that occur are devastating to families and friends. Injuries can be grievous and last lifelong. Yet the proud members of our military branches continue to serve.

For service members, re-entry into civilian life is not always easy. To help address the issues faced by some veterans when they return to civilian life, the Los Angeles County Bar Association Armed Services Committee founded the Veterans Legal Services Project, one of four projects now under the auspices of Counsel for Justice. The Veterans Project assists veterans with a range of legal issues. From launching its first monthly Virtual Record Clearing Clinic in June to creating a hotline and clinic under LACBA's Entrepreneurial Assistance Program (LEAP) to assist veterans with starting new businesses, the project continues to adapt to meet the needs of veterans in a COVID-19 world. To some, these legal issues may seem modest, but they can prevent veterans from finding a job, securing stable housing, and rejoining civilian society. Having served their country, these men and women are deserving of our support on their return.

Funding for the Veteran's Project is getting thin, and new sources of support are needed immediately. Therefore, on this Veterans Day, I ask you all to remember our veterans not just one day a year, but every day, with your generous support of LACBA's Veterans Legal Services Project. ■

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[1] Columbia College: Columbia Univ., *The Iliad*, *available at* https://www.college.columbia.edu/core/content/iliad (last accessed Sept. 29, 2020).

[2] *See, e.g.*, Antoine Prost, *War Losses*, 1914-1918-ONLINE. INTERNATIONAL ENCYCLOPEDIA OF THE FIRST WORLD WAR, https://encyclopedia.1914-1918-online.net/article/war_losses (last accessed Sept. 29, 2020).).

[3] History on the Net, How Many People Died in WW1? A Look at the Numbers, https://www.historyonthenet.com/how-many-people-died-in-ww1 (last accessed Sept. 29, 2020).

[4] U.S. Dep't of Veterans Affairs, Office of Public & Intergovernmental Affairs, History of Veterans Day, https://www.va.gov/opa/vetsday/vetdayhistory.asp.

[5] *Id.*

The 2020-21 president of the Los Angeles County Bar Association, Tamila C. Jensen, is the owner of the Law Offices of Tamila C. Jensen, PC., in Granada Hills, California, where she focuses on elder law and real estate law. She is a former president of the San Fernando Valley Bar Association and Neighborhood Legal Services Los Angeles where she remains on the board of directors.

BARRISTERS TIPS

by John Ford

What should an attorney do if a represented client tells the attorney that the client is planning to take his or her own life? The legal process can be extraordinarily stressful. At some point, any attorney may have a client who is facing financial ruin or an ugly divorce that tears the client's family apart—the kind of thing that can take someone to the absolute breaking point. It is worth thinking about how to react to such a situation before it actually happens. If the first reaction is to call 911 or a mental health professional, one may be surprised to learn that taking action to save the client's life violates the California Rules of Professional Responsibility and that an attorney could be disciplined by the State Bar for doing it.

For me, the issue is not hypothetical. In my current practice, I exclusively represent victims of rape and sexual assault. Protecting victims' rights is a very rewarding role that allows me to positively impact people's lives. However, it can also be a stressful job because every person I represent is the victim of sexual violence, and many of them are suffering from serious emotional trauma. Many of my clients have attempted to commit suicide or threatened to commit suicide.

Attorney's Role

Early on in this role, I thought about what I would do if one of my clients told me he or she was going to commit suicide. How could I stop it? What could I do? If, someday, one of my clients did tell me he or she was about to kill him- or herself, I wanted to know if I, even as the person's legal representative, could tell someone who could get to the client in time and intervene to save a life.

I looked up California's Rules of Professional Responsibility governing the disclosure of confidential information in such situations and found that disclosure was absolutely prohibited. California's Rule 1.6(b) says that an attorney can only reveal client confidential information if it is necessary to prevent a criminal act that could result in death or serious bodily harm. Suicide is not a criminal offense any longer in any state in the Union. Thus, because suicide is not a crime, if my client tells me of a plan to kill him- or herself, I am prohibited from telling anyone about it without the client's permission. I cannot even call 911 to have an ambulance dispatched to the client. This is an absurd rule rooted in an overly restrictive idea of what is required to protect client confidences, and the rule endangers the lives of vulnerable people.

Most lawyers take client confidentiality seriously and are competent to make reasonable judgments when extraordinary circumstances arise. The importance of the attorney-client privilege is drilled into a lawyer's head from the day he or she sets foot on campus for the first day of law school.

There is a better way, one that has been adopted by many other jurisdictions. In 2002, the American Bar Association (ABA) amended its Model Rules to allow disclosure of a client's suicidal ideation. The old Rule 1.6 permitted disclosure only to prevent a criminal act that could result in death or substantial bodily harm—just as California's rule does today. However, the ABA changed the rule to remove the requirement that there be a criminal act in the case of such disclosure, and a lawyer may now disclose client communications "to prevent reasonably certain death or serious bodily harm." States have increasingly followed the ABA's lead, and 35 states now allow attorney disclosure of a client's suicidal ideation if it is necessary to preserve human life. Furthermore, a few states currently even require disclosure in these circumstances.

Attorney-Client Privilege

The experience from the states that now follow the ABA's guidance demonstrates that allowing lawyers to reveal confidences when necessary to preserve life and limb does not lead to an epidemic of unwarranted disclosures. Most lawyers take client confidentiality seriously and are competent to make reasonable judgments when extraordinary circumstances arise. The importance of the attorney-client privilege is drilled into a lawyer's head from the day he or she sets foot on campus for the first day of law school. Attorneys are not in the business of frivolously revealing client's secrets. They do, however, need to be trusted with the freedom to take necessary action in extraordinary circumstances.

As attorneys, we must protect confidentiality but we also have to look after our clients' interests. How can we say that we are looking after our clients' interests if we can't even act to save their lives? California's Rules of Professional Responsibility should be amended to bring them in line with the emerging consensus that, in extreme circumstances, the greater interest of protecting clients' lives outweighs the interest in protecting their secrets. ■

John Ford is a member of the executive board of the Barristers/Young Attorneys Section of the Los Angeles County Bar Association. He has served 10 years as a U.S. Army Judge Advocate.

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By Brian S. Kabateck and Nidya Gutierrez

Practice Tips

Insurance as a Lifeline to Businesses Suffering Pandemic Losses

Brian S. Kabateck is a former president of the Los Angeles County Bar Association and a consumer rights attorney as well as founder of Kabateck LLP. He represents plaintiffs in insurance bad faith lawsuits, insurance coverage disputes, class actions, catastrophic personal injury cases, and commercial litigation. Nidya Gutierrez is an attorney whose practice focuses on consumer protection, including insurance bad faith and personal injury.

As the COVID-19 global pandemic continues to impact nearly every aspect of daily life, business interruption insurance coverage has become the focal point of commercial property policyholders, insurers, and their attorneys during this crisis. Businesses across the country have filed insurance claims and subsequent state and federal lawsuits, seeking recovery under their insurance policies for financial harm incurred as a result of the various governmental shutdown orders requiring nonessential businesses to close (or limit operations) in order to combat the progression of COVID-19.[1] Multiple questions need to be answered to determine whether specific property insurance policies apply to losses caused by the COVID-19 shutdown orders issued by numerous local and state municipalities. These questions are driving the determination of rapidly developing issues in business interruption insurance litigation. As is the case with all contracts, the analysis of an insurance policy will depend on the specific language of the policy.

Property insurance is an agreement whereby the insurer agrees to indemnify the insured in the event that the insured property suffers a covered loss.[2] Property insurance may be written on an all-risk (or open peril) basis, covering all losses not expressly excluded by the policy, or on a specified perils (or named perils) basis, covering loss or damage from specified causes only.[3] Under an all-risk policy, the exclusions become the limitation on loss coverage.[4] Under a specified-perils policy, the initial focus is on whether the cause of loss was a named peril (e.g., fire), and only if it was do the exclusions become relevant.[5]

Business interruption coverage issues in the context of the COVID-19 shutdown orders typically involve an all-risk policy that covers all risks of direct physical loss or damage to the property. In this scenario, the insured has the threshold burden of proving a loss within the policy's scope of coverage.[6] Once the insured has done so, the burden shifts to the insurer to prove the loss is specifically excluded.[7] The burden on the insured in this situation is usually minimal, typically requiring proof only that the insured suffered a "direct physical loss of" or "damage to" covered property while the policy was in effect.[8]

Commercial property insurance policies often include coverage for damages sustained from "loss of business income" (also known as "business interruption" coverage) resulting from a covered peril (sometimes worded as "suspension of operations" at the insured premises). The

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purpose of business interruption insurance is "to indemnify the insured against losses arising from his inability to continue the normal operation and functions of his business, industry, or other commercial establishment."[9] The coverage normally extends for the time it takes to rebuild, repair, or replace the insured's operations with the exercise of due diligence, often up to a specified period of time. This insurance may be purchased as a separate policy but is usually either part of, or an endorsement to, a commercial property insurance policy. The following sample provision in a property insurance policy provides business interruption coverage:

> We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your operations during the period of restoration. The suspension must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.

Thus, assuming a property insurance policy contains business interruption coverage, in order to trigger this coverage, policies typically require that there be a "necessary suspension" of operations. Some policy forms define "suspension" to include a slowdown of the insured's business activities, as well as complete cessation of operations.[10] However, when the term is not defined within the policy, courts interpret the ordinary meaning of the term "suspension" as a temporary but complete cessation of activity.[11] In addition, policies typically define "business income" as: 1) net income (net profit or loss before income taxes) that would have been earned or incurred and 2) continuing normal operating expenses incurred, including payroll.[12] Some policies may state a specific limit of coverage (e.g., $25,000 total) and/or limit the duration of coverage (e.g., 12 months) during which business interruption losses are covered. The burden is on the insured to prove with nonspeculative evidence that it lost profits as well as the amount of its loss.[13]

Governmental Shutdown Orders

Beginning in mid-March 2020, state and local governing authorities throughout the country responded to the COVID-19 pandemic by issuing various declarations of emergency, as well as some version of a stay-at-home order to combat the progression of COVID-19. Most stay-at-home orders required nonessential businesses to close for a period of time. For example, California's March 19, 2020, stay-at-home order provides "all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors" and Los Angeles County's March 19, 2020, Safer at Home order provides, with some exceptions, "all businesses within the City of Los Angeles are ordered to cease operations that require in-person attendance by workers at a workplace."[14] As a result of these and similar orders, countless businesses suffered—and continue to suffer—significant business interruption losses, for which they sought coverage through their insurance carriers.

While loss estimates for small businesses reach as high as $383 billion a month, insurance companies routinely deny business interruption claims made in the wake of COVID-19-related closure orders by taking the position that these losses fall outside the terms of a policyholder's insurance contract.

While loss estimates for small businesses reach as high as $383 billion a month,[15] insurance companies routinely deny business interruption claims made in the wake of COVID-19-related closure orders by taking the position that these losses fall outside the terms of a policyholder's insurance contract. In addition, insurance trade groups say having to pay such monumental sums all at once could cause their industry to collapse.[16] Many key issues arise from this litigation.

Property insurance policies normally cover "direct physical loss of or damage to" the insured property, without defining these terms. The phrase "direct physical" applies to both "loss" and "damage."[17] The phrase "direct physical loss" contemplates an actual change in the insured property "occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so."[18] Thus, to trigger business interruption coverage, policyholders must prove there has been a "direct physical loss of or damage to" their insured property caused by or resulting from a covered cause of loss.

To that effect, policyholders have asserted various theories in their lawsuits against insurance companies for failure to pay business interruption benefits. One theory is that the "direct physical loss of or damage" prerequisite for business interruption coverage has been satisfied because contamination by the coronavirus constitutes "direct physical loss" requiring remediation to clean the surfaces of the covered property.[19] However, since most businesses have no evidence of the virus's presence in the business or in employees or patrons testing positive, a more common theory asserted by policyholders is that their businesses suffered a "direct physical loss" due to the suspension of their operations from the civil authorities' measures to curb transmission of COVID-19.[20] Yet another group has asserted a theory that the stay-at-home government orders "were issued in response to dangerous physical conditions and caused a suspension of business operations on the covered premises."[21] Courts have recognized that despite the absence of physical alteration, a physical loss may occur when a property is rendered uninhabitable or unusable for its intended purposes.[22]

While most courts have been agreeing with insurers' interpretation of the phrase "direct physical loss of or damage" as it pertains to losses resulting from COVID-19 shutdown, at least one federal court has adopted the reading asserted by policyholders.[23] On August 12, 2020, the U.S. District Court for the Western District of Missouri allowed a group of businesses to proceed with a proposed class action against an insurance company that denied coverage for losses sustained during COVID-19 shutdowns.[24] In *Studio 417 Inc., et al. v. The Cincinnati Insurance Company*, the district court judge denied the insurance company's motion to dismiss, rejecting the argument that the policy's requirement of "direct physical loss or damage" property can only be satisfied by "actual, tangible, permanent, physical alteration."[25] The judge held that the

insurance company conflates "loss" and "damages" when the terms actually have different meanings.[26] Since neither of the terms is defined in the policy, the judge relied on the dictionary, which defines loss as the "act of losing possession" or "deprivation."[27] This ruling does not conclusively find that the losses are covered, but it does allow the action to proceed.

Regardless of the theory, insurance companies predictably contend that these losses fall outside the terms of a policyholder's insurance contract. Many (if not most) property insurance policies contain a virus exclusion, which is used by the insurers to negate business interruption coverage.[28] Thus, even under the first theory, when policyholders assert that contamination by the coronavirus constitutes "direct physical loss" requiring remediation to clean the property, insurance companies contend this virus exclusion explicitly negates this type of coverage.

Virus Exclusion

Even when business interruption losses result from direct physical loss of or damage to covered property, the property damage still must be caused by a covered loss and not otherwise excluded by the policy. Many commercial property policies exclude losses caused by viruses or bacteria. An exclusion entitled "Exclusion of Loss Due to Virus or Bacteria" is attached to many standard commercial policies and expressly excludes "loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."[29] Therefore, even if damage to covered property is determined to have occurred, insurance companies contend that this endorsement excludes business interruption losses due to the coronavirus.

Many policyholders circumvent this exclusion by arguing that the known presence of the virus within their establishment is not what is causing their losses, but rather, their businesses were interrupted due to the suspension of their operations from the civil authorities' measures and therefore, the virus exclusion is inapplicable. Thus, as further explained below, policyholders commonly invoke civil authority coverage if it is provided by their policy. Again, once the policyholder has met its initial burden of showing a physical loss, the burden shifts to the insurer to establish that the virus exclusion applies. In addition, the terms of a particular exclusion are important in determining whether the exclusion applies.[30]

Many commercial policies include an additional coverage known as "civil authority." The coverage typically applies when an insured is unable to access its property due to a government order as a result of physical damage to adjacent or nearby property. If the policy requires physical damage to adjacent or nearby property, the insured must establish a connection between the government order and that physical damage.[31] The following sample provision in a property insurance policy provides additional civil authority coverage:

> When the Declarations show that you have coverage for Business Income and Extra Expense, you may extend that insurance to apply to the actual loss of Business Income you sustain and reasonable and necessary Extra Expense you incur caused by action of civil authority that prohibits access to the described premises. The civil authority action must be due to direct physical loss of or damage to property at locations, other than described premises, that are within 100 miles of the described premises, caused by or resulting from a Covered Cause of Loss.

The purpose of the civil authority provision is to expand the business interruption coverage to apply when civil authorities prohibit access to the area where the insured's property is located. Thus, policyholders are seeking to invoke this coverage for their business interruption losses resulting, they argue, not from the presence of the virus itself, but from the various stay-at-home orders issued by government authorities, which required nonessential businesses to close (or limit operations) for a period of time. On the other hand, insurers argue that civil authority coverage is not available in this context because the action of civil authority must "prohibit access" to the described premises for there to be any potential of coverage, and policyholders often point at most to a limited-use restriction. For example, some orders involve mandatory closures of certain businesses, and others only provide cautionary instructions to citizens. Thus, the order in question must be closely examined. Orders that "impede" or "regulate" access but still permit access may present a higher hurdle for policyholders to trigger civil authority coverage, while an order that truly "prohibits" access may not.

In addition, if the policy requires physical damage to adjacent or nearby property, the insured must establish a connection between the government order and that physical damage. For example, following the September 11, 2001, terrorist attacks, the Second Circuit held that United Airlines was not entitled to civil authority coverage because Ronald Reagan Washington National Airport was shut down before the attack on the Pentagon and not "as a direct result of damage" to adjacent property, as required by the policy.[32] The evidence showed that the shutdown was based on the fear of future attacks.[33]

However, in *Sloan v. Phoenix of Hartford Insurance Company*, the court interpreted the civil authority provision as not requiring physical damage to property to trigger coverage.[34] In *Sloan*, owners and operators of movie theaters made a claim for business interruption coverage following a curfew ordered by the governor of Michigan in response to widespread riots.[35] The policy provided coverage "against loss resulting directly from necessary interruption of business caused by damage to or destruction of real or personal property by peril(s) insured against during the term of this policy, on premises occupied by the insured and situated as herein described." Further, this policy was "extended to include the actual loss as covered hereunder, during the period of time, not exceeding 2 consecutive weeks, when as a direct result of the peril(s) insured against, access to the premises described is prohibited by order of civil authority."[36]

After reviewing the plain language of the policy, the court held there was business interruption coverage under the civil authority provision for losses incurred to comply with the governor's order.[37] In addition, the language of the government order that a policyholder relies upon is also important, since aside from the "prohibit access" requirement, insurers also argue that the virus exclusion still applies to civil authority coverage because the orders essentially stem in some way from the virus.

Insurance policies are contracts, and courts interpret them as such. Given the variances in policy language, whether a particular policy will provide coverage will depend upon the actual language of the policy and the specific circumstances giving rise to the claim. One thing is certain, the battle between policyholders and their insurers over coverage related

to business interruption losses amid COVID-19 is just getting started. ■

[1] In re COVID-19 Bus. Interruption Prot. Ins. Litig., MDL No. 2942 (J.P.M.L. 2020).
[2] Garvey v. State Farm Fire & Cas. Co., 48 Cal. 3d 395, 406 (1989).
[3] *Id.*; Julian v. Hartford Underwriters Ins. Co., 35 Cal. 4th 747, 751, 764 n.2 (2005).
[4] Garvey, 48 Cal. 3d at 407.
[5] *Id.* at 406.
[6] *Id.*
[7] *Id.*
[8] Central Nat'l Ins. Co. v. Superior Ct., 2 Cal. App. 4th 926, 932 (1992).
[9] Pacific Coast Eng'g Co. v. St. Paul Fire & Marine Ins. Co., 9 Cal. App. 3d 270, 275 (1970).
[10] IS0 Props., Inc., Bus. Income (and Extra Expense) Coverage Form, CP 00 30 06 07 at ¶ F.6.
[11] Buxbaum v. Aetna Life & Cas. Co., 103 Cal. App. 4th 434, 444 (2002).
[12] ISO form, *supra* note 9, CP 00 30 06 07 at ¶ A.1.
[13] Pyramid Tech., Inc. v. Hartford Cas. Ins. Co., 752 F. 3d 807, 822 (9th Cir. 2014).
[14] Exec. Order No. N-33-20 (March 19, 2020); Safer At Home, Pub. Order Under City of Los Angeles Emergency Auth. (Mar.19, 2020 (revised May 27, 2020).)
[15] Press Release, Am. Prop. Cas. Ins. Ass'n, David A. Sampson, APCIA: Insurance Perspective on COVID-19 (Mar. 26, 2020), *available at* https://www.pciaa.net/pciwebsite/Cms/Content/ViewPrint?sitePageId=59762.
[16] Jeremy Roebuck & Catherine Dunn, *Should insurance companies pay for coronavirus shutdown losses? Philly businesses are taking them to court*, PHILADELPHIA INQUIRER, May 17, 2010, https://www.inquirer.com/business/small-business/philly-businesses-are-suing-their-insurance-companies-over-covid-19-losses-20200517.html.
[17] Ward Gen. Ins. Servs., Inc. v. Employers Fire Ins. Co., 114 Cal. App. 4th 548, 554 (2003).
[18] MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co., 187 Cal. App. 4th 776, 779 (2010).
[19] *See* Cajun Conti LLC et al. v. Certain Underwriters at Lloyd's, London et al., No. 2020-02558 (La. Dist. Ct., Orleans Parish, Mar. 16, 2020); Pez Seafood DTLA, LLC v. Travelers Indem. Company, et al, No. 2:20-cv-04699-DMG-GJS (C.D. Cal. Apr. 20, 2020).
[20] *See* El Novillo Restaurant, et al. v. Certain Underwriters at Lloyd's, London et al., No. 1:20-cv-21525-UU (S.D. Fla. Apr. 9, 2020).
[21] Cafe Int'l Holding Co. LLC v. Chubb Ltd. et al., No. 1:20-cv-21641 (S.D. Fla. Apr. 20, 2020).
[22] *See* Port Auth. of N.Y and N.J. v. Affiliated FM Ins. Co., 311 F. 3d 226, 236 (3d Cir, 2002).
[23] Studio 417 Inc., et al. v. The Cincinnati Ins. Co., No. 6:20-cv-03127, Doc. 40 (W.D. Mo., Aug. 12, 2020).
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] ISO form, *supra* note 9, CP 01 40 07 06, Exclusion of Loss Due to Virus or Bacteria.
[29] *Id.*
[30] *See* Safeco Ins. Co. of Am. v. Robert S., 26 Cal. 4th 758, 764 (2001).
[31] United Airlines, Inc. v. Insurance Co. of State of PA., 439 F. 3d 128 (2d Cir. 2006).
[32] *Id.*
[33] *Id.*
[34] Sloan v. Phoenix of Hartford Ins. Co. et al., 46 Mich. App. 46 (Mich. Ct. App. 1973).
[35] *Id.*
[36] *Id.*
[37] *Id.*

by Gary B. Ross

Practice Tips

Employers Beware: Anticipating a Post-COVID-19 Workplace

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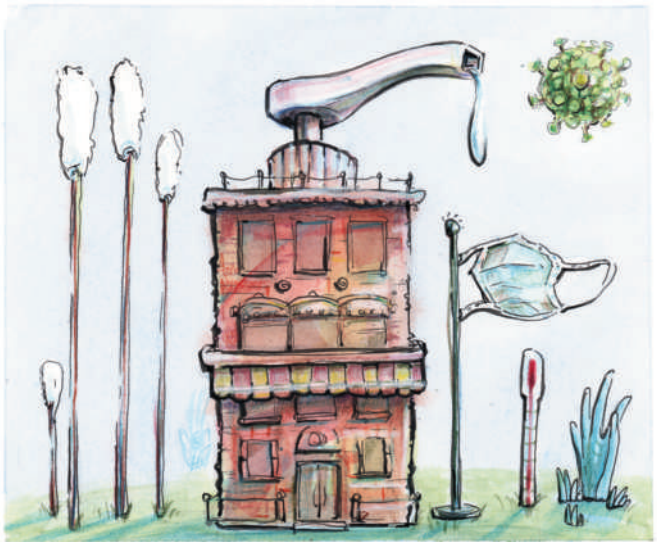
COVID-19 has resulted in devastating loss of life (more than 200,000 American fatalities),[1] economic calamity (historic unemployment and business closures), and international and racial tension. It is not surprising, therefore, that the pandemic has invaded the U.S. workplace. With businesses forced to close, lay off workers, conduct workforce reductions, furloughs, and/or shift workers to remote locations, the coronavirus has trampled working relationships such that, even after the contagion passes, workplaces are unlikely to ever be the same.

Disputes over responsibility for workplace safety were anticipated from the outset, and parties now have turned to the courts and elected officials seeking legal relief and remedies. Legal wrangling between labor and management is already under way and evidenced in hotly contested lawsuits and unprecedented governmental orders. Employee groups are arguing for implementation of strict rules requiring management to ensure a safe workplace. In one case, the American Federation of Labor and Congress of Industrial Organizations filed a lawsuit seeking an emergency order requiring the federal Occupational Safety and Health Administration (OSHA) to promulgate (and enforce) safety standards to protect workers.[2] Business owners and management groups, by contrast, are actively working to oppose these claims, measures, and orders, and to otherwise limit employer liabilities. The U.S. Chamber of Commerce, for example, is advocating for "safe harbor" protection for employers, insulating them from anticipated lawsuits by workers and/or customers who claim they were infected by the virus at a business establishment.[3]

In this environment, in order to ensure a safe return to work and avoid legal liabilities, employers must be mindful of how and under what circumstances work should be resumed. To that end, employers will need to pay careful attention to, and comply with, emerging laws, orders, regulations, and measures aimed at ensuring safe workplaces, and which will impose new legal obligations on management.

Stay-at-Home Workers

Measures are being considered that, if they become law, will require business owners to dedicate time and financial resources to ensure compliance and avoid liability to stay-at-home workers. Assembly Bill 1492 (the Telecommuting Act), for example, would provide flexibility to those working remotely. Among other things, it would relax regulations that dictate when and whether remote workers must take rest and meal breaks. It would include a requirement that employers compensate workers for missing breaks. It would require employers to pay for various work-at-home expenses, such as computer equipment and communication tools that are necessary to work remotely.



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Notably, AB 1492 would also require employers to reimburse other home or "home-office" expenses, including a portion of the employee's internet and utility bills.

If enacted, proposed AB 3216 will guarantee employees up to 12 weeks of unpaid leave for hospitality workers and airport employees. This legislation would enable a parent, guardian, or custodian to care for a dependent whose school or daycare has been closed due to a health emergency. Under AB 3216, the worker on leave would enjoy job protection for leave taken (up to the maximum of 12 weeks).

Senate Bill 1383 will extend job protection by enabling workers of smaller companies (5 or fewer employees) to take 12 weeks of unpaid family leave to care for a family member, without risking their jobs.

A paid leave proposal is pending in SB 729. If it becomes law, SB 729 would require companies to provide 80 hours of paid sick leave to certain essential workers (e.g., full-time food industry employees), during a COVID-19 declared emergency.[4]

As part of this new order, companies will need to create, modify, implement, and update handbooks, policies, procedures, and routines. In the "new normal" of work life after the pandemic, compliance with these measures will be considered essential from a health standpoint and for liability reasons.

Workers Compensation System

California's Workers Compensation program is a statutory method of compensating workers who suffer a workplace injury or illness.[5] The statutory scheme is streamlined in that, among other things, compensation can be recovered regardless of fault and without regard to negligence.[6] To receive compensation, however, the worker must prove that the illness or injury arose "out of and in the course and scope of employment." At the outset of the pandemic, California Governor Gavin Newsom attempted to remove this obstacle to recovery by issuing a Temporary Executive Order creating a presumption that if a worker contracts COVID-19, it occurred on the job.[7]

The California State Legislature is considering several measures that would codify Governor Newsom's Temporary Executive Order. Senate Bill 1159, for example, would make COVID-19 an "on the job" injury and ensure that it would be covered under the state's workers compensation program. Notably, SB 1159 would shift the burden of proving "on the job" liability to the employer (e.g., requiring employers to prove that the virus was contracted outside the workplace).

Assembly Bill 196 would go a step further than SB 1159. This legislation, if passed, would create a non-rebuttable presumption that essential workers who contract COVID-19 were infected while "on the job" (e.g., with no opportunity for the employer to argue against the finding).

Statutory and Common Law Claims

Since the pandemic's outset, workers have brought lawsuits against large employers alleging a variety of statutory and common law claims, including negligence, "premises liability," retaliation for taking leave or seeking an accommodation, harassment, discrimination, and novel claims that employer inaction has created a "public nuisance." The claims range from traditional claims (negligence) to claims reimagined and applied to COVID-19 (public nuisance). In each case, workers attempt to hold companies

liable for failing to protect them from the virus. In Illinois, for example, employees of McDonald's sued the company in a class action based on alleged failures of safety protocols that amounted to a "public nuisance." In a similar case against Amazon, a group of workers alleged safety violations at a fulfillment center and sought orders that the company comply with public health guidance.

In defending against such claims, places of business will be required to demonstrate, in words and deeds, a renewed awareness of, and commitment to, a safe workplace. As a threshold matter, employers will need to be cognizant of, and adjust to, worker protection regulations, laws, and guidelines while embracing measures that impose a higher standard of health and safety protocols. Employers who, in the past, turned a blind eye to staff attending work sick, or those who, expressly or impliedly, discouraged the taking of sick leave, will no longer be tolerated. In the aftermath of the pandemic and the loss of hundreds of thousands of lives, employer actions will be scrutinized in courtrooms through the prism of COVID-19 where companies will be held to higher legal standards.

In that regard, employers will be required to develop and embrace health standards that can help prevent the spread of illness. This action will have the effect of redefining corporate culture, prioritizing health and safety on par with traditional goals of customer service, profits, quality assurance, and recent efforts aimed at eliminating workplace harassment. As a first order of business, companies should create a new position identifying one business executive—a member of senior management—to serve in a newly created role of health and safety compliance officer (or chief health officer, safety ambassador, or even safety "czar"). This person will oversee all aspects of infection avoidance. This will need to be more than a gesture: It will need to ensure the presence of a dedicated executive whose principal job is to oversee all aspects of workplace health and safety and emergency preparedness and to ensure compliance with laws and regulations.

As a complement to the safety officer, it will be equally important to convey health and safety as a workplace priority by enlisting all workers—supervisors, managers and line-workers alike—to assume responsibility for implementing and promoting a well-crafted safety campaign. As with sexual harassment, legal compliance, and other safety protocols, managers, supervisors, and line-workers should receive annual training in health and safety protocols and should be required to lead by example. As part of that training, all team members should be charged with a duty to observe and report instances of unsafe practices and persons at work who may be exhibiting symptoms of illness. Training should include the five Rs of workplace health and safety. (See sidebaron page 17).

Another method of demonstrating a commitment to a safe workplace is for employers to make the financial commitment to illness prevention and emergency preparedness by purchasing, storing, and stockpiling ready supplies of safety gear and Personal Protective Equipment (PPE). In addition to establishing and conforming to a legal "standard of care" (necessary to fend off common law negligence claims), this obligation is the subject of pending legislation. One such proposal, AB 2537, would require acute hospital facilities to stockpile three months of PPE. Generally, and even in the absence of AB 2537, supplies would include masks, gloves, gowns, goggles or protective lenses, hand sanitizers, wipes, soaps, disinfectants, paper towels, temperature gages, and thermometers. Employers should adopt enhanced cleaning protocols to include monitoring and cleaning (especially of shared spaces and common areas including lobbies, waiting areas, conference rooms, changing rooms, locker rooms, kitchens, storage areas, mail collection, restrooms, and heating and ventilation systems).

In addition to spacing, handwashing, disinfection of surfaces, and other industry-specific requirements, businesses will need to maintain strict control over shared equipment, tools, appliances, and gadgets (e.g., copy machines, pens, pencils, coffee makers, microwave ovens). Hand sanitizers should be placed throughout the organization, and at all points of entry and exit. Cleaning of areas and equipment should be performed routinely after each use (by the user) and on a systematic and periodic basis by management and include cleaning schedules that identify specific tasks and responsible persons like those schedules commonly posted in public and/or shared restroom facilities.

Occupational Spacing

The concept of social distancing has become ingrained in the public consciousness. That habit will need strict application to, and definition in, the workplace. In the workplace, such separation may be known as "occupational spacing," accomplished through multiple methods. While many employees, even before the virus, engaged in telework programs and telecommuting, there is little doubt that the prevalence of working remotely will increase. Prior concerns about the cost of technology, skepticism about whether workers would remain productive and concerns that some jobs were not conducive to being performed remotely, will be revisited through the lens of an epidemic. Teleconferencing, communicating electronically, and meeting via Facetime, Zoom, Skype—among other electronic platforms—will enjoy greater usage and may enable companies to shrink or eliminate brick-and-mortar structures thereby reducing operating expenses. Companies may also achieve occupational spacing by outsourcing jobs and/or hiring independent contractors and gig workers.

Companies can achieve occupational spacing through new office designs, including by redesigning floor plans to spread the workforce. For example, areas can be divided by work groups, practice areas, and/or business units. Such work "spheres" will serve to confine a defined group and a specific number of workers to identified portions of the workplace. Companies can limit the size of group gatherings, and/or disallow them, including in-person meetings, kitchen and restroom usage, and environments where close contact cannot be avoided. Workers can be required to eat in defined and limited locations, at their desks, or outside the office. Finally, office spaces may be redesigned to spread people out, including installation of plexiglass or other see-through barriers, temporary walls and partitions, by creating separate points of entrance and exit to reroute employees and avoid person-to-person contact by controlling and limiting movement, and by means of one-way traffic.

Occupational spacing can also be achieved by innovations in scheduling. To that end, work schedules and simple routines will need to be reimagined. Companies can achieve physical separation of workers by staggering work hours and breaks, splitting shifts, implementing flexible schedules, and adopting new definitions of weekends (e.g., Sunday/-Monday, Tuesday/Wednesday and Thursday/Friday "weekends").

Some of these measures may soon be considered baseline measures. There are harsher, more draconian, practices to be considered, including policies barring

touching of a coworker in any manner (including handshakes and fist bumps). Some consider this to be antisocial and/or bad for morale. (Similar comments have been made regarding anti-sexual harassment policies.) Others have advocated in favor of enhanced compensation for high-risk positions ("hazard" or "battle" pay) for workers who undertake essential services in close physical proximity to coworkers and/or consumers (patients, customers, or otherwise).

On-site Testing

To ensure a safe workplace, employers will need to engage in onsite testing and screening at point(s) of entry. Testing would include taking temperatures when commencing a shift and after returning from a rest or meal break, utilizing thermometers to identify (and rid the workplace of) persons exhibiting fever (like metal detectors might identify weapons and block them from entering the workplace). Screening could also take the form of self-testing and self-reporting, with repercussions (discipline) for knowingly attending work with a fever or other symptom. Companies should be mindful of privacy and related protections (including the Handicapped Persons Protection Act and the Americans with Disabilities Act (ADA) protections) but know that governmental entities have authorized testing and screening. For example, on April 23, 2020, the Equal Employment Opportunity Commission (EEOC) announced that management may test employees for signs of the virus before a work shift and that doing so does not violate the ADA.[8] Similarly, the White House's three-phase plan for reopening the country's economy calls upon employers to implement policies for testing workers through temperature checks to monitor them for symptoms of the virus.[9]

To avoid litigation liability, employers will want to consider offering voluntary return to work options. Specifically, to avoid evidence of coercion that might result in legal liability, companies should adopt opt-in return to work programs, including more flexible work from home policies, to avoid emerging claims of retaliation and/or failure to accommodate.[10] Litigation claims are emerging in which plaintiff workers are claiming that refusing them the right to work from home denies a "reasonable accommodation" to which they are reasonably and legally entitled. One such matter, pending in Massachusetts, will serve as a test case, as courts have been leery of requests for remote working as a reasonable accommodation.[11] Now, however, in the context of a pandemic and the broader need for worker protections, the requests may be viewed differently.

In order to avoid or limit liability, including liability for statutory or common law claims such as negligence, premises liability and/or nuisance claims, and in order for employers to demonstrate a reasonable standard of care, employers should take guidance from governmental health agencies and public officials, and craft policies based upon these guidelines. For example, the Centers for Disease Control and OSHA have promulgated safety standards and guidelines that offer companies some measure of "cover" against claims that management did too little to protect workers. Notably, OSHA regulations require companies to ensure a safe and healthy workplace, free of serious hazards, and OSHA is imbued with authority to conduct inspections, issue citations, and file lawsuits to enforce protection mandates and safety laws. Assembly Bill 685 further obligates employers to ensure health and safety protocols and empowers OSHA with "shut down" authority. Specifically, AB 685 will require employers to take affirmative steps if an employee contracts COVID-19. In that event, employers will have the obligation to notify workers and public health officials of possible exposures and, significantly, empowers OSHA to shut down businessess peceived as a serious health or safety risk.

Employers will need to take measures to prevent or limit claims of harassment, retaliation, and discrimination in hiring, retention, furloughs, layoffs, terminations, and returning workers to places of business. Such job actions will be scrutinized for possible signs that they are opportunistic, punitive, and/or based on illegal or improper motives. Employers who conduct partial layoffs or workforce reductions will want to do so in a neutral manner that is not based on any protected characteristic such as age, race, gender, or for contracting illness, requesting an accommodation, and/or taking time off for illness.[12] Employers also will want to implement and abide by strict policies prohibiting retaliation, harassment, and/or repercussion, or any negative consequence for the taking of sick leave.

When deciding who to bring back from temporary layoff or furlough, employers need to make careful, logical, and provable (e.g., documented) decisions based on objective criteria, in order to mitigate the risk of claims of discrimination, harassment, retaliation, and the like. Any appearance or evidence that persons are selected for rehire or refused rehire based on age, race, gender, whistleblowing, or other protected characteristic, can give rise to a potential claim under the Fair Employment and Housing Act. Similarly, the EEOC has stated its intention to protect employees from unlawful discrimination.[13]

One protective approach may be for employers to consider returning employees back to work based on a purely objective measure, such as seniority. Management will also want to avoid the implication or appearance that workers are selected for layoff or for a return to work in a discriminatory way or in a

(Continued on page 51.)

THE FIVE Rs OF WORKPLACE HEALTH AND SAFETY

- ✔ **RECOGNIZE**, observe, and identify legal violations, unsafe practices, and/or signs of illness in workers, customers, or guests.
- ✔ **REMOVE** persons exhibiting symptoms from the general employee population and workplace.
- ✔ **REPORT** and advise others who may have had contact with a person exhibiting symptoms and reveal unsafe practices to persons responsible for workplace safety (e.g., human resources or other responsible persons).
- ✔ **RESTRICT** by creating space among workers and limiting access to a workspace in which an unsafe practice occurred and/or where a person with symptoms had been observed.
- ✔ **REMEDIATE** by scheduled and periodic deep cleaning, sanitizing, and disinfecting all surface areas.

by Howard Smith

Petition the Court with Prayer?

Even though it may be inadmissible, an adverse anti-SLAPP ruling can make it extremely difficult to bring a successful motion for summary judgment later

The California anti-SLAPP (Strategic Lawsuits Against Public Participation) statute can be explained through the words of lead singer of the Doors Jim Morrison from 1969: "When I was back there in [law] school, there was a person there who put forth the proposition that you can petition the [court] with prayer. Petition the [court] with prayer? Petition the [court] with prayer? You cannot petition the [court] with prayer!"[1] Fifty years later in 2019, similar words were echoed by the California Supreme Court: "Code of Civil Procedure Section 425.16, commonly known as the anti-SLAPP statute, allows defendants to request early judicial screening of legal claims targeting free speech or petitioning activities."[2]

The application of the statute focuses on two issues or "prongs": 1) whether the claim arises out of petitioning activity, and 2) if a prayer for relief alone is insufficient, what is the necessary showing that must be made in opposing a motion under Section 425.16. The question of the proper evidentiary standard under the statute has been the subject of recent activity by the California Supreme Court and courts of appeal.

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Under Section 425.16(e), the anti-SLAPP statute applies to claims arising out of four different types of activity: 1) a written or oral statement made in a judicial proceeding; 2) a written or oral statement made in legislative, executive, or any other official proceeding; 3) a written or oral statement made in a place open to the public or a public forum in connection with an issue of public interest; or 4) any other conduct in furtherance of the exercise of the constitutional right of free speech in connection with a public issue or an issue of public interest.[3] Specifically, "[a] claim arises from protected activity when that activity underlies or forms the basis for the claim."[4]

Under Section 425.16(e)(1), the statute applies to any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding. Courts have adopted "a fairly expansive view of what constitutes litigation-related activities within the scope of Section 425.16."[5] For this reason, "[s]tatements made before an 'official proceeding' or in connection with an issue under consideration or review by a legislative, executive, or judicial body, or in any other 'official proceeding'" are subject to protection under the statute.[6]

Similarly, the "litigation privilege" of Civil Code Section 47(b) provides that a statement made as part of a judicial proceeding may not form the basis of liability.[7] The litigation privilege encompasses not only testimony in court and statements made in pleadings but also communications in connection with matters related to a lawsuit.[8] The court of appeal in *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.*[9] compared the application of Section 425.16 and Civil Code Section 47(b) with statements made during ongoing litigation: "In general, communications in connection with matters related to a lawsuit are privileged under Civil Code section 47(b) (*citations*.) Communications 'within the protection of the litigation privilege of Civil Code section 47(b) are equally entitled to the benefits of section 425.16 (*citations*.)'"[10]

The statute also applies to the filing of a lawsuit.[11] For this reason, an action for malicious prosecution based upon a party's or attorney's statements or writings in connection with or in an earlier judicial proceeding is subject to being stricken as a SLAPP suit: "[B]y its terms, section 425.16 potentially may apply to every Malicious Prosecution action, because every such action arises from an underlying lawsuit, or petition to the judicial branch."[12] Specifically, the anti-SLAPP statute protects attorneys from an action for malicious prosecution brought against them by parties whom they had sued on behalf of a client.[13]

The statute applies to pre-lawsuit notices,[14] including pre-lawsuit communication about contemplated litigation.[15] Moreover, the statute applies to statements regarding pending litigation[16] and litigation conduct, which includes settlement discussions.[17]

Under Section 425.16(e)(2) the statute applies to any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding. All statements or conduct made "in connection with an issue under consideration" by a judicial body or "other office proceeding authorized by law" are protected by the anti-SLAPP statute, even if no public issue is involved.[18]

The same bright-line test that protected statements or conduct made during a legislative, executive, judicial body, or other official proceedings (Section 425.16(e)(2)) protects conduct outside the proceedings if sufficiently related to matters considered by the official body.[19]

Under Section 425.16(e)(3), the statute applies to any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest. What constitutes a public forum is broadly defined. It is not limited to government proceedings but anything open to the public, such as the board meetings of a homeowners association.[20]

The key decision in this context is *Park v. Board of Trustees of California State University*.[21] In *Park,* the California Supreme Court found the vote of a school board leading to the denial of tenure—based upon a discriminatory intent—was not entitled to protection under the statute because the plaintiff was not suing on account of the vote but due to the later denial of tenure.[22] The rule under *Park* has been stated as: "[T]he focus is on determining what 'the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.'"[23]

The decision in *Park* and the later appellate cases appear to require an additional showing beyond whether the activity took place in a public forum. In order to fall under the protection of the statute, the statement both must have been made in in a public forum and the defendant's activity upon which liability is based must constitute protected speech or petitioning activity. Under this formulation, the supreme court in *Park* found that the statute did not apply: While the vote was made in a public forum (before the school board), the activity giving rise to the claimed liability was not the vote (which is protected) but the ultimate failure to provide tenure (not a protected activity).

Under Section 425.16(e)(4) the statute applies to any other conduct in furtherance of the exercise of the constitutional right of free speech in connection with a public issue or an issue of public interest. There are several key decisions concerning this activity. First, in *Wilson v. Cable News Network, Inc.*,[24] the California Supreme Court found that claims for employment discrimination and retaliation under Government Code Section 12940, against a news organization, could qualify for anti-SLAPP protection.[25] The supreme court reasoned that any protection would fall under Section 425.16(e)(4) as speech on a matter of public interest, as terminating an employee based on plagiarism was protected speech under the First Amendment because journalistic integrity is central to news products.[26] While the claim for employment discrimination and retaliation is protected under the statute, the supreme court found the plaintiff's claim for defamation was not subject to the anti-SLAPP statute because the employee was not a public figure and the alleged privately made statements about the reason for termination did not address a public controversy.[27]

In *FilmOn.com Inc. v. DoubleVerify Inc.*,[28] in determining whether a confidential report evaluating a company's business practices fell within the anti-SLAPP catchall provision in Section 425.16(e)(4), the commercial context of the report had to be considered, as well as its content.[29] The catchall provision required an inquiry into whether the speech contributed to the public debate, under a two-part analysis, identifying a matter of public interest and then asking what functional relationship existed between the public interest and the speech.[30] The court found the statute did not apply because a report evaluating a company's internal business practice did not involve any issue of public interest.[31]

When determining whether the defendant's conduct falls under the above subsections, a court does not consider the legitimacy of the plaintiff's claims.[32] Specifically, "[a]rguments about the merits of the claims are irrelevant to the first step of the anti-SLAPP analysis."[33]

Further, it must be acknowledged that criminal conduct is not protected under the statute. In *Flatley v. Mauro*,[34] the supreme court found that the anti-SLAPP statute did not apply to petitioning activity that is illegal as a matter of law—criminal activity, not merely violative of a statute of common law.[35] It almost became the exception that swallowed the rule because potentially any prelitigation settlement demand could be alleged to be some form of criminal extortion. However, realizing the overbreadth of the rule, the appellate courts have taken steps to limit the exception, which includes finding that heated prelitigation threats and/or settlement demands do not constitute criminal extortion.[36]

In order to avoid overreaching, it is important to know which claims do not fall under the statute. First, Section 425.16 does not apply to causes of action for legal malpractice.[37] Likewise, Section 425.16 does not apply to an action brought by a consumer against a manufacturer of dietary supplements for violations of California's unfair competition false advertising laws and the Consumer Legal Remedies Act.[38] Again, the reason for this rule is clear. The manufacturer's list of product ingredients on product labels and on its website was commercial speech, not a matter of public interest.[39]

The statute also does not apply to a bad faith claim based upon the insurer's report to the California Department of Insurance.[40] Again, the ruling is consistent with the purpose of the statute. While the report to the Department of Insurance may have triggered the plaintiff's action, the action did not arise from the report but instead from the insurer's claims handling.[41]

Similarly, the statute does not apply to an action based upon the failure to comply with the statutory requirements of Welfare and Institutions Code Section 5152 resulting in the release of a person previously detained for psychiatric evaluation.[42] Again, the action did not arise out of communicating medical information but constituted medical malpractice in releasing the patient from physical custody.[43]

Evidentiary Standard

Notwithstanding the statute's long history, California case law has focused almost entirely on the first prong, i.e., whether the statute applies. This has left open the question of what constitutes the proper standard under prong two: If the moving party has shown the anti-SLAPP statute applies, the court "must then determine whether the Plaintiff has demonstrated a probability of prevailing on the claim."[44]

On this issue, the decisions from the California Court of Appeal found that an anti-SLAPP motion worked as a motion for summary judgment in reverse, acting as a gatekeeper to weed out unsupported claims early in the litigation by requiring the plaintiff to present admissible evidence supporting every element of the claim.[45] "[A] standard 'similar to that employed in determining nonsuit, directed verdict or summary judgment motions.'"[46] For this reason, it has been called a motion for summary judgment in reverse.[47]

It was not until February 28, 2019, that the California Supreme Court issued its first decision addressing the necessary evidentiary showing—under the second prong—in *Sweetwater Union High School District v. Gilbane Building Co.*[48]

In *Sweetwater*, the California Supreme Court held that in order to demonstrate a probability of prevailing on the claim, courts require that the evidence relied on by the plaintiff must be admissible at trial.[49] Unless the evidence referred to is admissible, or at least not objected to, there is nothing for the trier of fact to credit. An assessment of the probability of prevailing on the claim looks to trial and the evidence that will be presented at that time. Such evidence must be admissible.

Consistent with the gatekeeper purpose of the statute, the supreme court found that the case law contemplated a SLAPP plaintiff's presentation of competent, i.e., admissible, evidence in support of its prima facie case in opposition to the motion.[50] The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment.[51]

The decision, however, included language that appeared to suggest a lesser evidentiary standard on the motion: While the opposition required the presentation of evidence that would be admissible at trial, evidence could be considered if it is reasonably possible the evidence would be admissible at trial.[52]

Not surprisingly, there has been little case law addressing the evidentiary standard under *Sweetwater*.[53] In fact, it took almost a full year—until February 19, 2020—for the issuance of an appellate decision that provided an interpretation of *Sweetwater* in *Kinsella v. Kinsella*.[54]

In *Kinsella*, the court of appeal addressed a cause of action for malicious prosecution based upon the filing of a prior civil action.[55] On a cause of action for malicious prosecution, the plaintiff's opposition to an anti-SLAPP motion must demonstrate the claim is "supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the Plaintiff is credited."[56]

In *Kinsella*, the inquiry focused upon whether the defendant as the plaintiff in the prior action had probable cause to bring a claim under *Marvin v. Marvin*[57] for breach of an express oral habitation agreement.[58] Relying upon *Sweetwater*, the court of appeal found the plaintiff (defendant in the prior action), had shown a probability of prevailing because he did not only submit proof to support the claim, but also evidence making a prima facie showing that the prior action was based upon false evidence.[59]

In reaching this conclusion, again relying upon *Sweetwater*, the court of appeal was clear that under prong two, the applicable standard is whether "plaintiff presented evidence of a prima facie case of the elements of the Cause of Action"—here the cause of action for malicious prosecution.[60] If the plaintiff has made the necessary showing, the court then evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law.[61] These defenses may include both factual and legal defenses, such as the litigation privilege of Civil Code Section 47(b).[62]

The gatekeeping function of the anti-SLAPP statute was affirmed on June 30, 2020, when the court of appeal in *Roche v. Hyde*[63] cited *Sweetwater* in describing the "summary-judgment-like" proceedings at prong two of the anti-SLAPP process and the need to weed out, at an early stage, meritless claims arising from protected activity.[64]

The court of appeal in *Roche* quoted the language from *Sweetwater* that the trial court may consider evidence if it is reasonably possible the proffered evidence will be admissible at trial.[65] The court of appeal in *Roche*, however, neither attempted to define this standard nor apply any kind of lesser standard. Instead, as in *Kinsella*, the court in *Roche* focused upon whether admissible evidence had been presented to show that a finding in a prior action—providing probable cause to pursue that action—was obtained through fraud.[66]

The question of the evidentiary standard on prong two of the anti-SLAPP statute continues to evolve. Based upon *Sweetwater* and the subsequent appellate decisions, it is clear the regular admissibility standard at trial will apply. Consistent with the gatekeeper function of the statute, in order to demonstrate a probability of prevailing on the claim, the plaintiff is

required to support his or her claim with admissible evidence, sufficient to sustain a favorable judgment.

For parties opposing an anti-SLAPP motion, a possible argument may exist. Consistent with the language from *Sweetwater,* it appears that a lesser standard may apply. The issue is not the presentation of admissible evidence, but in order to establish the necessary minimal merit of a claim, the court may consider evidence if it is reasonably possible the evidence would be admissible at trial.

Procedural Features

The anti-SLAPP statute has numerous procedural features. Foremost, an anti-SLAPP motion is a motion to strike and may be brought against the entire complaint.[67] However, as with any motion to strike, the moving party may move against specific allegations of petitioning activity in the complaint.[68] Again, as with any motion to strike, the filing of an answer does not preclude the later filing of the motion.[69]

It is intended that the motion be heard on an expedited basis and there are specific requirements as to when the motion may be filed and heard. Under Section 425.16(f), the motion needs to be filed within 60 days of the service of the complaint or amended complaint or at any later time in the court's discretion. Under Section 425.16(f), the motion needs to be heard not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

The filing of an amended complaint, however, does not automatically reopen the time to file the motion. If the claims in the amended complaint were included in an earlier complaint, the filing of the amended complaint does not reopen the time to file an anti-SLAPP motion as to those claims.[70]

The court maintains the ability—even when defendants did not first seek leave—to hear an untimely motion if it serves the purpose of the statute.[71] Specifically, the trial court has discretion to consider and grant late-filed anti-SLAPP motions, even when the defendant did not first seek leave before filing the motion.[72] When determining whether to hear an untimely motion, the court should consider the following: 1) the purpose of the statute, i.e., to dismiss meritless lawsuits designed to chill a defendant's petitioning activity early in the case; 2) whether there was extreme delay; 3) the status of the case, i.e., how close to trial has the motion been filed and whether significant discovery has been conducted; and 4) potential prejudice to the plaintiff.[73]

Once the motion is filed, all discovery is stayed pending the ruling on the motion.[74] The statute provides: "The court, on a noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision."[75] As shown by the language of the statute, the request for discovery during the stay may not be sought through ex-parte relief but only through a noticed motion. Similarly, the filing of an amended complaint—after the motion has been filed—does not prevent the court from ruling on the motion.[76]

An important feature of the statute is the automatic right to appeal: "An order granting or denying a special motion to strike shall be appealable under section 904.1."[77] Accordingly, as the defendant maintains the right to appeal from any adverse ruling, counsel should have a court reporter present to transcribe the hearing on the motion to facilitate appellate review.

Attorneys' Fees

Under the statute, the prevailing party may move for attorneys' fees and costs necessary to bring or oppose the motion. However, different standards apply when the defendant or plaintiff is the prevailing party.

The prevailing defendant on an anti-SLAPP motion shall be entitled to recover his or her attorneys' fees and costs.[78] The fee award is mandatory: "[A]ny defendant who brings a successful Special Motion to Strike under section 425.16 is entitled to mandatory attorney fees."[79] The court applies a lodestar approach—the number of hours reasonably expended multiplied by the reasonable hourly rate prevailing in the community—in setting a fee award under Section 425.16(c).[80]

The plaintiff can only recover attorneys' fees under Code of Civil Procedure Section 128.5 if he or she can establish the prior anti-SLAPP motion was "frivolous or solely intended to cause unnecessary delay."[81] The reference to Section 128.5 means a court "must use the procedures and apply the substantive standards of section 128.5 in deciding whether to award fees under the anti-SLAPP statute."[82] Specifically, the standards of Section 128.5 guide the implementation of the attorney fee provision of Section 425.16(c).[83]

Section 128.5(b)(2) defines "frivolous" to mean "totally and completely without merit" or "for the sole purpose of harassing an opposing party." When a motion has even partial merit, it is not "totally and completely without merit" nor can it be said its "sole" purpose is to harass.[84]

The determination if an anti-SLAPP motion is "totally and completely without merit" or "solely to harass" requires a finding "any reasonable attorney would agree such a motion is totally and completely without merit."[85] Under this standard, a motion that any reasonable attorney would agree is totally and completely without merit would be a business dispute that simply mentions incidental protected activity.[86]

Practical Considerations

When representing the plaintiff, counsel needs to advise any client of the existence of the anti-SLAPP statute, which requires: 1) the client has all of his or her evidence available before filing the case, 2) any estimate of fees or costs provided to the client includes opposing the anti-SLAPP motion, and 3) the client understands that he or she could have to pay the other side's attorneys' fees.

As the defendant's counsel, if the court determines the plaintiff has established a probability he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and the applicable burden of proof shall not be affected by that determination in any later stage of the case.[87] However, counsel needs to advise the client that even if the ruling is inadmissible, an adverse ruling on the motion will make it extremely difficult to bring a successful motion for summary judgment later in the action. ■

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[1] The Doors, The Soft Parade (Electra Records 1969).
[2] Wilson v. Cable News Network, Inc., 7 Cal. 5th 871, 880-81 (2019).
[3] City of Cotati v. Cashman, 29 Cal. 4th 69, 78 (2002).
[4] *Id.*
[5] Neville v. Chudacoff, 160 Cal. App. 4th 1255, 1268 (2008).
[6] Digerati Holdings, LLC v. Young Money Entm't, LLC, 194 Cal. App. 4th 873, 886-87 (2011).
[7] Action Apartment Ass'n, Inc. v. City of Santa Monica, 41 Cal. 4th 1232, 1241 (2007).
[8] Sylmar Air Conditioning v. Pueblo Contracting Servs., Inc., 122 Cal. App. 4th 1049, 1058 (2004).
[9] *Id.* at 1049.
[10] *Id.* at 1058.
[11] Navellier v. Sletten, 29 Cal. 4th 82, 90 (2002).
[12] Jarrow Formulas, Inc. v. LaMarche, 31 Cal. 4th 728, 734-35 (2003); Dickens v. Provident Life & Accident Ins. Co., 117 Cal. App. 4th 705, 713 (2004).
[13] Chavez v. Mendoza, 94 Cal. App. 4th 1083, 1087 (2001).
[14] Feldman v. 1100 Park Lane Assocs.,160 Cal. App.4th 1467, 1479-80 (2008).
[15] Bailey v. Brewer, 197 Cal. App. 4th 781, 789 (2011).
[16] Contemporary Servs. Corp. v. Staff Pro Inc., 152 Cal. App. 4th 1043, 1055 (2007).
[17] Gene Thera, Inc. v. Troy & Gould Prof'l Corp., 171 Cal. App.4th 901, 907-908 (2009).
[18] Briggs v. Eden Council for Hope & Opportunity, 19 Cal. 4th 1106, 1116 (1999).

[19] Maranatha Corr., LLC v. Department. of Corr. & Rehab.,158 Cal. App. 4th 1075, 1085 (2008).
[20] Lee v. Silveira, 6 Cal. App. 5th 527, 539-45 (2016).
[21] Park v. Board of Trs. of Cal. State Univ., 2 Cal. 5th 1057, 1062-67 (2017).
[22] *Id*. at 1062.
[23] Okorie v. Los Angeles Unified Sch. Dist.,14 Cal. App. 5th 574, 591 (2017).
[24] Wilson v. Cable News Network, Inc., 7 Cal. 5th 871, 871 (2019).
[25] *Id*. at 880-81.
[26] *Id*. at 884-85.
[27] *Id*. at 892-93.
[28] FilmOn.com Inc. v. DoubleVerify Inc., 7 Cal. 5th 133 (2019).
[29] *Id*. at 143-46, 149-52.
[30] *Id*. at 152-54.
[31] *Id*.
[32] Coretronic Corp. v. Cozen O'Connor, 192 Cal. App. 4th 1381, 1388 (2011); Daimler-Chrysler Motors Co. v. Lew Williams, Inc., 142 Cal. App. 4th 344, 351 (2006).
[33] Coretronic Corp., 192 Cal. App. 4th at 1388.
[34] Flatley v. Mauro, 39 Cal. 4th 299 (2006).
[35] *Id*. at 320.
[36] Malin v. Singer, 217 Cal. App. 4th 1283, 1293, 1300 (2013).
[37] Jespersen v. Zubiate-Beauchchamp, 114 Cal. App. 4th 624, 630-32 (2003).
[38] Nagel v. Twin Labs., Inc., 109 Cal. App. 4th 39, 46-49 (2003).
[39] *Id*. at 47-51.
[40] Gallimore v. State Farm Fire & Cas. Ins. Co., 102 Cal. App. 4th 1388, 1397-99 (2002).
[41] *Id*. at 1398-99.
[42] Swanson v. County of Riverside, 36 Cal. App. 5th 361, 366 (2019).
[43] *Id*. at 372-73.
[44] Navellier v. Sletten, 29 Cal. 4th 82, 88 (2002).
[45] Tichinin v. City of Morgan Hill, 177 Cal. App. 4th 1049, 1062 (2009).
[46] *Id*.
[47] *Id*.
[48] Sweetwater Union High Sch. Dist. v. Gilbane Bldg. Co., 6 Cal. 5th 931, 940 (2019).
[49] *Id*. at 946-48.
[50] *Id*. at 946-47.
[51] *Id*.
[52] *Id*. at 947.
[53] *See* Wilson v. Cable News Network, Inc., 7 Cal. 5th 871, 891-92 (2019) (burden of proof on a claim for employment discrimination.); Monster Energy Co. v. Schechter, 7 Cal. 5th 781, 795-96 (2019) (burden of proof on a claim for breach of settlement agreement.); Citizens of Humanity, LLC v. Hass, 46 Cal. App. 5th 589, 598-99 (2020) (declaration allowed as evidence on claim for malicious prosecution.); Swanson v. County of Riverside, 36 Cal. App. 5th 361, 366 n.3 (2019) (evidence on a claim for medical malpractice.); Jenni Rivera Enters., LLC v. Latin World Entm't Holdings, Inc., 36 Cal .App. 5th 766, 783 (2019) (burden of proof on a claim for breach of nondisclosure agreement.).
[54] Kinsella v. Kinsella, 45 Cal. App. 5th 442 (2020).
[55] *Id*. at 450-52.
[56] *Id*. at 453.
[57] Marvin v. Marvin, 18 Cal. 3d 660 (1976).
[58] Kinsella, 45 Cal. App. 5th at 454-57.
[59] *Id*. at 457-60.
[60] *Id*. at 463 n.16 (emphasis in original).
[61] *Id*. at 453.
[62] Peregrine Funding v. Sheppard Mullin Richter & Hampton, LLP, 133 Cal. App. 4th 658, 675-87 (2005).
[63] Roche v. Hyde 51 Cal. App. 5th 757 (2020).
[64] *Id*. at 771, 787.
[65] *Id*. at 787.
[66] *Id*. at 821.
[67] Robertson v. Rodriguez, 36 Cal. App. 4th 347, 356 (1995).
[68] Baral v. Schnitt, 1 Cal. 5th 376, 391-92 (2016).
[69] Dixon v. Superior Ct., 30 Cal. App. 4th 733, 739-40 (1994).
[70] Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism, 4 Cal. 5th 637, 640 (2018).
[71] Chitsazzadeh v. Kramer & Kaslow, 199 Cal. App. 4th 676, 684 (2011).
[72] *Id*.
[73] Platypus Wear, Inc. v. Martin Goldberg, 166 Cal. App. 4th 772, 776, 784-87 (2008).
[74] Code Civ. Proc. §425.16(g).
[75] *Id*.
[76] Salma v. Capon, 161 Cal. App. 4th 1275, 1293-1294 (2008); Summons v. Allstate Ins. Co., 92 Cal. App. 4th 1068, 1072 (2001).
[77] Code Civ. Proc. §425.16(i).
[78] Code Civ. Proc. §425.16(c).
[79] Ketchum v. Moses, 24 Cal. 4th 1122, 1131 (2001).
[80] *Id*. at 1136.
[81] Code Civ. Proc. §425.16(c); Ketchum, 24 Cal. 4th at 1131.
[82] California Back Specialists Med. Group v. Rand, 160 Cal. App. 4th 1032, 1038 (2008).
[83] Moore v. Shore, 116 Cal. App. 4th 182, 199 n.9 (2004).
[84] Gerbosi v. Gaims, Weil, West & Epstein, LLP, 193 Cal. App. 4th 435, 450 (2011).
[85] Moore, 116 Cal. App. 4th at 199; Gerbosi, 193 Cal. App. 4th at 450.
[86] Baharian-Mehr v. Smith, 189 Cal. App. 4th 265, 275 (2010).
[87] Code Civ. Proc. §425.16(b)(3).

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by Stephen Thomas

The *Cumis* Canon

Under the Cumis Rule, "canons of ethics" impose a simple formula: Clear conflicts or quit

"No one can serve two masters. Either you will hate the one and love the other, or you will be devoted to the one and despise the other."[1] This biblical stricture is the moral core of Rule 1.7 of the California Rules of Professional Conduct and the landmark *Cumis* case,[2] both of which require insurer-appointed panel defense counsel to make written disclosures to, and obtain informed written consent from, their two clients, the policyholder and the insurer, for certain conflicts of interest. While proper

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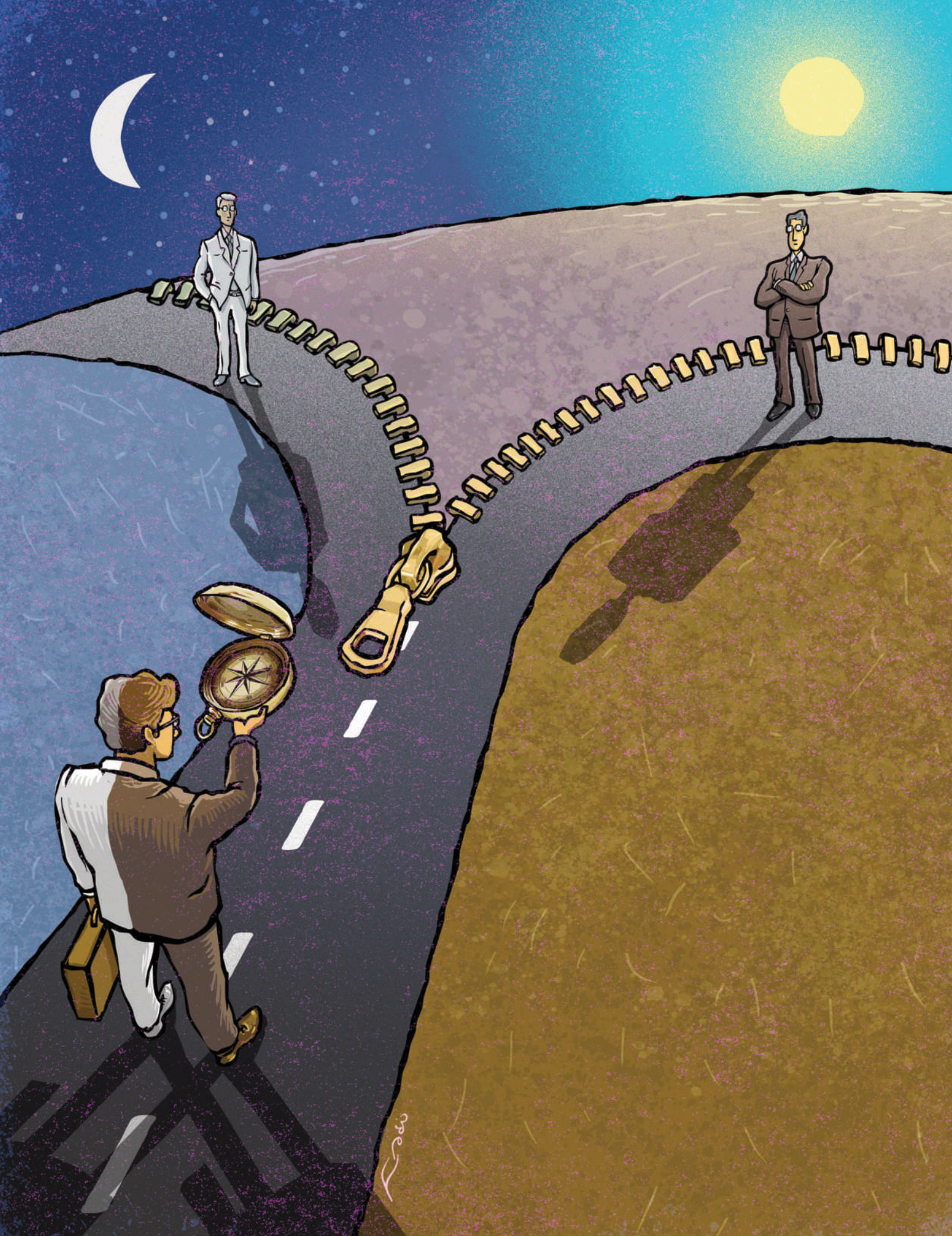

interpretation of "canons of ethics" can be challenging, well-developed case law is clear that when a liability insurer reserves its rights to deny coverage to its policyholder in a third-party liability dispute and agrees to defend its policyholder by hiring its chosen counsel (herein described as dependent counsel[3]), the insurer's lawyer must always adhere to a prescribed protocol.

This protocol includes the "Cumis Rule," the "Cumis Test," and the "Proper Cumis Analysis." The Cumis Rule requires dependent counsel to either clear conflicts or quit, in which case the insurer must pay for independent counsel. The Cumis Test objectively identifies disqualifying conflicts of interest. The Proper Cumis Analysis articulates guidance to thoroughly investigate and analyze potential conflicts of interest. While many dependent counsel are ethical, those who are not are easy to identify, and many remedies are available to policyholders, here called the "Cumis Teeth."

Rule 1.7 bars any lawyer from concurrent representation of joint clients with described conflicts of interest. The text of Rule 1.7 (with bracketed client identification) includes:

> (a) A lawyer shall not, without informed written consent from each client . . . represent a [policyholder/client] if the representation is directly adverse to [the insurer/client]… [or] (b) represent a [policyholder] if there is a significant risk the lawyer's representation of the [policyholder] will be materially limited by the lawyer's responsibilities to or relationships with [the insurer], or by the lawyer's own interests [such as a strong desire to keep the insurer happy]…[and] (d)(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; and (3) the representation does not involve the assertion of a claim by [the insurer of non-coverage] against the [policyholder/client who desires coverage]….

Such phrases as "directly adverse," "significant risk," "materially limited," and "reasonably believes" requires dependent counsel to make judgments. Subsections (a), (b), and (d) of Rule 1.7 all must be satisfied, so that a failure to comply with any one requirement disqualifies the lawyer from representation. A lawyer's "reasonable belief" alone that no disqualifying conflict of interest exists is insufficient. Clear case law has developed an objective, bright-line test of what constitutes a disqualifying conflict of interest, viz., the Cumis Test.[4]

A threshold question in the *Cumis* context is whether the insurer that hires dependent counsel qualifies technically as a "client." Case law is clear that the insurer is a client and that, even if it were not, Comment 4 to Rule 1.7 makes clear that the rule applies to "another person who may be affected substantially by the resolution of the matter." As the potential payor of defense fees and costs, an adverse judgment, and a settlement, the liability insurer always qualifies as such a person who is affected substantially by resolution of the matter. "The defense counsel-insurer relationship is unique. The insurer typically hires, pays, and consults with defense counsel…[with whom] the insurer frequently have a longstanding, if not collegial, relationship."[5] The existence of an attorney-client relationship may be easy to prove. "The signed defense guidelines, with the negotiated hourly rate, and subsequent correspondence, along with the subsequent dealings between [the insurer and dependent counsel], reflected an agreement between them and an attorney-client relationship as a matter of law."[6]

Thus, a liability insurer's reservation of rights coupled with hiring dependent counsel to represent the policyholder always triggers Rule 1.7, requiring dependent counsel to always follow the Cumis protocol.

The Cumis Rule

The two-part Cumis Rule is rooted in lawyers' canons of ethics, not insurance contract law.[7] Part one prohibits dependent counsel from unethical representation. "Canons of Ethics impose upon lawyers hired by the insurer an obligation to explain to the insured and the insurer the full implications of joint representation in situations where the insurer has reserved its rights to deny coverage. If the insured does not give an informed consent to continued representation, counsel must cease to represent both."[8] The stated remedy in part one is behavior: Dependent counsel must clear conflicts or quit.

Part two of the Cumis Rule compels the insurer to pay for independent counsel because dependent counsel is barred from ethical representation:

> Moreover, in the absence of such consent [by the policyholder], where there are divergent interests of the insured and the insurer brought about by the insurer's reservation of rights based on possible non-coverage under the insurance policy, the insurer must pay the reasonable cost for hiring independent counsel by the insured. The insurer may not compel the insured to surrender control of the litigation. (Citations). Disregarding the common interests of both insured and insurer in finding total nonliability in the third party action, the remaining interests of the two diverge to such an extent as to create an actual, ethical, conflict of interest warranting payment for the insureds' independent counsel."[9]

The remedy in part two requires the insurer to pay money to independent counsel to fulfill its contractual and statutory duty to defend.[10]

The ethical standards imposed on lawyers are high. "It is also an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances."[11] The standard establishes that an attorney is "precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests."[12]

Without ethical compliance, dependent counsel may not accept an assignment from a reserving insurer, limiting dependent counsel's conduct. "The primary purpose of this prophylactic rule is to prevent situations in which an attorney might compromise his or her representation of the client in order to advance the attorney's own financial or personal interests."[13]

There is good reason to stop unethical conduct early. The rationale for the Cumis Rule is that: "it is almost unavoidable that…the insured's attorney will come across information relevant to a coverage or similar issue."[14] The rationale for a prophylactic remedy is that a policyholder who is guided through a judicial procedure by unethical counsel may be deprived of procedural due process of law. Trying to unravel the consequences of unethical representation from hindsight is like attempting to reconstitute a whole viable egg from a baked cake.

Cumis Test

While neither the *Cumis* case nor Civil Code Section 2860 (the Cumis statute) "clearly state[s] when the right to an independent counsel vests,"[15] in the three decades since *Cumis* and Section 2860 have been on the books, a large body of case law has developed to enunciate a substantive legal test to objectively identify disqualifying conflicts of interest.

Perhaps the best statement of the Cumis Test is this: "It is only when the basis for the reservation of rights is such as to cause assertion of factual or legal theories which undermine or are contrary to the positions to be asserted in the liability case that a conflict of interest sufficient to require independent counsel, to be chosen by the insured, will arise."[16] Nevertheless, the Cumis Test has been expressed in a variety of ways, both negatively and positively, but always describing the same concept.

Expressed negatively, no disqualifying conflict of interest for dependent counsel exists, and a reserving liability insurer has no duty to pay for independent counsel if each ground upon which the insurer may later deny coverage has "nothing to do with,"[17] "is logically unrelated to,"[18] "is independent of,"[19] or "is extrinsic to"[20] disputed issues of fact or law in the liability dispute.

Expressed positively, a disqualifying conflict of interest does exist, and the reserving liability insurer is required to pay for independent counsel under the following conditions: "the basis for the reservation of rights is such as to cause assertion of factual or legal theories which undermine the positions to be asserted in the liability case";[21] "whenever [the insurer's and policyholder's] common lawyer's representation of the one is rendered less effective";[22] coverage issues "overlap"[23] issues in the third-party liability action, "the ground of non-coverage was based on the nature of the insured's conduct";[24] or "upon the insured's own conduct";[25] dependent counsel has an "incentive to attach liability to"[26] the policyholder; "the outcome of the coverage issue can be controlled by the way counsel defends the case";[27] "can be controlled by counsel first retained by the insurer for the defense of the claim";[28] "the way counsel retained by the insurance company defends the action will affect an underlying coverage dispute between the insurer and the insured";[29] or "where the issue creating the conflict is one that must be decided in the underlying action."[30]

The recently published Restatement of Liability Insurance expresses the Cumis Test as follows:

> When an insurer with the duty to defend provides the insured notice of a ground for contesting coverage under §15 and there are facts at issue that are common to the legal action for which the defense is due and to the coverage dispute, such that the action could be defended in a manner that would benefit the insurer at the expense of the insured, the insurer must provide an independent defense of the action.[31]

Fifty American jurisdictions have addressed the reservation of rights conundrum and the trend is to adopt the Cumis Rule.[32]

The "tripartite relationship" does not exempt dependent counsel from compliance with the Cumis Test:

> [I]t is settled that absent a conflict of interest [i]n the insured-insurer relationship, the attorney is engaged and paid by the [insurer] to defend the insured [who] have a common interest in defeating or settling the third party's claim. Conceptually, each member of the trio, attorney, client-insured, and client-insurer may be viewed as a loose alliance directed toward a common goal—the defense team.[33]

While the courts recognize harmony in the absence of any conflict of interest, they also recognize dissonance when conflicts arise. "[W]hen coverage is disputed, the interests of the insured and the insurer are always divergent."[34] The situation is viewed differently "when some or all of the allegations in the complaint do not fall within the scope of coverage under the policy."[35] In this situation it is recognized that there may be little commonality of interest and that "[o]pposing poles of interest are represented…in the insurer's desire to establish no coverage under the policy, and…in the insured's desire to obtain a ruling [that] liability emanated from conduct within his insurance coverage."[36] Thus, although coverage issues under the policy are not actually litigated in the third-party suit, "this does not detract from the force of these opposing interests as they operate on the attorney selected by the insurer."[37]

Accordingly, when the insurer reserves its rights, the "traditional obligations of an attorney are in no way abridged by the fact that an insurer employs him to represent an insured."[38] So, regardless of whether in the insurer-insured context or otherwise, the attorney who undertakes to represent parties with divergent interests owes the "'highest duty' to each to make a full disclosure of all facts and circumstances" necessary to enable the parties to make a fully informed decision regarding the subject matter involved in the litigation, "including the areas of potential conflict and the possibility and desirability of seeking independent legal advice."[39]

Thus, the tripartite relationship does not limit dependent counsel's ethical duties. While the harmonious, unconflicted tripartite relationship is reminiscent of the Three Musketeers' spirit of "all for one and one for all," its dissonant, conflicted version often instigates a free-for-all.

Proper Cumis Analysis

Dependent counsel must thoroughly investigate and analyze potential conflicts of interest in order to obtain a client's "informed written consent" to ethical representation. Rule 1.0.1(e) defines informed consent to mean the policyholder's "agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct." Rule 1.4 elaborates what a lawyer must explain to the client:

> A lawyer shall promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent is required; reasonably consult with the client about the means by which to accomplish the client's objectives in the representation; keep the client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed; and advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.[40]

The purpose of dependent counsel's written disclosure is to warn the policyholder to at least consider distrusting a reserving insurer and its dependent counsel. "Through reservation, the insurer gives the insured notice of how it will, or at least may, proceed and thereby provides it an opportunity to take any steps that it may deem reasonable or necessary in response."[41] This guidance includes whether the insured should accept defense at the insurer's hands and under the insurer's control, or for the insured to defend itself as it chooses.

Building on a foundation of the canons of ethics, case law clearly illuminates what dependent counsel must communicate and explain. "There is no talismanic rule that allows a facile determination of whether

a disqualifying conflict of interest exists."[42] Instead, case law goes on to warn that "'[t]he potential for conflict requires a careful analysis of the parties' respective interests to determine whether they can be reconciled…or whether an actual conflict of interest precludes insurer-appointed defense counsel from presenting a quality defense for the insured.'"[43]

One court elaborated upon the questions to be asked and answered by a Proper Cumis Analysis:

> (1) what is the exact nature of the claims asserted in the underlying action, (2) what defenses to coverage are asserted by the insurers, and to what extent, if at all, are they logically related to the liability issues raised in the underlying action, (3) what factual questions have to be resolved in order to sustain or defeat such defenses, (4) what is the likely nature of the available evidence, (5) to what extent, if at all, will [the policyholder] suffer prejudice by the enforced discovery of the evidence which tends to support or defeat its claim of coverage or the defenses raised by the insurers and (6) to what extent, if at all, will a confidentiality order realistically protect [the policyholder] from prejudicial disclosure.[44]

The duty to initiate an investigation, analysis, and written disclosure falls only on the lawyer, not on the lay policyholder. Thus, dependent counsel has "the obligation to render a full and fair disclosure to the [client] of all facts which materially affect his rights and interests."[45] In other words, attorneys have an affirmative obligation to make full disclosure, and non-disclosure itself may be considered a fraud. Under Section 2860 dependent counsel also owes a duty to the policyholder "to disclose potential conflicts of interest."[46]

If a policyholder sues dependent counsel or a reserving insurer, it assumes the evidentiary "burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."[47] However, the plaintiff's burden of proof at trial in a coverage contest should not be confused with dependent counsel's ethical burden to clear conflicts of interest before starting work on a third-party liability dispute. Dependent counsel's burden to clear conflicts or quit does not shift simply because the policyholder is forced to sue. Thus, the policyholder is only required to show that dependent counsel failed to comply with Rule 1.7, not that dependent counsel had a disqualifying conflict of interest.

In several "failure of proof" cases, however, courts found that the insurer faithfully paid all costs of defense and settlement and ruled that the insurer was not obligated to also pay for the policyholder's independent counsel. In these cases, the policyholder failed to sue dependent counsel and failed to present any evidence that dependent counsel had any disqualifying conflict of interest. On these facts, these cases conclude that "[a] mere possibility of an unspecified conflict does not require independent counsel. The conflict must be significant, not merely theoretical, actual, not merely potential."[48] Thus, it may be difficult for independent counsel to be paid by the insurer unless dependent counsel is first dispatched. Also, if coverage litigation ensues, policyholder counsel should be prepared to prove an actual and significant disqualifying conflict of interest as described by the Cumis Test.

Unethical Dependent Counsel

Many ethical dependent counsel obey the law, but it is quite easy to identify those who do not. When a liability insurer agrees to defend a policyholder under a reservation of rights and hires dependent counsel, the policyholder should always promptly receive a written disclosure letter from dependent counsel.[49] But if no disclosure has already been made, dependent counsel's ethics may be suspect.

One convenient way to ask dependent counsel for an explanation is to send an Ethical Compliance Questionnaire to dependent counsel and a Coverage Questionnaire to the insurer.[50] Some dependent counsel still may choose to disobey the law, either refusing to respond to questioning at all,[51] responding only verbally,[52] or writing dismissively.[53]

The policyholder, not counsel, should be the voice to challenge dependent counsel's ethics in writing for several reasons: 1) a writing helps avoid confusion and creates an evidentiary record; 2) dependent counsel's fiduciary duties are owed to the client, not other lawyers; 3) some courts may not admit into evidence letters deemed mere bantering of counsel but rarely fail to admit communications between parties; and 4) some dependent counsel may claim that the mere existence of policyholder counsel excuses dependent counsel's ethical compliance.

Cumis Teeth

Policyholders and their counsel have a quiver full of arrows with which to urge dependent counsel into ethical compliance without litigation. First, the policyholder may summarily fire dependent counsel. "The relation between them is such that the client is justified in seeking to dissolve that relation whenever he ceases to have absolute confidence in either the integrity or the judgment or the capacity of the attorney."[54] Second, the policyholder may move the court to recuse dependent counsel.[55] Third, the policyholder may report unethical dependent counsel to the State Bar. Fourth, the policyholder may insist that dependent counsel not be paid. "A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a [policyholder] client from one other than the client [such as the liability insurer] unless…the lawyer obtains the [policyholder/] client's informed written consent."[56] Fifth, dependent counsel may be disciplined: "Corruptly or wilfully and without authority appearing as attorney for a party to an action or proceeding constitutes a cause for disbarment or suspension."[57]

Litigation remedies are available as well. First, dependent counsel may become liable to the policyholder for damages.

> [The insurer]-hired law firm, was at that moment placed in a position of open conflict of interest. Yet neither [the insurer] nor its attorneys bothered to inform the client…Thus a lawyer who, while purporting to continue to represent an insured and who devotes himself to the interests of the insurer without notification or disclosure to the insured, breaches his obligations to the insured and is guilty of negligence [even without expert testimony].[58]

Second, liability insurers have a right to sue their own policyholder for what is known as Buss reimbursement of sums it paid to dependent counsel.[59] However, if dependent counsel has not complied with Rule 1.7, the policyholder may be able to seek indemnity from dependent counsel Also, if dependent counsel's employment contract with the insurer may be void as against public policy.[60] Thus, if the insurer gets Buss reimbursement from the policyholder, then dependent counsel may be required to indemnify the policyholder. No good reason appears for unethical dependent counsel to keep its ill-gotten gains.

Third, although diligent research has not found any reported opinion directly on point, a policyholder may be entitled to an injunction under Business and Professions Code Section 17200 against dependent counsel.[61] Part one of the Cumis

Rule controls the behavior of dependent counsel, that it not be allowed to accept assignments or compensation from a reserving insurer to represent a policyholder without first complying with Rule. 1.7. The *Cumis* holding itself says that dependent counsel "must cease to represent" the policyholder. One very recent related case holds that a policyholder may obtain an injunction against an insurer, that standing to sue is satisfied by paying money to an attorney, that a damage claim does not diminish the policyholder's right to an injunction as an adequate remedy at law, and that the policyholder need not allege a class action.[62] All of these points of law may support a policyholder's claim for an injunction against unethical dependent counsel.

Strict compliance with the *Cumis* law is good for policyholders and the justice system. Most of the enforcement tools mentioned may obviate the need to spawn coverage litigation. Vesting control of the defense and settlement in independent counsel may foster prompt settlements of third party liability disputes. But perhaps most importantly, compelling ethical compliance or the immediate withdrawal of conflicted dependent counsel may avoid the risk to the policyholder and the courts of a failure of procedural due process of law. ■

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[1] MATTHEW 6:24 (New Int'l).

[2] San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc., 162 Cal. App. 3d 358, 364 (1984).

[3] The moniker "dependent counsel" describes and differentiates its counterpart, "independent counsel."

[4] "[W]hen the reservation of rights is based on coverage disputes that have nothing to do with the issues being litigated in the underlying action...there is no conflict of interest...." (Long v. Century Indemnity Co., 163 Cal. App. 4th 1460, 1470 (2008)).

[5] Unigard Ins. Group v. O'Flaherty & Belgum, 38 Cal. App. 4th 1229, 1236-37 (1995). See also Assurance Co. of America v. Haven, 32 Cal. App. 4th 78, 83-84 (1995); United Pac. Ins. Co. v. Hall, 199 Cal. App. 3d 551, 556 (1988); Blanchard v. State Farm Fire & Cas. Co., 2 Cal. App. 4th 345, 350 (1991); Mosier v. S. Cal. Physicians Ins. Exch., 63 Cal. App. 4th 1022, 1042 (1998).

[6] Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone 79 Cal. App. 4th 114, 127 (2000).

[7] *See* Haven, 32 Cal. App. 4th at 83-84; Hall, 99 Cal. App. 3d at 556; Blanchard, 2 Cal. App. 4th at 350; Mosier, 63 Cal. App. 4th at 1042.

[8] Cumis, 162 Cal. App. 3d at 375.

[9] *Id.*

[10] "An indemnity against…liability…embraces the costs of defense…incurred in good faith, and in the exercise of a reasonable discretion; The [insurer] is bound, on request of the [policyholder], to defend actions or proceedings brought against [the policyholder] in respect to the matters embraced by the indemnity, but [the policyholder] has the right to conduct such defenses, if he chooses to do so." CIV. CODE §2778(3)(4).)

[11] Anderson v. Eaton, 21 Cal. 113, 116 (1930) (citations and ellipses omitted).

[12] *Id.*

[13] Santa Clara County Counsel Attorneys Assn. v. Woodside, 7 Cal.4th 525, 546 (1994); *see also* Gregori v. Bank of America, 207 Cal. App. 3d 291, 308 (1989).

[14] Assurance Co. of America v. Haven, 32 Cal. App. 4th 78, 87 (1995); *see also* Rockwell Int'l Corp. v. Superior Ct., 26 Cal. App. 4th 1255, 1264 (1994) ("it is unavoidable that…the insured's attorney will come upon information relevant to a coverage.")

[15] Dynamic Concepts, Inc. v. Truck Ins. Exch., 61 Cal. App. 4th 999, 1007 n.5 (1998); *see also* James 3 Corp. v. Truck Ins. Exch., 91 Cal. App. 4th 1093, 1101 (2001); Gafcon, Inc. v. Ponsor & Assocs., 98 Cal. App. 4th 1388, 1421 (2002).

[16] State Farm Fire & Cas. Co. v. Superior Ct., 216 Cal. App. 3d 1222, 1226 n.3 (1989).

[17] Long v. Century Indemnity Co., 163 Cal. App. 4th 1460, 1470 (2008).

[18] Montrose Chem. Corp. v. Superior Ct., 6 Cal. 4th 287, 302 (1993); Haskel, Inc. v. Superior Ct., 33 Cal. App. 4th 963, 980 (1995).

[19] Blanchard v. State Farm Fire & Cas. Co., 2 Cal. App. 4th 345, 350 (1991).

[20] Gafcon, 98 Cal. App. 4th at 1422.

[21] State Farm, 216 Cal. App. 3d at 1226 n.3.

[22] Spindle v. Chubb/Pacific Indem. Group, 89 Cal. App. 3d 706, 713 (1979).

[23] United Enters., Inc. v. Superior Ct., 183 Cal. App. 4th 1004, 1010 (2010).

[24] McGee v. Superior Ct., 176 Cal. App. 3d 221, 226 (1985).

[25] Foremost Ins. Co. v. Wilks, 206 Cal. App. 3d 251, 261 (1988).

[26] Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone 79 Cal. App. 4th 114, 131 (2000).

[27] Novak v. Low, Ball & Lynch, 77 Cal. App. 4th 278, 282 (1999).

[28] Civ. Code §2860(a).

[29] James 3 Corp. v. Truck Ins. Exch., 91 Cal. App. 4th 1093, 1108 (2001).

[30] Truck Ins. Exch. v. Superior Ct., 51 Cal. App. 4th 985, 994 (1996); *see also* Golden Eagle Ins. Co. v. Foremost Ins. Co., 20 Cal. App. 4th 1372, 1395-96 (1993).

[31] Restatement of the Law, Liability Insurance §16 (2019).

[32] *See* Steve Thomas, *50 State Survey Does RPC Rule 1.7 Disqualify Insurance Defense Counsel and Require Liability Insurers to Pay Independent Counsel When Reserving Rights to Deny Coverage?*, DutytoDefend.com (Aug. 28, 2020), https://dutytodefend.com/50-state-survey-does-rpc-rule-1-7-disqualify-insurance-defense-counsel-and-require-liability-insurers-to-pay-independent-counsel-when-reserving-rights-to-deny-coverage/.

[33] Gafcon, Inc. v. Ponsor & Assocs., 98 Cal. App. 4th 1388, 1407 (2002) (citations, quotation marks, and ellipses omitted); *see also* National Union Fire Ins. Co. v. Stites Prof. Law Corp., 235 Cal. App. 3d 1718, 1727 (1991) ("So long as the interests of the insurer and the insured coincide"); Unigard Ins. Group v. O'Flaherty & Belgum, 38 Cal. App. 4th 1229, 1236-37 (1995) ("[W]here there is otherwise no actual or apparent conflict of interest.")

[34] San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc., 162 Cal. App. 3d 358, 375 (1984).

[35] *Id.* at 364-65 (citations, quotation marks, and ellipses omitted).

[36] *Id.*

[37] *Id.*

[38] Betts v. Allstate Ins. Co., 154 Cal. App. 3d 688, 716 (1984) (ellipses omitted).

[39] *Id.*

[40] Ellipses omitted.

[41] Buss v. Superior Ct., 16 Cal. 4th 35, 61 n.27 (1997).

[42] Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone 79 Cal. App. 4th 114, 131 (2000) (quoting Dynamic Concepts, Inc. v. Truck Ins. Exch., 61 Cal. App. 4th 999, 1007-1008 (1998).

[43] *Id.*

[44] Haskel, Inc. v. Superior Ct., 33 Cal. App. 4th 963, 980 (1995); *see also* Armstrong Cleaners, Inc. v. Erie Ins. Exch., 363 F. Supp. 2d 797, 816 (S.D. Ind. 2005) ("fact- intensive and case-specific nature of the inquiry").

[45] Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 188-89 (1971).

[46] Canton Poultry & Deli, Inc. v. Stockwell, Harris, Widom & Woolverton, 109 Cal. App. 4th 1219, 1224 (2003).

[47] EVID. CODE §500.

[48] *See* Dynamic Concepts, 61 Cal. App. 4th at 1007; see also Midiman v. Farmers Ins. Exch., 76 Cal. App. 4th 102, 120 (1999); James 3 Corp. v. Truck Ins. Exch., 91 Cal. App. 4th 1093, 1099 (2001); Federal Ins. Co. v. MBL, Inc., 219 Cal. App. 4th 29, 48 (2013); Centex Homes v. St. Paul Fire & Marine Ins. Co., 237 Cal. App. 4th 23, 31-32 (2015); Centex Homes v. St. Paul Fire & Marine Ins. Co., 19 Cal. App. 5th 789, 802 (2018).

[49] *See* DutytoDefend.com, Model Conflict of Interest Disclosure Letter, http://dutytodefend.com/model-conflict-of-interest-disclosure-letter/ (last accessed Sept. 25, 2020).

[50] *See* DutytoDefend.com, Ethical Compliance Questionnaire, http://dutytodefend.com/ethical-compliance-questionnaire/and Coverage Questionnaire (last accessed Sept. 25, 2020).

[51] Some dependent counsel recognize that complying with the Cumis protocol may scare off the policyholder resulting in the loss of valuable new business and angering the insurer. In short, poking the bear can be bad for business.

[52] *See* DutytoDefend.com, Pitches and Fallacies of Dependent Counsel—PP, http://dutytodefend.com/pitches-and-fallacies-of-dependent-counsel/ (last accessed Sept. 25, 2020).

[53] Real-life terse responses have been limited to: "There is no conflict of interest," or "Your analysis is flawed," or "*Cumis* has been superceded."

[54] Fracasse v. Brent, 6 Cal. 3d 784, 790 (1972).

[55] For a Model Motion to Disqualify Dependent Counsel, *see* http://dutytodefend.com.

[56] CAL. R. OF PROF'L CONDUCT R. 1.8.6(c).

[57] BUS. & PROF. CODE §6104.

[58] "Expert testimony is not required to establish legal malpractice in all cases. (Citation) This is not a case in which the question of breach turned on legal technicalities requiring the fine exercise of professional judgment. The issue was simply whether (dependent counsel) did or did not abandon (the policyholder/client's) best interests in deference to the conflicting interest of (the insurer). The proof on that issue was clear in its inculpatory impact. It speaks for itself without the aid of expert opinion." (Betts v. Allstate Ins. Co., 154 Cal. App. 3d 688, 710, 716 (1984).)

[59] Buss v. Superior Ct., 16 Cal 4th 35 (1997). Rule 1.8.6 prohibits dependent counsel from accepting compensation from an insurer without the policyholder's informed written consent.

[60] The Rules are "an expression of public policy to protect the public. A contract in violation of [old] Rule 3-310(C) [now Rule 1.7] is against the public interest." (Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc., 244 Cal. App. 4th 590, 614-16 (2016).)

[61] For a Model Motion to Enjoin Dependent Counsel, *see* http://dutytodefend.com.

[62] Ghazarian v. Magellan Health, Inc., 53 Cal. App. 5th 171 (2020)).

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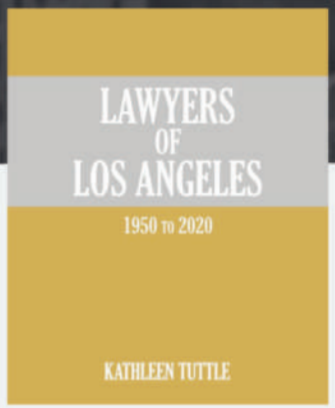

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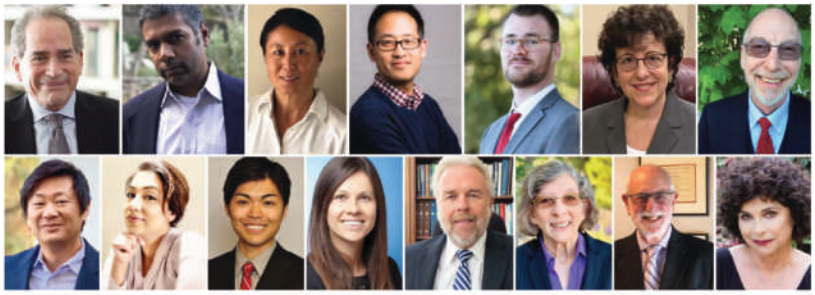

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35 Miller Avenue, Suite 331, Mill Valley, CA 94941, (415) 381-3133, fax (415) 381-3131, e-mail: jsrutch@neoma.com. Website: www.neoma.com. Jonathan S. Rutchik, MD, MPH, FAAN, FACOEM is one of the few physicians in the USA who is board certified in both Neurology and Occupational and Environmental Medicine. An Associate Professor at UCSF, he provides clinical evaluations and treatment, including electromyography, of individuals and populations with suspected neurological illness secondary to workplace injuries or chemical exposure. Services include medical record and utilization review and consulting to industrial, legal, government, pharmaceutical, and academic institutions on topics such as metals and solvents, carbon monoxide poisoning, pesticides, mold exposures, product liability, musicians' injuries, neurological fitness for duty in police, firefighter, DOT and safety sensitive positions as well as head injuries and neurological trauma. Offices in SF, Richmond, Petaluma, Sacramento, and Eureka/Arcata. Licensed in CA, NY, MA, NM and ID. **See display ad on page 47.**

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PRACTICE TIPS

(Continued from page 17.)

manner that shows a "pattern" against, or a disproportionate impact on, "protected" workers. For example, employers inviting younger workers to return to work while refusing older workers could give rise to claims of age discrimination.[14] Similarly, if only healthy workers are brought back or pregnant workers are excluded, bias claims could be brought, based on a pattern of job actions that work to the detriment of "protected" workers.[15]

To this point, the EEOC has issued guidance on proper approaches to a "Return to Work" that addresses how to handle requests by employees for time off and other accommodations and warns employers of the risk of claims of retaliation, harassment, and discrimination when businesses reopen.[16]

The contagion will permanently alter the workplace and redefine working relationships, including matters that are based on economic need, health concerns, and new social mores. Various legal burdens and obligations now alter the way companies manage their workforces. The pandemic requires employers to reimagine the workplace in myriad ways and to navigate new burdens, expenses, and hardships. To ensure compliance and avoid liabilities, employers must be cognizant of new and emerging legal obligations, including obligations to stay-at-home workers, changes to workers' compensation laws, and by anticipating litigation of statutory and common law claims. Whatever becomes of the relationship between employees and employers, there is little doubt that the workplace is, and will be, permanently altered by the sickness known as COVID-19. ■

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[1] *Covid in the U.S.: Latest Map and Case Count*, N.Y Times, *available at* https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html (last accessed Oct. 5, 2020).

[2] Braden Campbell, *DC Circ. Tosses AFL-CIO Suit Seeking Virus Safety Rule*, Law360, www.law360.com/employment/articles/1282136.

[3] Laurence Darmiento, *Businesses are reopening. If you're older or sick, what happens to your job?* L.A. Times, May 25, 2020, *available at* https://www.latimes.com/business/story/2020-05-22/coronavirus-reopening-preexisting-conditions-seniors-older-workers.

[4] *See* Susan E. Groff, *California Legislature Proposes Bill Mirroring Executive Order Regarding Food Sector Supplemental Paid Sick Leave*, Nat'l L. Rev., Jul. 23, 2020, *available at* https://www.natlawreview.com/article/california-legislature-proposes-bill-mirroring-executive-order-regarding-food-sector.

[5] Lab. Code §§3600 *et seq*.

[6] Lab. Code §3602(a).

[7] Press release, Governor Gavin Newsom Announces Workers' Compensation Benefits for Workers who Contract COVID-19 During Stay at Home Order (May 6, 2020), *available at* ttps://www.gov.ca.gov/2020/05/06/governor-newsom-announces-workers-compensation-benefits-for-workers-who-contract-covid-19-during-stay-at-home-order.

[8] U.S. Equal Employment Opportunity Comm'n, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws, *available at* www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (last accessed Sept. 23, 2020) [hereinafter What You Should Know].

[9] The White House, Guidelines: Opening Up America, *available at* www.whitehouse.gov/openingamerica (last accessed Sept. 23, 2020).

[10] Linn v. CGIT Systems, Inc., No. 1:20-cv-11051(D. Mass., June 3, 2020).

[11] *Id*.

[12] Cal. Fair Employment and Hous. Act, Cal. Gov. Code § 12940, et. seq.

[13] U.S. Equal Employment Opportunity Comm'n, Coronavirus and COVID-19, *available at* www.eeoc.gov/coronavirus (last accessed Sept. 23, 2020).

[14] *See* McDonnell Douglas v. Green, 411 U.S. 792 (1973); Levy v. Regents of Univ. of Cal., 199 Cal. App. 3d 1334, 1343 (1988); Stephens v. Coldwell Banker Commercial, 199 Cal. App. 3d 1394, 1399-1400 (1988).

[15] *Id*.

[16] What You Should Know, *supra* note 8.

by Colonel (Ret.) Adam Siegler and Tara Hunter

Closing Argument

LACBA's Veterans Legal Services Project Helps Veterans Day to Day

The trauma of combat overseas is reflected in the homeless encampments in Los Angeles County, which include almost 4,000 homeless veterans. Many returning veterans are suffering the effects of PTSD, abuse, or sexual trauma while in the military and resulting problems with addiction and mental illness.

These problems are compounded by many legal challenges, such as tickets and warrants, family law issues, and denial of benefits based on a less-than-honorable discharge. Left unresolved, these problems can spiral into homelessness and suicide. It is estimated that veterans constitute less than 3 percent of Los Angeles County residents but 6 to 11 percent of suicides in the county.

The Los Angeles County Bar Association's Veterans Legal Services Project provides effective solutions to these legal challenges. With outreach clinics in Patriotic Hall downtown and throughout the county, the project, which is currently operating remotely, was created by LACBA's Armed Forces Committee. The project is led by Directing Attorney Tara Hunter and staffed with volunteer attorneys with the generous support of the Wells Fargo Foundation, Land of the Free Foundation, and other donors. The project conducts free legal clinics every month and has expanded the scope of its services to include tickets and warrants, misdemeanor expungements, family law, and legal help for veteran entrepreneurs. These legal services can dramatically improve lives and in some cases save them.

One client, Joseph B., served in combat during the Iraq War, and the invisible wounds he suffered resulted in seemingly overwhelming legal problems. While he lived through the trauma, he didn't know how to live with it. In his words:

> Inspired by my uncle's service, I enlisted in the United States Army in 2005. The next year, I was deployed to combat as a vehicle mechanic in support of Operation Iraqi Freedom. And by the age of 25, I had experienced, witnessed, and endured things that the average person could never imagine. I served honorably and was awarded numerous medals for my service. But in 2011, when I returned home, I wasn't the same. I was scarred.
>
> For nearly a decade, I struggled while I tried to find my own way through undiagnosed PTSD, depression, and anxiety. In that time frame, I lost my marriage, lost custody of my son, lost my father, became unemployed, found myself chronically homeless, and had lost my driving privileges as a result of missing traffic court proceedings. I hit rock bottom last year when I had a break-down, leading to my hospitalization at the V.A.

Fortunately, through the Department of Veterans Affairs program, Joseph began rehabilitation treatment, therapy, and achieved sobriety. However, without enough income for an attorney and unable to leave the inpatient program, he still could not fix his legal problems or address his debts.

The Veterans Legal Services Project came to the rescue, and Joseph was able to resolve his outstanding traffic matters, clear the outstanding debt, and get his license back. As he put it, "I finally feel like I am getting my life back on track. Now that I have graduated from my rehabilitation program, having a license will help me get a job and earn a living. I just moved into a new apartment and am looking forward to the day I can see my son." His journey ended with a home.

This Veterans Day, we need to remember that there are at least 4,000 veterans out there like Joseph B. They served their country and should not be living in a cardboard box or a tent under the freeway. Free legal services for veterans can make all the difference. By removing the constant threat of arrest from warrants, reducing debts, clearing criminal records, and restoring driver's licenses, the Veterans Legal Services Project makes it possible for veterans to live productive lives in homes of their own.

To learn more or donate, visit www.lacba.org/veterans. ■

Colonel (Ret.) Adam Siegler is an attorney with Greenberg Traurig, LLP, in Los Angeles. A veteran of the Iraq War, he was the founding chair of the LACBA Armed Forces Committee. Tara Hunter is the directing attorney of the LACBA Veterans Legal Services Project.

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