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INTRODUCING THE

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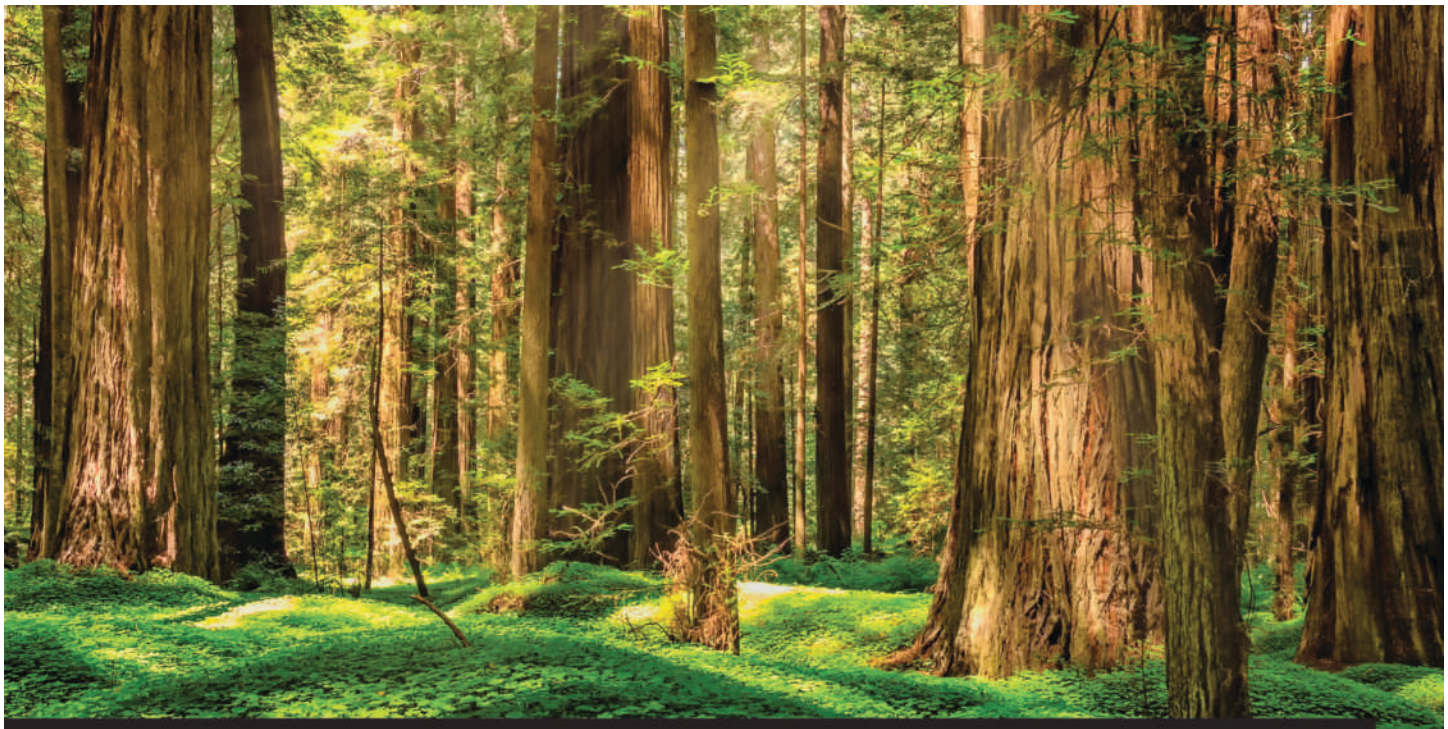

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FROM THE CHAIR

by Brianna Strange

As I write in early September, a record heatwave has crashed on Los Angeles. Leather car seats are dangerous to touch. My dogs don't want to walk. I intended to highlight the incredible authorship in recent issues, which deserves coverage, but my window is open to get a slight breeze and I can hear lawnmowers in the distance—who is mowing a lawn in this heat?

Los Angeles is in a severe drought, a term signifying inadequate grazing land, longer fire seasons, wildlife disease, and stressed trees. Severe drought is two steps away from exceptional drought, where fire season is year-round, wildlife death is widespread, orchards are removed, and fish rescue and relocation begins.

To help combat the drought, the Los Angeles Department of Water and Power (LADWP) has limited Angelenos to watering Monday and Friday (odd number ending address) or Thursday and Sunday (even). All outdoor watering is prohibited from 9 A.M. to 4 P.M. Repeated noncompliance can result in fines upwards of $2,000.00 and implementation of flow restrictions. A Turf Replacement Program encourages residents to apply for a rebate to replace lawns with pre-approved sustainable landscaping. Rebates on water-saving devices and free introductory landscape classes also are offered to customers (though it may be more beneficial if classes were open to anyone who maintains yards in an LADWP district).

Half the lawns in my neighborhood are so crispy you can feel the crunch just looking at them. Others are conspicuously green. Newly built houses have drought-tolerant landscaping with flagstone and lavender or smooth stones and strategically placed cacti. So, who cares about curtilage, and why do we even have lawns?

Drive through certain neighborhoods, and the lawns remain dewy and emerald. We are in Los Angeles, nearing 2023, the temperatures are hot enough to warrant cooling centers around the city, and Lake Mead may reach dead pool status. So why are some people not giving up on their lawns?

In the 1700s, lawns premiered as a symbol of wealth in England and France, a green, well-kempt inedible crop purely for aesthetics, requiring costly maintenance and serving no real function.[1] Such lawns necessitated extensive human labor, which only the upper crust could afford. By the 1800s, lawns popped up at Thomas Jefferson's infamous Monticello and other European-replica estates in the U.S. With the advent of the lawn mower, lawns became more accessible to the working class; a lawnmower replaced the need for human hands and scythes.

The prototypical lawn border, a white picket fence, has come to represent an idealized suburban middleclass, and the green lawn "a physical manifestation of the American Dream of home ownership."[2] The green lawn with clean-cut edges is deeply ingrained in our culture, the zeitgeist of U.S. exceptionalism.

The lawn has come a long way from a European status symbol to the basis for LADWP rebates to tear it out. Cynically, the brown lawns around Los Angeles may seem like a metaphorical death of the American dream of homeownership. Or maybe it's a sign for times ahead when lawns are once again reserved only for the wealthy. But this time, instead of labor, it will be water that only the wealthiest can afford. ■

[1] The History of the American Lawn, Pennington, https://www.pennington.com/all-products/grass-seed/resources/the-history-of-the-american-lawn (last accessed Sept. 15, 2022).

[2] Krystal D'Costa, *The American Obsession with Lawns*, Scientific American, May 3, 2017, *available at* https://blogs.scientificamerica.com/anthropology-in-practice/the-american-obsession-with-lawns.

A partner at Strange LLP, a boutique plaintiffs' firm focusing on mass torts, class actions, antitrust, and select high-profile civil disputes, Brianna Strange is the 2022-2023 chair of the **Los Angeles Lawyer** *Editorial Board.*

PRESIDENT'S PAGE

by Ann I. Park

As we finally see some relief from the summer heat and the pandemic, I am very pleased to share with you some exciting developments at the Los Angeles County Bar Association, which give us a great deal to look forward to as we enter the fall. It has never been a more exciting time to be a member of LACBA!

First, LACBA launched a new website on August 31, 2022. Our new website (www.lacba.org) is a much needed improvement from the old one, and, among other things, offers the following new features:

- New "MyLACBA" pages allow any member to login and update profile information, review personalized event and CLE information, renew membership, and view links around LACBA that are relevant to the member's practice.
- Listserv forums online allow members to conveniently participate in listservs, review listserv messages, search listserv messages, and configure listserv message frequency (digest or real-time). These new features are also conveniently accessible on small screens and big screens.
- Enhanced event registration and "on demand" features make attending and viewing CLE content easier than ever, as well as event syndication to other bar associations.
- Each section and committee has its own webpage, easily updated with the latest section events, news, and information.
- More graphics, more photos, and better event interface.

Many thanks to our Director of Operations Seth Chavez, Director of Web Services Tom Horne, and their teams for year-long efforts to develop our new website, which will be operated at a lower cost than the old website. Please log in, look around, and explore! If you have any questions or feedback, please contact Seth at schavez@lacba.org.

In connection with our new, revamped website, LACBA is now offering a new section membership structure. Developed by our Membership Task Force, headed by Sarvenaz Behar, the new membership policy provides that members can join one section for $50, but for only $85 members can join an unlimited number of sections.

Second, I am very pleased to announce that LACBA has found a new home. In December 2022, LACBA will be moving its headquarters to 444 South Flower Street. This new office space, in the original "L.A. Law" building downtown, offers incredible new features to our members, including state-of-the-art conference facilities, with ability to host meetings for up to 100 people. There is audiovisual equipment for hybrid meetings as well as outdoor space for receptions. The conference facilities will allow our sections and committees to conduct meetings, host networking events, and offer MCLE presentations in person, free of charge (except for cleaning and after-hours air conditioning), which will help cut LACBA's event costs.

Also, the downtown facility will be in close proximity to our members who work downtown, and is walking distance from the Stanley Mosk courthouse. We were able to take advantage of the pandemic downturn in the commercial real estate market to negotiate a fantastic deal for LACBA, which gives us better office space, conference facilities we did not have, and a significant upgrade in safety and prestige at the same cost, or even less, than our Spring Street offices.

We are looking forward to welcoming everyone to our new offices! If your section has events starting after the new year that you would like to host in our new conference center, please contact our amazing CEO, Stan Bissey, after the new year at sbissey@lacba.org.

I am also pleased to announce that LACBA has launched its Task Force on Reproductive Rights, chaired by former LACBA President Edith Matthai. This task force is a member of the Steering Committee of the Southern California Legal Alliance for Reproductive Justice (SoCal LARJ), which has been organized by the UCLA School of Law's Center for Reproductive Health, Law, and Policy.

We are organizing a coalition of law firms and lawyers willing to provide pro bono legal support to patients, providers, and others affected by the *Dobbs* decision in Southern California and beyond. This is modeled on similar coalitions formed in New York and San Francisco to bring together the legal profession in SoCal to provide pro bono representation regarding abortion and other reproductive rights and justice issues. If your firm is interested in joining this coalition, please contact Lara Stemple at stemple@law.ucla.edu.

Finally, Counsel for Justice is holding a Community Impact Reception on October 20 at the Jonathan Club to recognize the individuals and law firms who have most contributed to CFJ projects in the past year. To register and sponsor this great event, please visit www.counselforjustice.org.

Albert Camus once said, "Autumn is a second spring when every leaf is a flower." As we enter this autumn full of promise and progress for LACBA, I wish you good health, happiness, and many enjoyable times with family and friends. Many thanks for your membership in and support of LACBA. ■

The 2022-2023 president of the Los Angeles County Bar Association, Ann I. Park is a partner in the Los Angeles Office of Foley & Mansfield PLLP, where she specializes in the defense of complex toxic tort actions. Active in LACBA for more than 30 years, she previously served as president of the Korean American Bar Association of Southern California and on the California State Bar's Commission on Judicial Nominees Evaluation and Council on Access and Fairness.

BARRISTERS TIPS

by Roy Fan

A judicial clerkship is a veritable holy grail in the legal profession. Clerkships can, and often do, open doors to lucrative future careers and positions that might otherwise be unattainable, and for that reason remain one of the most highly sought-after opportunities year after year.

The experience of clerking for a judge, however, is more than just a feather in one's cap. For a year (or more in some cases), a young lawyer has the incomparable opportunity to not only observe the inner workings of a court before which he or she may later be practicing but also to study and learn from the habits and hallmarks of both good and bad lawyers—all before practicing law after the clerkship ends. Many law clerks also have the good fortune of clerking for judges who are excellent mentors, willing to lend advice and counsel years after the clerkship ends.

As most lawyers are aware, the vast majority of clerkships are only for a limited term. Therefore, every year, thousands of law clerks try to leverage the newest gold star on their resume into a new job that interests them and will help them achieve their career goals. For many clerks, that new job will be an associate position at a law firm, sometimes with a sizeable sign-up bonus to boot. However, a clerkship differs markedly from working at a law firm in several key respects, and new and young lawyers transitioning from the former to the latter should be mindful of various potential challenges they may encounter in the process.

To begin with, a law firm is not a judge's chambers, and a lawyer is not a judge. The differences between the two roles manifest themselves in both mindset and the day-to-day practicalities of the job. In a judge's chambers, a law clerk's every act—whether reading a brief or drafting an opinion—is directed towards resolving a dispute from the perspective of a neutral arbiter. In almost any other practice setting, the lawyer's mission is instead to advocate on the client's behalf and to further the client's interests. This shift in mindset might seem trivial at first blush, but it can trip up an unwitting lawyer still accustomed to the expectations of a law clerk. To combat this, new and young lawyers making this transition should be sure, before engaging in a new task, to understand the nature of the task and how the work product will advance the client's interests.

Every year, thousands of law clerks try to leverage the newest gold star on their resume into a new job that interests them and will help them achieve their career goals.

Differences in the working environment also must be considered. Many clerkships, especially those at appellate courts, can be a solitary experience in which an individual law clerk mostly works on his or her own and reports only to the judge to whom the clerk is assigned. At a law firm, by contrast, matters are often staffed by teams of lawyers consisting of partners, counsel, and associates of varying levels of seniority, requiring streamlined teamwork and collaboration by and between all lawyers involved. Transitioning from largely independent work to serving as part of a team can be an adjustment, and it will be important for new and young lawyers to ensure that they endeavor to communicate and collaborate with their new colleagues as fluently as possible.

A more practical challenge for former clerks is billing. While billing is vital to the operation of any law firm—large, medium, or small—many law clerks have never worked in an environment in which they had to keep track of and justify every minute billed to a client. It is therefore important for former clerks transitioning to a law firm to learn how to bill their time in the manner that the firm requires. The key here is to familiarize oneself with the specifics as soon as possible. What are the firm's billable hour requirements? What time unit increments does the firm use? How does the firm's billing software work? How does the firm require billing narratives or billing codes to be formatted? It is important to obtain answers to these questions as soon as possible in order to hit the ground running.

Relatedly, once one becomes familiar with a firm's billing practices, it will be vital to stay up-to-date with recording hours and narratives, however the firm requires them to be done. It is easy for those who are not in the habit of performing billing and other administrative tasks to overlook or neglect them. Memories of what one did at a particular time on a particular day fade as well, making it all the more important to complete billing entries promptly and regularly. Like any other task, the failure to do so creates a backlog of hours and narratives that will only compound over time.

Finally, and perhaps most importantly, a new associate should ask questions when unsure about something. Everyone has had a first day at a new job, at law school, or, indeed, at a clerkship. The sheer volume of information that gets thrown at a new associate during his or her first few days, or even weeks, can be overwhelming. As is true of any other new job, the best way to get one's bearings is to take things a step at a time and ask plenty of questions, if not for one's own sake, then for the sake of one's new clients, who are relying on their legal counsel to be the best lawyers—not the best law clerks—they can be. ■

Roy Fan is a litigation associate at the Los Angeles office of Greenberg Gross LLP.

by Oleksii Makarenkov

Practice Tips

Challenges for Justice under Martial Law: Experience of Ukraine

Oleksii Makarenkov is a lawyer in Ukraine who serves as vice-dean for International Relations of the Law Faculty of Zaporizhzhia National University as well as professor in the Department of History and in the Theory of State and Law of the Law Faculty.

The 2022 Russian Federation's open military aggression against Ukraine has reawakened our legal reality. Its scope originally was limited from February 2014 to February 2022. Accordingly, some adjustments had already been put in place, but they initially were made, supported, and felt by only some citizens of Ukraine. Others found it convenient, or profitable, to disregard the Russian Federation's violence and danger, as well as the degraded legal standards introduced by the Federation. As a result, from the end of the 2014 limited military intervention by the Russian Federation up to the day of the start of the full-scale invasion on February 24, 2022, Ukraine failed to properly protect itself from the Federation.

When Ukraine gained its independence on August 24, 1991, the country's military and economic potential were sufficiently significant to render it implausible that an invader could win a war in Ukraine. It was never envisioned that the Russian Federation would harbor such intentions. However, corruption and official crimes in the intervening years changed that potential, and Ukraine entered the current war with a high level of corruption. The war has only partially abated it. This context illustrates the current role and capability of Ukraine's 764 courts.

2014 Migration of Judges

The seizure of certain territories in Ukraine by the Russian Federation in 2014 (the Autonomous Republic of Crimea and some districts of Donetsk and Luhansk) caused judges to move from those territories to regions where the laws of Ukraine actually apply and where the powers of its public authorities can be exercised. However, not all of the nation's judges were able to recognize in time that the seizure of the territory constituted a new legal reality. For example, a judge from the Luhansk oblast (i.e., district or region) speaks about his strong concerns while crossing numerous checkpoints manned by the occupying forces.[1] The risk of being captured and/or killed while leaving the occupied territory in 2014 remained very high. The judicial robe and other external attributes of the judge had to be hidden so as not to reveal his social status. Otherwise it would mean death.

Not all judges remained faithful to the judge's oath and moved to Ukraine. Yet they were not given clear direction or support from the central public authorities. As a result, questions of fidelity arose. Judges were asked about various issues, such as their betrayal, the timeliness of their leaving the Federation-occupied territory, the content and conditions (for example, under the barrel of a machine gun) of their video interviews. After the

The Borodianka District Court of the Kiev region suffered significant damage due to invasion attack (February 28, 2022). (Photo provided by author.)

Russian Federation's occupation of Crimea, more than 270 local judges joined the occupier, in violation of their oath.

In addition to the protection of judges and court staff, the seizure of territories then (in 2014) and now (in 2022) caused a number of other problems—preservation and transportation of archives, continuation of ongoing court proceedings and consideration of new cases. The issue of logistics did not arise, as the property was either destroyed or not permitted to be taken out by the military of the Russian Federation.

Solving the problem of courts in the occupied territories and changing the working conditions of courts in the territory free from occupation has involved the use of at least three sources of law: the laws of parliament; the acts of the judiciary (cassation and judicial self-government); and legal awareness, dedication, responsibility and other virtues of judges and court staff, law enforcement, and municipal authorities. In 2014, most operational issues in the occupied territories were often decided by judges on their own. There were no other sources of law, and delays precluded any progress. Furthermore, no one had relevant experience. In 2014, Ukraine was not ready for a military invasion by the Russian Federation; however, in 2022, there has been a clarity and coherence of actions to protect justice and its instrumentalities.

Area surrounding Borodianka District Court reduced to rubble (February 28, 2022). (Photo provided by author.)

Legal Actions

The first acts of parliament that aimed at resolving issues of justice in the war with Russia were the Law of Ukraine: "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine."[2] and "On Implementation of justice and criminal proceedings in connection with the anti-terrorist operation."[3] There was also the order of the chairman of the High Specialized Court of Ukraine for Civil and Criminal Cases (from September 2010 to December 2017, the highest court of Ukraine) "on the definition of territorial jurisdiction of cases."[4]

Relevant clarifications about the administration of justice were made in response to the temporary occupation of the territory of Ukraine, anti-terrorist operations, and/or hostilities (war). These changes affect all procedural codes of Ukraine, including the Criminal Procedure Code of April 13, 2012, No. 4651-VI; the Code of Administrative Procedure of Ukraine of July 6, 2005, No. 2747-IV; the Civil Procedure Code of March 18, 2004, No.1618-IV; and the Economic Procedure Code of November 6, 1991, No. 1798-XII.

The occupied territories necessitated a change in territorial jurisdiction as well as a redistribution of the burden to other courts, in particular to those courts within the unoccupied areas of Ukraine that relied on the actual protection of Ukraine's constitutional values by law enforcement agencies. Due to the impossibility of administering justice by the courts of the Autonomous Republic of Crimea and the city of Sevastopol in the temporarily occupied territories, the territorial jurisdiction of those courts was changed. Thus, as early as 2014, consideration of cases in response to occupation was provided. A similar approach was applied to the courts of Donetsk and Luhansk regions, which were located in enemy-occupied territories. In 2022, taking such measures has been based on that prior experience.

On February 24, 2022, The Council of Judges of Ukraine (middle-level judicial self-government bodies) stressed that some recommendations to the courts on the organization of work in war areas had already been developed. They took into account the previous evacuation experience of courts from the temporarily occupied territories and determined actions to be implemented in case of escalation of hostilities in the territory controlled by Ukraine. On February 28, 2022, the Council of Judges stated that the civilian population of Kyiv, Kharkiv, Chernihiv, Sumy, Mariupol, Mykolaiv, Kherson, and almost all settlements in the northern, eastern and southern regions of Ukraine were currently under fire.

On March 2, 2022, the Council of Judges published recommendations for the operation of courts in the war zone. They were updated on March 14, 2022. The scope of those recommendations addressed several issues. First, they stipulated that the specifics of the operation of each court is to be determined by the a meeting of that court (the primary body of judicial self-government) or by its chairman if it is impossible to convene a meeting. Second, the conditions of operation are to be determined on the basis of the circumstances of the real situation prevailing in the region at the time of the decision. Third, at the oblast level, operational headquarters have been set up to coordinate the activities of the justice system and law enforcement agencies in the respective region. Working conditions of the court are to be in agreement with such headquarters. It is essential to take into account the possible need to protect the organizational issues of the court and its procedural activities.

It was also determined that in case of threat to life, health, and safety of court visitors and court staff, judges will promptly suspend the proceedings by a court order until the circumstances that led to the termination of the case are eliminated. Judges must report such decisions to the following authorities: operational headquarters, the Supreme Court, the Council of Judges of Ukraine, and the State Judicial Admin-

istration of Ukraine (a body of the judiciary that organizes the material support of courts and staffing in their offices).

Also, a person responsible for maintaining a current accounting of staff and judges must be designated to account for the court work (e.g., is it being done remotely?). Judges and court staff must provide information on their whereabouts, including joining the Territorial Defense Forces or the Armed Forces of Ukraine. Employees of courts and judges who are unable to exercise their powers, including remotely, should submit applications for vacation (including at their own expense). Court management should promptly approve these statements.

Until the end of the war courts are to avoid issuing orders for dismissal (of staff), dismissal due to violation of labor discipline, absenteeism, and so forth. Irrespective of the reasons for absence from work, courts are to record the work of all court staff and judges (except for confirmed cases of temporary incapacity for work, on vacation, death, etc.) in order to continue paying salaries and judges' fees. If possible, all available employees should be transferred to remote work. Each court must determine the minimum number of people to be in the court buildings during the work day, divide the responsibilities among them, and organize the duties of judges and court staff. It is also recommended that courts be closed to visitors and that it be explained to citizens the possibility of adjourning cases due to hostilities as well as the possibility of considering cases by videoconference and restricting admission to court hearings of persons who are not parties to those hearings.

Consideration of cases (except for urgent court proceedings) is postponed and removed from consideration if possible. It is noted that a large number of litigants may not be able to apply for adjournment due to the impact of hostilities on critical infrastructure or due to serving as a member of the Armed Forces of Ukraine, territorial defense, volunteer military formations, and other forms of countering armed aggression against Ukraine, or due to being unable to come to court due to danger to life.

Cases that are not urgent are to be considered only with the written consent of all participants in the proceedings. It is prudent to approach issues related to the return of various procedural documents, leaving them without motion, and setting different deadlines, if possible, to extend them at least until the end of hostilities.

Courts are to focus exclusively on conducting urgent court proceedings (detention, extension of detention), and must not postpone court hearings that address the issue of choosing or continuing a measure of restraint in the form of detention. In these cases, the court (investigating judge) acts on the basis of the current criminal procedure legislation.

Accordingly, the investigating judge is primarily obliged to verify the circumstances that indicate whether the stated risk has not decreased or that new risks have emerged justifying the detention of a person. These circumstances (risks) certainly include military aggression against Ukraine, which significantly limits the ability of the authorities to exercise their powers in certain territories and qualitatively worsens the situation. Investigating judges must apply special attention to cases in which the territorial jurisdiction of criminal offenses at the stage of pre-trial investigation has changed and in which the documents of criminal proceedings due to hostilities were not transferred in full.

The formulaic approach of some courts to the obligation to provide copies of proceedings and other appendices, which obviously cannot be provided to the court due to hostilities, is considered unjustified. Given the fact that all other circumstances were considered in deciding the relevant motions, the court has already given an assessment when choosing a measure of restraint. In the absence of the possibility of certifying the court decision with a seal and/or imposing a bar code, the decision of the investigating judge is confirmed by the fact that it is included in the Unified Register of Court Decisions. In this regard, the custodial authorities also must be informed by appropriate notice.

Law enforcement agencies need to be advised that if the operations of the court that conducted the proceedings are suspended, or if it is impossible to administer justice by the relevant court due to hostilities, they must apply to the relevant courts of appeal or, if there are grounds, to the Supreme Court to change the jurisdiction of criminal proceedings.

If, under objective circumstances, a party to the proceedings cannot participate in a court hearing by videoconference by the technical means specified by the criminal procedure law, an exception will permit that party to participate by any other technical means, including the party's own technical means.

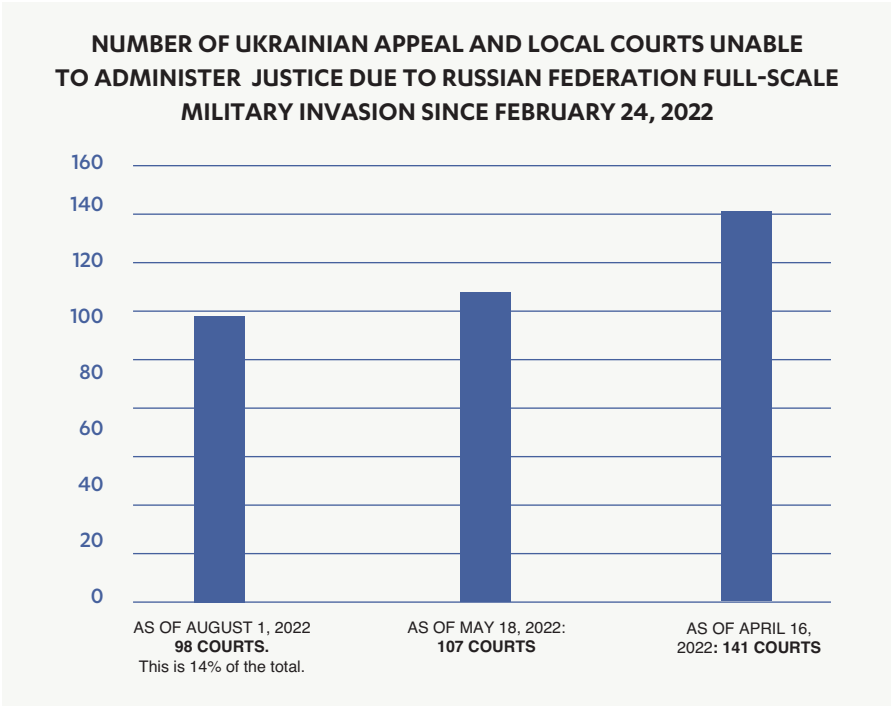
There are no concessions to speed over quality. The rule of law remains a key principle on which judges base their actions in spite of this war of aggression by the Russian Federation.

If the proceedings are to be considered collectively and the panel of judges cannot meet in one room, it is permissible to consider cases from different rooms of the courts, including with the use of their own technical means.

The courts' attention is focused on the need to take responsibility to develop relevant judicial practice based on the realities of wartime and the need to comply with the general principles of criminal proceedings.

An example of the change of territorial jurisdiction in connection with the full-scale war was the order of the Supreme Court of March 6, 2022, No. 1/0/9-22 "On changing the territorial jurisdiction of courts in martial law" in accordance with part seven of Article 147 of the Law of Ukraine, "On Judiciary and the status of judges," of June 2, 2016, No. 1402-VIII. As of March 10, 2022, the jurisdiction was changed for 96 courts.

On March 13, 2022, the Order of the Chairman of the Supreme Court, No. 6/0/9-22 approved the recommendations to the courts of first and appellate instance in case of seizure of the town and/or court or imminent threat of its seizure. The recommendations pre-



scribe the step-by-step actions of court chairmen, judges, and chiefs of staff in case of the threat of possible capture of the town and court by the occupying Russian Federation troops. Judges and court staff stationed in Federation-occupied territory are cautioned to avoid negotiating with the occupiers or offering cooperation. They must wait for the creation of evacuation corridors. In addition, the robes and badges of judges should, if possible, be taken to the court with jurisdiction.

From April 1, 2022, an automated court record system based on new computer programs was introduced. The administrator was the State Enterprise "Information Judicial Systems." This system worked after testing and installation of the developed updates. It also received approval by courts of the introduced changes.

As of April 16, 2022, 141 courts of appeal and local courts were not administering justice, and 51 court buildings out of the total number of 777 buildings were damaged or completely destroyed, 47 buildings of judicial institutions having suffered critical damage (figures 1, 2). There are 63 courts left in the territories temporarily not under the control of the Ukrainian authorities. By orders of the president of the Supreme Court, the territorial jurisdiction of 130 courts was changed. As the territories are liberated from the Russian military, the work of the courts resumes.

Thus far, during the war with the Russian Federation (supported by public authorities of the Republic of Belarus), Ukraine has managed to maintain its justice system in all types of proceedings. Judicial enforcement is in strict accordance with the current procedural codes of Ukraine. The unique circumstances of law enforcement are due only to the circumstances of the war, namely, the impossibility, due to the occupation of the territory and/or involvement in the defense of the country, to perform procedural actions that are possible in peacetime. For example, there has beenimpact on the provision of evidence, personal presence in the courtroom, and so on. The quality of justice and human rights remains a priority for judges.

The Present

There are no concessions to speed over quality. The rule of law remains a key principle on which judges base their actions in spite of this war of aggression by the Russian Federation. Justice under the conditions of war has acquired the following key features: regular monitoring of the situation at the location of the courts; prompt organizational decisions, in particular through the relocation of judges and court staff to safe places or their service in the army; change of territorial jurisdiction; resolution of urgent court cases, in particular criminal proceedings; postponement of all cases of lesser social significance; and providing the parties involved with additional terms and other opportunities for them to exercise their procedural rights.

Law enforcement officers, judges, and other citizens remain vigilant to maintain law and order. In particular, they are increasingly intolerant of looters, corrupt officials, and war criminals. Proposals have been made to include illegal enrichment in wartime as a crime of treason. Criminal liability for official crimes during wartime has been strengthened. Thousands of criminal cases against the military of the Russian Federation have been initiated for their offenses against peace, security of mankind, and international law and order, namely, war propaganda, justification, and recognition as lawful, denial of the armed aggression of the Russian Federation against Ukraine, as well as glorification of its participants, planning, preparation, resolution, and conduct of aggressive war, and violation of the laws and customs of war.

Software is used to prevent and record war crimes, e.g., eyeWitness to Atrocities.[5] Information is automatically transmitted to the United Nations International Criminal Court (ICC) through this program. The preamble to the ICC statute clearly places the obligation to prosecute international crimes on states first, with the court's being able to prosecute the most serious international crimes only if no prosecutions are brought at the national level. The process of justice should be accessible and visible, and cooperation by states with the tribunals remains an indispensable condition for the effective prosecution of war criminals. It is also clear that the ICC can only deal with a limited number of war criminals and should concentrate on "big fish," leaving the bulk of mid-level and low-level perpetrators to domestic courts.[6] The Ukrainian authorities also transmit such information twice a day to the U.N. High Commissioner for Human Rights. ■

[1] M. Yasenovs'ka et al., Pravosuddya v ekzyli. Dotrymannya prava na spravedlyviy sud na skhodi Ukrayiny, vklyuchno iz terytoriyeyu, tymchasovo nepidkontrol'noyu ukrayins'komu uryadu [Justice in exile. Observance of the right to a fair trial in the East of Ukraine, including the territory temporarily not under the control of the Ukrainian government] (2016).
[2] Law of Ukraine No. 1207-VII (Apr. 15, 2014).
[3] Law of Ukraine No. 1632-VII (Aug. 12, 2014).
[4] Decision of the Judges of Ukraine Council No. 2341-III (Aug. 5, 2022)..
[5] Welcome to eyeWitness Homepage, https://www.eyewitness.global/ (last visited Aug. 7, 2022).
[6] Eva La Haye, War Crimes in Internal Armed Conflicts 384 (2008).

by James Cooper and Kashyap Kompella

Practice Tips

AI and Threats to the Criminal Justice System

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Twenty years ago, Steven Spielberg's science fiction thriller, *Minority Report*, starring Tom Cruise, painted a dystopian world that Artificial Intelligence (AI)[1] and predictive policing might bring in 2054. Unfair results, miscarriages of justice, and abrogation of fundamental rights were the norm. That world may be here now. Artificial Intelligence is increasingly being utilized in law enforcement and the administration of justice today. Currently, nearly 60 risk assessment tools using AI are being used across the United States.[2] Most of these tools rely on static inputs about a defendant, mainly regarding criminal history, while a growing number are considering dynamic factors like employment, education, and familial status.[3]

While experts may disagree on the definition of what constitutes AI, AI systems share a number of characteristics. First, AI systems are automated decision-making software tools relied upon for decision-making by human actors. Second, the decision rules are derived from matching patterns after ostensibly analyzing large amounts of data. Third, these systems are non-deterministic. They are neither intuitive nor readily explainable. Fourth, their internal workings remain opaque because they use advanced computational methods such as artificial neural netorks—commonly referred to as deep learning. Many AI systems are proprietary in nature and have not undergone extensive outside scrutiny.

Police regularly use AI to pursue criminal investigations. It is being used in crime prevention, predictive policing,[4] pretrial bail hearings (such as bail amount and what evidence to admit) [5] during the trial itself, post-trial sentencing (including decisions regarding probation, parole, [6] community service, fine amount),[7] and the enforcement of punishment. Judges use AI risk assessment tools in bail hearings and in criminal sentencing.[8] Also, policymakers look to AI technologies as they design criminal reform legislative projects.

Among the many problems with AI is the fact that these systems are not inherently trustworthy. Since humans provide data sets to computers to train them to learn and predict outcomes, racial, gender, and other biases are baked into the algorithms. Humans—be they police, judges, juries, parole officers, or judicial administrators—oftentimes get it wrong. Wrongful convictions are not anomalies.[9] That they replicate the systemic discrimination that is present in our criminal justice today only adds to the challenge to improve criminal justice. Moreover, AI tools are not open to scrutiny because they are proprietary materials or because the AI models are uninterpretable.[10]

It is no secret that the U.S.

RICHARD EWING

judicial system historically has suffered from (and continues to perpetuate) racial injustice at a meta level.[11] African Americans are much more likely to be stopped by police than their fellow white citizens, even in progressive California.[12] The war on drugs has proved an insidious scheme to criminalize low-level drug offenses to incarcerate African Americans[13] as they are more likely to face far longer prison sentences for crimes of a similar nature than white Americans.[14] If they are convicted felons, African Americans may be prevented from voting.[15] Police in the United States kill African Americans at twice the rate of white Americans—"three times the rate when they are unarmed."[16] The rate of fatal police shootings of African Americans between 2015 and June 2022 was estimated to be 40 per million of the population, while for white Americans the rate stood at 16 fatal police shootings per million of the population.[17] Likewise, Latinos are overrepresented when it comes to deaths by police.[18] So, the growing adoption of AI in this space risks exacerbating the inequities and putting up barriers to much-needed reforms.

AI Systems and Criminal Justice

The tools associated with AI are designed to reduce arbitrariness and increase objectivity and fairness. They are intended to produce better performance compared with human judgement. To be sure, there is undue subjectivity and biases in law enforcement institutions, including the police, prosecutors, sentencing officials, corrections officers, and judges.

As seen in *Minority Report,* predictive policing is intended to prevent crime before it happens through AI-based risk assessments. Nevertheless, the risk assessment tools in AI themselves pose a risk. Because these tools are not transparent, they can result in discrimination and a violation of the principle of equal treatment.[19] For instance, when greater policing efforts are directed to a location, it leads to a greater amount of crime being detected. As a result, the data that predictive policing tools use are not completely objective. Thus, predictive policing can lead to self-fulfilling scenarios and vicious cycles of discrimination.

Facial recognition is another AI technology that threatens to undermine due process and the presumption of innocence. Even before the advent of facial recognition, innocent people routinely were sent to prison due to misidentification.[20] However, facial recognition technology now automates this historic injustice, making it even more endemic and unjust. That risk has not prevented law enforcement from using facial recognition technology in federal, state, and local investigations. In Fiscal Year 2020, 18 out of 24 federal agencies reported using facial recognition technology.[21]

Neither the police nor prosecutors are mandated to disclose when they use facial recognition technology to identify a criminal suspect. That circumstance puts criminal defense attorneys at a disadvantage: How can they challenge the use of AI if it is not disclosed in the first place? That these tools tend to be highly inaccurate in identifying people of color in general, and women of color in particular, must give us pause. Clearly, there are a great many risks in using AI in the criminal justice system. That there is no opportunity, or only a very limited ability, to review or challenge the use of AI tools violates findamental principles of justice and fairness.[22]

The problems with AI are well-known. Instead of reducing human biases, AI tools reinforce existing biases and inequities. They enshrine and encourage implicit bias. That is the reason why the use of facial recognition software in criminal justice investigations has been banned in jurisdictions all over the political map—from the Commonwealth of Virginia to progressive cities like Oakland and San Francisco.

AI and Ethics

Use of AI systems raises all sorts of ethical questions. After all, criminal justice is a social construct that requires human discretion and a strong commitment to the rule of law. What happens, though, when the rights of the defendants are being curtailed (and the discretion of the courts eliminated) due to AI tools? Discretion is an important part in determining criminal prosecution, in establishing criminal liability, in evaluating and admitting evidence, and in considering penalties. Are we really improving the quality of criminal justice while respecting defendants' rights? If the philosophy behind criminal justice systems is rehabilitative as well as punitive, does AI tip the balance in favor of the latter? Finally, we need to ask if we want to construct a society in which "data is destiny," thus making a defendant a prisoner of his or her past.

In the aftermath of *State v. Loomis*, it is clear there are concerns surrounding the use of AI and all our deeply held due process rights and other human rights obligations that states commit to protect.[23] It is no secret that many AI technologies have inherent biases[24] and that defendants are unable to review the methods underlying its determination.[25] Nevertheless, should public institutions outsource inherently sovereign activities like criminal justice prosecution to machines that are programmed by for-profit corporations? Legal institutions need to be more transparent if the social contract is to be respected.

Going Forward

Before going any farther down the road toward further reliance on AI tools, their use needs to be regulated. There have been proposals to regulate AI in the European Union[26] and the United Kingdom.[27] The United States does not have to reinvent the wheel, but ethical fuse boxes need to be installed, enshrining best practices and reversing the damage that is already being inflicted on traditionally marginalized and indigent communities. Confidence in the rule of law nor trust in the administration of justice should be sacrificed for the sake of efficiencies and ease.

There needs to be a robust discussion of potential risks. To do this, however, an investment in training for law enforcement agencies, the judiciary, and prosecutor offices is necessary. There should be more scrutiny, clear guidelines, and public evaluation at the procurement stage of AI tools. Procedurally, the ability of attorneys to examine software and test data collection and analysis methods must be facilitated. Assurance must be provided that AI tools are fit for their intended purpose and can be relied upon in a given context or a specific case while pushing for more transparency of AI systems.

A mandatory panel needs to be created to act as a watchdog for the development and deployment of AI in criminal justice matters similar to the Institutional Review Board used for medical studies involving humans. A directory of experts who can assist in challenging and validating AI systems can help do that. Finally, every state needs to create and empower an independent agency/watchdog agency like New York State's Forensic Digital Unit to manage the development, adoption, and deployment of AI systems used in criminal law matters.

Regulaton and reform in the use of AI systems are long overdue. First, there

must be public agreement about the role that AI and technology should play in improving the ability of the judicial system to better dispense justice and uphold the rights of the citizenry. Given the penchant of judicial administrators to place an increased degree of faith in AI tools, believing that they can do a better job than humans, this is an important discussion.[28] Too often, and that too without adequate verification of the underlying evidence, these tools are seen as more efficient, rational, and cost-effective.[29] In truth, however, it is not clear that the actual performance and validity of AI is as advertised given varied results within differing classes like race and gender. Let's hope we never have to ask, "Open the jail doors, HAL." ■

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[1] *See, e.g.*, John Villasenor & Virginia Foggo, *Artificial Intelligence, Due Process, and Criminal Sentencing*, 2020 MICH. ST. L. REV. 295, 301 [hereinafter Villasenor & Foggo]; Cary Coglianese & Lavi M. Ben Dor, *AI in Adjudication and Administration*, 86 BROOKLYN L. REV. 791, 801-02 (2021).
[2] Arthur Rizer & Caleb Watney, *Artificial Intelligence Can Make Our Jail System More Efficient, Equitable, and Just*, 23 TEX. REV. L. & POL. 181, 191 (2018) [hereinafter Rizer & Watney]; Doaa Abu Elyounes, *Bail or Jail? Judicial Versus Algorithmic Decision-Making in the Pretrial System*, 21 COLUM. SCI. & TECH. L. REV. 376, 389 (July 29, 2020) [hereinafter Abu Elyounes].
[3] Rizer & Watney, *supra* note 2, at 192.
[4] Andrew Guthrie Ferguson, *Policing Predictive Policing*, 94 WASH. U.L. REV. 1109, 1112-1113.
[5] Abu Elyounes, *supra* note 2, at 380-81.
[6] PAMELA M. CASEY ET AL., USING OFFENDER RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING: GUIDANCE FOR COURTS FROM A NATIONAL WORKING GROUP, NAT'L CTR. FOR STATE COURTS, USING OFFENDER RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING 29 (2011).
[7] Villasenor & Foggo, *supra* note 1, at 309.
[8] University of Virginia, School of Law, Artificial Intelligence in Criminal Sentencing (Transcript of Panel Discussion) (Apr. 2, 2021), https://www.law.virginia.edu/news/videos-podcasts/artificial-intelligence-criminal-sentencing. *See also* Carlow Univ., Artificial Intelligence in Criminal Justice: How AI Impacts Pretrial Risk Assessment (July 27, 2021), https://blog.carlow.edu/2021/07/27/artificial-intelligence-in-criminal-justice/. *See also* Hon. Noel L. Hillman, *The Use of Artificial Intelligence in Gauging the Risk of Recidivism*, A.B.A. JUD. DIV. TECH. (Jan. 1, 2019). *See generally* Villasenor & Foggo, *supra* note 1. For a critique of this trend, *see* Alberto De Diego Carreras, *The Moral (Un)intelligence Problem of Artificial Intelligence in Criminal Justice: A Comparative Analysis Under Different Theories of Punishment*, 25 UCLA J. L. & TECH. 1 (Fall 2020). *See also* Vincent Southerland, *With AI and Criminal Justice, the Devil is in the Data*, A.C.L.U. (Apr. 9, 2018), https://www.aclu.org/issues/privacy-technology/surveillance-technologies/ai-and-criminal-justice-devil-data.
[9] The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited Aug. 5, 2022).

[10] Julia Angwin et al., *Machine Bias*, ProPublica (May 23, 2016), *available at* https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing. Charlotte A. Tschider, *Beyond the "Black Box,"* 98 Denv. L. Rev. 683, 700 (2021) [hereinafter Tschider].

[11] Consent Decree/Rampart Los Angeles Police Department Online, https://www.lapdonline.org/consent-decree-rampart/ (last visited Aug. 5, 2022). *See also* Bill Quigley, *Racial Discrimination and the Legal System: The Recent Lessons of Louisiana*, U.N. Chronicle, *available at* https://www.un.org/en/chronicle/article/racial-discrimination-and-legal-system-recent-lessons-louisiana (last visited July 31, 2022). *See also* Amnesty Int'l, Amnesty International Condemns Racist Vigilantism and White Supremacy in the US Criminal Justice System (Nov. 19, 2021), https://www.amnestyusa.org/press-releases/aiusa-condemns-racist-vigilantism-and-white-supremacy-in-the-us-criminal-justice-system. *See also* Amnesty Int'l, The United States is Violating the Human Rights of Black People by Failing to Restrict Use of Deadly Force, https://www.amnestyusa.org/issues/the-united-states-is-violating-the-human-rights-of-black-people-by-failing-to-restrict-use-of-deadly-force-by-police/ (last visited Aug. 5, 2022).

[12] Darwin Bond Graham, *Black people in California are stopped more often by police, major study proves,* The Guardian, Jan. 3, 2020, *available at* https://www.theguardian.com/us-news/2020/jan/02/california-police-black-stops-force.

[13] *See generally* Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Color-blindness (2010); *see also* Graham Boyd, *The War on Drugs is the New Jim Crowe,* A.C.L.U. (2001), https://www.aclu.org/other/drug-war-new-jim-crow (last visited July 11, 2022).

[14] William Rhodes et al., *Federal Sentencing Disparity: 2005-2012*, Bureau of Justice Statistics, Working Paper No. 2015:01 (2015), *available at* https://bjs.ojp.gov/content/pub/pdf/fsd0512.pdf.

[15] *Id.*

[16] *George Floyd's Killing and the Black Lives Lost,* Human Rights Watch (June 1, 2020), https://www.hrw.org/news/2020/06/01/george-floyds-killing-and-black-lives-lost.

[17] *Number of people shot to death by the police in the United States from 2017 to 2022, by race*, Statistica (2022), https://www.statista.com/statistics/585152/people-shot-to-death-by-us-police-by-race (last visited Aug. 5, 2022) and *Rate of fatal police shootings in the United States from 2015 to August 2022, by ethnicity*, Statistica (2022), https://www.statista.com/statistics/1123070/police-shootings-rate-ethnicity-us (last visited Aug. 5, 2022).

[18] Silvia Foster-Frau, *Latinos are disproportionately killed by police but often left out of the debate about brutality, some advocates say*, Wash. Post, June 2, 2021, *available at* https://www.washingtonpost.com/national/police-killings-latinos/2021/05/31/657bb7be-b4d4-11eb-a980-a60af976ed44_story.html.

[19] Litska Strikwerda, *Predictive Policing: The Risks Associated with Risk Assessment*, 94:3 Police J. 422 (Sept. 2021), *available at* https://doi.org/10.1177/0032258X20947749.

[20] Khari Johnson, *The Hidden Role of Facial Recognition Tech in Many Arrests*, Wired (Mar. 7, 2022), https://www.wired.com/story/hidden-role-facial-recognition-tech-arrests.

[21] U.S. Government Accountability Office, Facial Recognition Technology: Federal Agencies' Use and Related Privacy Protections, GAO-22-106100, June 29, 2022, https://www.gao.gov/products/gao-22-106100. *See also* U.S. Government Accountability Office, Facial Recognition Technology: Current and Planned Uses by Federal Agencies, GAO-21-526 (Aug. 2021), https://www.gao.gov/assets/gao-21-526.pdf.

[22] Jasmine Hicks, *Go read this data analysis that uncovers predictive policing's flawed algorithm,* The Verge (Dec. 6, 2021), https://www.theverge.com/2021/12/6/22814409/go-read-this-gizmodo-analysis-predpol-software-disproportionate-algorithm.

[23] State v. Loomis, 371 Wis. 2d 235, 248 (2016).

[24] Ed Yong, *A Popular Algorithm Is No Better at Predicting Crimes Than Random People,* The Atlantic, Jan. 17, 2018, *available at* https://www.theatlantic.com/technology/archiv/2018/01/equivant-compas-algorithm/550646/ (last visited July 9, 2022)

[25] Tschider, *supra* note 10, at 700; Arun Rai, *Explainable AI: From Black Box to Glass Box*, J. Acad. Mktg. Sci. 138 (2019).

[26] *See* Fair Trials, Regulating Artificial Intelligence for Use in Criminal Justice Systems in the EU: Policy Paper (Jan. 2022), https://www.fairtrials.org/app/uploads/2022/01/Regulating-Artificial-Intelligence-for-Use-in-Criminal-Justice-Systems-Fair-Trials.pdf.

[27] U.K. Parliament, Justice & Homes Affairs Comm., Technology Rules? The advent of new technologies in the justice system, Report, 2021-22, H.L. 180 (Mar. 30, 2022), *available at* https://publications.parliament.uk/pa/ld5802/ldselect/ldjusthom/180/18002.htm.

[28] Bernard Harcourt, Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age 1-2 (2007).

[29] *Id.*

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Despite the NSA, hurdles still exist to protect patients from unforeseen medical cost surprises due to pending litigation, possible conflicts with existing state laws, and issues regarding the "Good Faith Estimate" requirement

BY ERIC CHAN

No More Surprises... One Day

LEGISLATIVE EFFORTS to combat "surprise" medical billing in California and nationwide had already begun before the Covid-19 pandemic,[1] but those efforts had seemingly stalled. Somewhat expectedly, however, at the end of 2020, Congress passed a significant package of surprise billing reforms.[2] The No Surprises Act (NSA) officially took effect on January 1, 2022,[3] providing a national solution to issues raised by surprise medical billing. The NSA was needed due to the inherent shortcomings in state laws, which, for the most part, stop at state borders.

In addition to prohibiting surprise billing, the NSA also creates a framework for resolving payment disputes between health care providers and plans, known as Independent Dispute Resolution (IDR), that takes patients out of the middle. The NSA makes numerous incremental reforms in the commercial health care market.

Taken together, they are easily the most significant changes that have been made to the American health care system since the Affordable Care Act of 2010. Furthermore, a little-known development is that the NSA imposes new requriements on

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STOP
NO SURPRISES!
HADI FARAHANI

all providers to tell patients in advance how much their care will cost.

Surprise Billing Explained

Surprise medical billing occurs when a patient with private health insurance coverage receives an unexpected bill following a hospital visit. This can arise when a patient visits a hospital emergency room and the hospital, or a treating physician, is "out-of-network" with the patient's health plan. It can also happen when a patient receives non-emergency services at an "in-network" hospital from a physician who is out-of-network.

In either scenario, the health care provider does not have an agreement with the health plan to accept a particular rate. Historically, if the provider believed that the plan had not paid a fair amount for services rendered, the patient could receive a bill for the unpaid balance. This is commonly referred to as "surprise billing" or "balance billing."

Surprise billing had been a growing problem in the years leading up to the enactment of the NSA. As the federal government puts it: "When individuals are unable to avoid nonparticipating providers, it raises health care costs and exposes patients to financial risk."[4] One study cited found that surprise bills arose from 39 percent of emergency room visits and that the average surprise bill increased from $220 in the year 2010 to $628 in the year 2016.[5] Surprise bills were even more costly when the patient had to be admitted to the hospital: Those bills rose from an average of $804 in 2010 (when 20.3 percent of hospital stays resulted in surprise bills) to $2,040 on average by 2016 (when a surprise bill occurred 42 percent of the time).[6]

California's Partial Protections

While California had protections against surprise billing prior to the NSA, they had significant limitations. A 2009 decision by the California Supreme Court, *Prospect Medical Group, Inc. v. Northbridge Emergency Medical Group*, ended surprise billing for emergency room patients covered by California-regulated health maintenance organizations.[7] However, the *Prospect* decision only applied to California health insurance policies governed by the Knox-Keene Act,[8] which is governed by the California Department of Managed Health Care (DMHC) and not those governed by the California Department of Insurance (CDI), California's other health insurance regulatory agency. A subsequent law, Assembly Bill 72, prohibited surprise billing by out-of-network physicians who render non-emergency care at an in-network hospital facility.[9] This legislation applies to both Knox-Keene- and CDI-governed health care policies.

The NSA, as enacted, forbids surprise billing of patients who have virtually any kind of commercial health care. The act covers group health plans as well as state-issued health insurance policies—thereby filling the gaps left by existing California law.

Neither AB 72 nor *Prospect*, however, extends to other forms of health care coverage such as employer-sponsored group health plans. When private employers create and maintain such plans, those plans are governed by the Employee Retirement Income Security Act, which preempts state law regulation.[10] Nor do California's protections extend to health insurance provided to California state employees (such as those covered through the California Public Employees' Retirement System) or federal employees. The NSA stepped in to fill this gap.

Enter the No Surprises Act

The NSA resulted from two years of intense congressional negotiation and compromise. Everyone agreed that the patient should be taken out of the middle of billing disputes between payers an providers. Two distinct camps, however, formed over the course of the 116th Congress: those who also wanted to impose specific payment rates on hospitals and physicians[11] and those who sought to avoid rate-setting in favor of an IDR process that would fairly resolve disputes between payers and providers.[12]

The IDR approach won out. According to a congressional press release at the time, the IDR process enacted by Congress would "fairly decide[] an appropriate payment for services based on the facts and relevant data of each case."[13] The same press release explained that the agreed-upon legislation "includes **NO** benchmarking or rate-setting."[14]

The NSA, as enacted, forbids surprise billing of patients who have virtually any kind of commercial health care.[15] The act covers group health plans as well as state-issued health insurance policies—thereby filling the gaps left by existing California law.[16]

Crucially, the NSA prohibits surprise billing not only for bills arising from an initial emergency room screening but also for the more substantial medical bills that may result when a patient is admitted to the hospital.[17] By default, patients can only be billed for post-stabilization care if the provider obtains the patient's informed consent and the patient agrees in writing to be balance-billed for the hospital stay (known as the "notice and consent" process).[18] Absent that, the patient can be held liable only for an "in-network" cost sharing amount.[19]

IDR Process

The NSA ensures that disputes over payment do not result in bills to the patient. Independent arbiters (known as "certified Independent Dispute Resolution entities") are appointed to resolve payment disputes that arise between health care providers and insurers.[20] The process is structured as a "baseball arbitration"—meaning that both sides submit a payment amount they believe to be appropriate, and the arbiter must then pick one side's offer or the other. Baseball arbitration is designed to "reward[] parties for approaching disputes with a degree of reasonableness" while simultaneously "penalizing parties for unreasonable positions," and thus "help[ing] [to] eliminate inflated or bogus claims."[21]

Within these confines, arbiters are statutorily required to equally weigh a number of factors:

- The Qualifying Payment Amount (QPA), defined as the payer's median in-network rate of the health plan or insurer for a particular item or service in a geographic region;[22]
- Submitted offers and information that the arbiter requests from parties;
- The level of training, experience, and quality and outcomes of the provider;
- The market share of provider or plan in the geographic region;
- The acuity of the individual patient or the complexity of the case;
- The hospital or other provider's teaching status, case mix, and scope of services;
- Demonstration of "good faith efforts or lack thereof" to contract; and

• Historical contracted rates between the parties.[23]

Furthermore, the arbiter is prohibited from considering either a provider's "usual and customary charges" and "billed" amounts or rates paid by Medicare, Medicaid, CHIP, TRICARE, or other public governmental payers.[24]

Following these guidelines, the arbiter must determine the appropriate "out-of-network" rate to be paid to the provider.[25] This could be higher or lower than, or the same as, the initial payment that was made to the provider.

Arbiters must be certified by the federal government in order to handle IDR proceedings. Approximately ten entities have been certified to date.[26] Due to a number of delays (including the ones described below with respect to litigation), the federal IDR portal website did not become fully operational until late April or early May of this year. Thus, parties have just begun to engage in IDR.

Surprises So Far

Ending surprise billing was a seemingly obvious solution to a well-known problem. Yet, the rollout of the NSA has been unpredictable on a number of fronts.

First, there has been litigation over the rules for IDR. The three federal agencies tasked with implementing the NSA—the Department of Health and Human Services (HHS), the Department of Labor, and the Treasury Department (together, the "Departments") promulgated hundreds of pages of emergency rules without notice and comment in order to prepare for the January 1, 2022, implementation of the NSA, i.e., the Interim Final Rules.[27]

Many of the rules set forth in the Interim Final Rules help clarify how the Departments intend to implement aspects of the NSA on which Congress was unclear or silent. However, one of the aspects of the new rule—known as the QPA rebuttable presumption—would have placed a "thumb" on the scale in the IDR process.[28] It would have required the independent arbiters to select the offer closest to the QPA unless they determined, based on "credible information," that the true out-of-network rate was "materially different" from the QPA.[29]

The rebuttable presumption would have upset the carefully balanced structure of the NSA in a way that Congress never intended. If it were to take effect, the outcome of the IDR process would always result in payment at or near the QPA. The Departments openly admitted that this was by design and that "implementing the Federal IDR process in this manner encourages predictable outcomes, which will reduce the use of the Federal IDR process over time."[30] Yet this conflicts with the careful compromise struck by Congress, which avoided rate-setting in favor of resolving disputes over payment through a fair and impartial IDR.

On October 28, 2021, just three weeks after the QPA rebuttable presumption rule was announced, the first lawsuit challenging it was filed in Texas federal court by the Texas Medical Association (TMA lawsuit).[31] Numerous other lawsuits soon followed, including one by the American Medical Association and the American Hospital Association in the federal court in Washington, D.C.[32] The provider plaintiffs in most of these cases asked for summary judgment on an expedited briefing schedule. This was based on the common belief that individual claims would be ripe for IDR in or around late February or early March of this year. (It actually took longer than that.)

The TMA lawsuit was the fastest to proceed to judgment. Briefing on cross-motions for summary judgment was completed by early February. Judge Jeremy Kernodle held an hour-long hearing on those motions on February 4, 2022. Two and a half weeks later, on February 23, the court issued a thorough ruling invalidating the rebuttable presumption.[33]

The Texas court held that by requiring arbiters to weigh the QPA more heavily than other factors in the IDR, the rebuttable presumption rule conflicted with the NSA's statutory text. It reasoned that "[n]othing in the Act [] instructs arbitrators to weigh any one factor or circumstance more heavily than the others."[34] The court also ruled that the Departments had violated the federal Administrative Procedure Act by implementing the rebuttable presumption rule without notice and comment.[35]

Five days after the judgment in the TMA lawsuit came out, the federal Center for Medicare and Medicaid Services (CMS) issued a statement on its website indicating that it would no longer direct arbiters to impose a presumption in favor of the QPA.[36] Rather, arbiters were to weigh all factors equally, as Congress intended.

The Departments ultimately appealed the TMA judgment, though it appears they did so only to preserve their rights. The Fifth Circuit granted open-ended stay of the appeal, agreed upon by both sides, "pending ongoing rule-making proceedings involving provisions of the No Surprises Act, with a status report due every sixty (60) days."[37]

The federal government now intends to promulgate a new formal rule, through notice and comment, that would supersede the Interim Final Rules—and also address the issues in the TMA complaint. In light of this, most, but not all, of the later filed cases across the country, including the most prominent, in Washington, D.C., have been formally stayed pending the outcome of the expected federal rule-making.

For now, the decisive outcome of this whirlwind litigation has arguably resulted in a fairer IDR process. However, it has also helped delay the rollout of IDR. As noted above, the IDR portal on CMS's website has only recently gone live, and the details are still being worked out.

Specified State Law

Another confounding issue concerns the act's implementation in California. The NSA was designed to "wrap around" existing state protections. Under the NSA, a "specified State law" is one that sets forth "a method for determining the total amount payable" for medical care rendered.[38] Where such a state law exists, the NSA must defer to it in two specific ways.[39]

First, parties will not have access to the federal IDR process, because state law will govern to determine the total amount payable for the medical care.[40] Second, state law will be used to determine the "in-network" cost-sharing amount that limits what the patient must pay, rather than the federal formula (which the NSA calls the "recognized amount").[41]

The federal government prepared for the 2022 implementation of the No Surprises Act by approaching regulators in each state and federal territory to ask them whether they believed there were any "specified State laws" that should take precedence over the NSA. For almost every state, the federal government then memorialized its understanding in a letter to state regulators. In California's case, the CMS issued such a letter on December 22, 2021, following conversations with the DMHC, CDI, and other regulators.[42]

The CMS letter erroneously identified AB 72 as the only "specified State law" in California. When the letter became public earlier this year, other California stakeholders, including trade associations for health plans, physicians, and hospitals, disagreed with that conclusion. Specifically, California's Knox-Keene Act requires health plans to pay out-of-network emergency providers for the "reasonable and customary value" of their services after the consideration of numerous factors such as the nature of the services provided,

the fees usually charged by the provider, and the provider's training, qualifications, and length of time in practice.[43] This standard should therefore have been recognized as a "specified State law" in the first instance: It provides a method for determining the total amount payable for out-of-network emergency care.

Not recognizing the "reasonable and customary" standard as a state law to which the NSA defers would have had significant consequences. It would have made the federal IDR process available to determine the total amount that would be paid for out-of-network emergency care under state-regulated health plans (e.g., Knox-Keene), using a different set of factors than the reasonable and customary value standard requires. Doing so would potentially have deprived health care providers of the compensation to which they are entitled. This was a particularly pressing issue prior to the TMA judgment and CMS's resulting shift: The outcome of IDR would always have been in favor of the submitted offer closest to the QPA.

Why was this a controversy to begin with? At least part of state and federal regulators' initial hesitation to recognize the reasonable and customary value standard appears to be due to the fact that the standard is not set forth in any one California statute but, rather, a greater body of law including caselaw and regulation. Another objection was that unlike the NSA (or, for that matter, AB 72), the reasonable and customary value for out-of-network care is not "fixed" until the provider sues in court and a jury comes back with a verdict determining that value in light of all the relevant factors and circumstances.[44] These objections should not matter, of course, given that the NSA itself defines "State law" broadly to "include[] all laws, decisions, rules, regulations, or other State action having the effect of law, of any State."[45]

Ultimately, DMHC issued formal written guidance, titled All-Plan Letter (APL) 22-011, after consulting again with CMS.[46] This guidance now makes clear that "DMHC-licensed health plans must continue to comply with California law regarding enrollee cost-sharing, provider reimbursement, and the resolution of disputes between plans and providers/facilities for out-of-network emergency services."[47] In other words, California's body of law surrounding the reasonable and customary value is now recognized as a specified state law.

Finally, there is the issue of patient notice and consent to be balance-billed. In a footnote to APL 22-011, DMHC identifies one issue that still has not been resolved, viz., how California law meshes with federal law in situations in which a patient wants to agree to be billed the full amount for medical care.[48] This scenario may arise when a patient wants to see a particular specialist or other provider who is out-of-network with the patient's health insurance.

While AB 72 and the NSA have similar procedures for obtaining a patient's written notice and consent to be balance-billed, the particulars conflict in many ways. For instance, consent under AB 72 must be obtained at least 24 hours in advance, yet notice and consent under the NSA must generally be obtained at least 72 hours in advance, unless the procedures were scheduled on the same day as they are performed, in which case consent must be provided at least 3 hours in advance.[49] The NSA also flatly prohibits providers from obtaining notice and consent for certain kinds of ancillary services, such as anesthesiology, pathology, radiology, and neonatology.[50] AB 72 contains no such exclusion.

Like a number of other federal healthcare-related laws, the NSA preempts any state law that "prevents the application of" a federal "requirement" established by the No Surprises Act.[51] However, due to the way the NSA was codified, it is unclear whether this standard preempts AB 72 requirements that conflict with the NSA's notice and consent requirements.[52] It may very well be that DMHC may need further conversations with CMS and California stakeholders in order to bring clarity to this complex area.

Beyond Surprise Billing

One of the most sweeping reforms to come out of the NSA has nothing to do with surprise billing. The NSA now requires any physician or healthcare facility that schedules a future medical service or procedure to generate an estimate of how much the patient will have to pay out of pocket, known as a "Good Faith Estimate" (GFE).[53] Patients who are uninsured may initiate an arbitration process, known as Selected Dispute Resolution (SDR), with their provider if they are ultimately charged an amount that is "substantially in excess of such estimate," meaning in the amount of $400 or more.[54] The GFE requirement applies to all providers that schedule care in advance, as long as the patient has commercial insurance.

The GFE requirement advances a long-held goal of patient care advocates, which is to make it easier to understand how much care will cost. (This is also referred to as "price transparency.") It is harder than it sounds, though. A single scheduled procedure, like a knee replacement, usually results in multiple bills: a hospital (facility) bill, a surgeon's bill for professional charges, a bill from the assistant surgeon, a bill from the anesthesiologist, a bill from the radiologist, charges for drugs and other ancillary services and supplies, and so on. However, these providers do not typically coordinate their bills. The NSA will require a single GFE that contains estimates for all of them.

A further complication is that for patients with health coverage, the NSA directs providers to send the GFE to the payer, not the patient. The payer is to then generate an "Advanced Explanation of Benefits" that predicts the out-of-pocket costs that the patient would incur under the health plan were the patient to proceed with receiving those services. Again, though, the infrastructure for providers and payers to talk to each other in a way necessary to make this happen does not yet exist.

It is little surprise, then, that the federal government has decided only to partially implement the GFE requirement in calendar year 2022. Providers must generate GFEs for uninsured (or "self-pay") patients only, and need not include the estimated charges from other, related providers.[55]

In the next couple months, the Departments plan to issue a comprehensive new proposed rule that is intended to take place of the Interim Final Rules presently in place. The new rule-making is guaranteed to address how the federal government plans to structure the IDR process in light of the TMA ruling. However, it is also likely to refine, and possibly change, many of the rules and regulations that were imposed as a result of the Interim Final Rules. The implementation of the NSA remains a moving target. The NSA contains powerful new protections for patients, and it is an important advance in U.S. healthcare reform. Unfortunately, the NSA's rollout has been rockier than anticipated, and there are more surprises to come. ■

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[1] Eric Chan et. al, *Another Kind of Medical Shock*, L.A. Lawyer, Apr. 2020, 34-39.

[2] The No Surprises Act was enacted as part of the Consolidated Appropriations Act of December 2020 (Pub. L. 116-260), 134 Stat. 1182 (2020).

[3] *Id.*

[4] Requirements Related to Surprise Billing, Pt. I, 86 Fed. Reg. 36,872 (July 13, 2021) [hereinafter Surprise Billing Requirements, Pt. 1]; Interim Final Rules, Pt. I, 86 Fed. Reg. 36,874 (Oct. 7, 2021) [hereinafter Interim Final Rules, Pt. II).

[5] *Id.* n.10, citing Adam I. Biener et al., *Emergency Physicians Recover a Higher Share of Charges From*

Out-Of-Network Care Than From In-Network Care, 40 HEALTH AFFAIRS 622–628 (2021).

[6] Surprise Billing Requirements, Pt. 1, *supra* note 4, at n.11, citing Eric C. Sun et al., *Assessment of Out-of-Network Billing for Privately Insured Patients Receiving Care in In-Network Hospitals*. 179 J. AM. MED. ASS'N INTERNAL MED. 1543–1550 (2019).

[7] Prospect Med. Group, Inc. v. Northridge Emergency Med. Group, 45 Cal. 4th 497 (2009).

[8] HEALTH & SAFETY CODE §1340 *et seq*.

[9] AB-72 Health care coverage: out-of-network coverage (2015-2016), *available at* https://leginfo.legislature.ca.gov (last viewed Sept. 15, 2022).

[10] *See generally* 29 U.S.C. §1144; Rutledge v. Pharm. Care Mgmt. Ass'n, 141 S. Ct. 474 (2020).

[11] One example is the proposal known as the STOP Surprise Billing Medical Bills Act of 2019, *available at* https://www.congress.gov/bill/116th-congress/senate-bill/1531/text.

[12] *See* The Consumer Protections Against Surprise Medical Bills Act of 2020, *available at* https://waysandmeans.house.gov/media-center/press-releases/neal-and-brady-release-legislative-text-surprise-medical-billing.

[13] Protecting Patients from Surprise Medical Bills (Dec. 21, 2020), https://gop-waysandmeans.house.gov/protecting-patients-from-surprise-medical-bills.

[14] *Id*. (emphasis in original).

[15] The NSA's prohibitions on surprise billing technically apply to "plan year[s] beginning on or after January 1, 2022." *See* 42 U.S.C. §§300gg-131(a), §§300gg-132(a). Most insurance policies begin on January 1 of each year, but certain kinds of employer-sponsored health plans begin midyear.

[16] 42 U.S.C. §300gg-111(a), (b).

[17] 42 U.S.C. §300gg-111(a)(3)(C)(ii)(i) (defining "emergency services" to encompass "post-stabilization services" unless notice and consent is obtained from the patient).

[18] 42 U.S.C. §§300gg-111(a)(3)(C)(ii)(II), §§300gg-132(d) (specifying the criteria for obtaining notice and consent).

[19] 42 U.S.C. §§300gg-111(a)(1)(C)(ii),(iii),(v); 300gg-111(b)(1)(A),(B),(E).

[20] *See* 42 U.S.C. §300gg-111(c) (setting forth timeframes and procedures).

[21] *See generally* Lochlin B. Samples, *Resolving Construction Disputes through Baseball Arbitration*, ABA (Mar. 12, 2019), *available at* https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/resolving-dispute-baseball.

[22] 42 U.S.C. §300gg-111(a)(3)(E)(i).

[23] 42 U.S.C. §§300gg-111(c)(5)(C)(i), 300gg-(c)(5)(C)(ii)(I)-(V).

[24] 42 U.S.C. §300gg-111(c)(5)(D).

[25] 42 U.S.C. §§300gg-111(a)(3)(K) (definition of "out-of-network rate"), 300gg-111(c) (IDR procedure).

[26] CMS.gov, List of Certified Independent Dispute Resolution Entities, *available at* https://www.cms.gov/nosurprises/Help-resolve-payment-disputes/certified-IDRE-list.

[27] *See* Surprise Billing Requirements, Pt. I, *supra* note 4; Interim Final Rules, Pt. II, *supra* note 4, at 55,980.

[28] Interim Final Rules, Pt. II, *supra* note 4, at 55,984.

[29] *Id*.

[30] *Id*. at 55,985.

[31] Texas Med. Ass'n & Dr. Adam Corley v. United States Dep't Health & Human Servs., et al., No. 21-cv-425-JDK (E.D. Tex.), Dkt. No. 1, complt. (Oct. 28, 2021).

[32] Association Air Med. Servs. v. United States Dep't Health & Human Servs., et al., No. 21-cv-3031-RJL (D. D.C.) (Nov. 16, 2021); American Med. Ass'n et al. v. United States Dep't of Health & Human Servs., et al., No. 21-cv-3231-RJL (D. D.C.) (Dec. 9, 2021); American Soc'y of Anesthesiologists et al v. United States Dep't Health & Human Servs. et al., No. 21-cv-6823-MEA (N.D. Ill.) (Dec. 22, 2021); Georgia Coll. Emergency Physicians and Brett Cannon, M.D., v. United States Dep't Health & Human Servs., et al., No. 21-cv-5267-MHC (N.D. Ga.) (Dec. 23, 2021); Dr. Daniel Haller and Long Island Surgical PLLC v. U.S. Dep't Health & Human Servs., et al., No. 21-cv-7208-AMD-AYS (E.D. N.Y.) (Dec. 31, 2021).

[33] Texas Med. Ass'n v. United States Dep't Health & Hum. Servs., No. 6:21-CV-425-JDK, _ F. Supp. 3d _, 2022 WL 542879 (E.D. Tex. Feb. 23, 2022).

[34] *Id*. at *8.

[35] *Id*. at *11-13.

[36] CMS.gov, Memorandum Regarding Continuing Surprise Billing Protections for Consumers (Feb. 28, 2022), *available at* https://www.cms.gov/files/document/memorandum-regarding-continuing-surprise-billing-protections-consumers.pdf.

[37] Texas Med. Ass'n v. United States Dep't Health & Hum. Servs., No. 22-40264 (order by Fifth Circuit judge Gregg Costa granting "Appellants' unopposed motion to stay further proceedings in this court pending ongoing rulemaking proceedings involving provisions of the No Surprises Act, with a status report due every sixty (60) days").

[38] 42 U.S.C. §300gg-111(a)(3)(I).

[39] *See, e.g*., 42 U.S.C. §§300gg-111(a)(3)(H)(i), 300gg-111(a)(3)(K).

[40] 42 U.S.C. §§300gg-111(c)(1)(A), (2)(B) (making the IDR process available only "in a State described in subsection (a)(3)(K)(ii)" – meaning a state that "does not have in effect" any "specified State law").

[41] 42 U.S.C. §300gg-111(a)(3)(H) (definition of "recognized amount").

[42] Letter from CMS to Gov. Gavin Newsom, Insurance Commissioner Ricardo Lara, and DMHC Director Mary Watanabe (Dec. 22, 2021), *available at* https://www.cms.gov/files/document/cms-letter-ca-caa-enforcement-and-dispute-resolution.pdf.

[43] *See, e.g*., Gould v. Workers` Comp. Appeals Bd., 4 Cal. App. 4th 1059 (1992); CAL. CODE REGS., tit. 28, §1300.71(a)(3)(C).

[44] Long Beach Mem'l Med. Ctr. v. Kaiser Found. Health Plan, Inc., 71 Cal. App. 5th 323, 339 (2021).

[45] 42 U.S.C. §300gg-23(d)(1).

[46] APL 22-011 – No Surprises Act (NSA) Guidance (Mar. 21, 2021), *available at* https://www.dmhc.ca.gov/Portals/0/Docs/OPL/APL%2022-011%20-%20No%20Surprises%20Act%20(NSA)%20Guidance%20(3_21_22).pdf?ver=wVzqpHmSVpIA3trl8Uh46Q%3d%3d.

[47] *Id*. at 4.

[48] *Id*. at 3 n.5.

[49] HEALTH & SAFETY CODE §1371.9(c)(1); INS. CODE §10112.8; 42 U.S.C. §300gg-132(d)(1)(A).

[50] *Id*. §300gg-132(b)(2)(A).

[51] Public Health Service Act §2724, 42 U.S.C. §300gg-23(a).

[52] By it terms, Section 300gg-23(a) applies to federal "requirements" found in Part D of Chapter 6A, Subchapter XXV of Title 42 of the United States Code. The NSA's notice and consent requirements are found in Part E.

[53] 42 U.S.C. §300gg-136.

[54] 42 U.S.C. §300gg-137; Interim Final Rules, Pt. II, *supra* note 4, at 56,025.

[55] "[O]n or after January 1, 2022, through December 31, 2022, HHS will exercise its enforcement discretion in situations where the good faith estimate does not include expected charges for items and services." Interim Final Rules, *supra* note 4, at 56,030.

BY ALAN D. WEINFELD

Can Remedying Elder Abuse Be Abusive?

Statutorily mandated nonreciprocal attorney fees and enhanced damages in bad faith cases to a prevailing elder litigant can test the limits of justice in elder abuse cases

A **40-YEAR-OLD BUSINESSMAN** has an argument with his 65-year-old divorced father over his father's decision to marry a woman who is 20 years younger and very wealthy. At the end of the argument, the businessman announces that he will amend his revocable trust to remove his father as a 25 percent remainder beneficiary, out of spite and because he figures that the wealthy new wife will provide for his father. The businessman signs this trust amendment and dies in a car accident two days later, leaving a $4 million estate that is now slated to go 100 percent to charity. Does the father have a claim against his son's estate for financial elder abuse? Under the Elder Abuse and Dependent Adult Civil Protection Act (Elder Abuse Act) and current case law, such a claim might be possible.

The California Legislature enacted the Elder Abuse Act to protect persons 65 and older "by providing enhanced remedies to encourage private, civil enforcement of laws against elder abuse and neglect."[1] One of the purposes of the financial abuse provisions is to subject financial agreements with elders to special scrutiny.[2] The enhanced remedies for financial abuse include 1) attorney's fees, which are mandatory if the elder prevails and are not reciprocal to a prevailing defendant, and 2) double damages in cases of bad faith.[3] The Elder Abuse Act provisions are liberally construed in favor of elders.[4]

Financial elder abuse occurs when a person or entity "[t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder…for a wrongful use or with intent to defraud, or…by undue influence."[5] One who assists in the taking of an elder's property also can be liable for financial abuse.[6]

A person takes an elder's property "for a wrongful use" if the person "knew or should have known that [his or her] conduct was likely to be harmful to the elder."[7] A person "[t]akes, secretes, appropriates, obtains, or retains" an elder's property when the elder is "deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of [the] elder."[8] The outer limits of what constitutes a "taking" and an elder's "property right" have been tested in recent

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years, as elders and their attorneys have sought to tap into the enhanced remedies that accompany a financial abuse claim.

Promises and Prospective Transfers

It is settled that one who misappropriates funds to which an elder is entitled under a contract can be liable for financial elder abuse.[9] However, courts have expansively interpreted the law to support a claim based on an elder's mere entry into a contract that neither side performed.[10]

In *Bounds v. Superior Court*, the defendants manipulated an elder into signing escrow instructions that authorized the sale of real property owned by the elder's trust.[11] Although the elder successfully terminated the escrow and retained the property, she alleged that the mere existence of the escrow instructions significantly impaired the value of the property and her ability to use it as security for a loan.[12] The court found that these allegations sufficiently pleaded a "taking" of her property because the restrictions on alienability "deprived" her and the trust "of one of the incidents of property ownership."[13] The court further held that a "depriv[ation] of [a] property right…by means of an agreement" can occur even if the agreement is not performed.[14]

In reaching this holding, however, the *Bounds* court exceeded the Elder Abuse Act's applicability to unperformed agreements and stated that prospective donative transfers and testamentary bequests could constitute a "taking" for purposes of a financial elder abuse claim.[15] The court explained:

> A donative transfer is a gratuitous transaction. It can be inter vivos or testamentary. In regard to an inter vivos gift of personal property, the gift is not complete (or consummated) until the donor has transferred the gift to the donee. [] An inter vivos gift of real property is not complete until the requirements of making a valid conveyance by deed are met. [] A testamentary bequest (which is also a gratuitous transaction absent a contract to make a will) is merely an inchoate expectation on the part of the beneficiary because "[i]n California, a will is generally revocable by the testator at any time and for any reason prior to his or her death."
>
> Thus, in the context of this statute, the phrases "donative transfer" and "testamentary bequest" refer both to transactions that have been performed (the gift has been delivered and the testamentary bequest has taken effect) and to transactions that have not yet been performed (a promise to make a gift and a testamentary bequest has been made but the testator has not died)."[16]

How far does the "taking" provision reach? Does it reach a prospective bequest in a living person's estate planning documents, like the one in the hypothetical above?

Tepper v. Wilkins touched on this issue.[17] There a daughter sought to assert an elder abuse claim on behalf of her living elderly mother against her other siblings, who were trustees of the mother's trusts.[18] The court found that the daughter lacked standing to sue on behalf of her living mother because the daughter was not a conservator, trustee, or attorney-in-fact for her mother.[19] The court also suggested that even if the plaintiff daughter were named as a beneficiary in her mother's revocable trust, the daughter still would lack standing to sue for elder abuse: "[Plaintiff] does not claim to have any legally cognizable interest in her mother's revocable living trust; and, even if she were named as a beneficiary, she would not have one."[20] Given that this hypothetical finding is dicta, however, it is not necessarily binding precedent in other cases.

Harm to Elder's Trust or Corporation

For estate planning and asset protection purposes, people often own real estate or other assets through a corporate entity or trust. In this situation, a wrongdoer's conduct may only damage an asset legally owned by an elder's trust or corporation, and not the elder directly. A few recent cases have addressed this situation, but they are not entirely consistent.

Bounds permitted a financial elder abuse claim based on the transfer of an interest in real property owned by the elder's revocable living trust, of which the elder was trustee.[21]

Pynoos v. Massman[22] is an unpublished case that followed *Bounds*, which holds that a general partner's failure to make distributions to a limited partnership interest owned by an irrevocable trust of which an elder was trustee and primary beneficiary could constitute financial elder abuse.[23] The *Pynoos* court found that the distributions wrongfully retained by the general partner were the elder's "personal property," even though the limited partnership interest that had the right to them was held in the name of the irrevocable trust.[24] The court explained that elders who are duped into transferring property from their trust to the wrongdoer (like in *Bounds*) can sue for financial elder abuse and noted that "[i]f this were not the rule, elders who elect to use living trusts as an estate planning tool would forfeit their ability—and the ability of their heirs—to pursue elder abuse claims should the elders be manipulated into transferring property out of the trust and into an abuser's pocket."[25]

The court did note, however, that at some point, an elder's property interest is too speculative to qualify for financial elder abuse:

> To be sure, a plaintiff must have a sufficiently definite interest in the property allegedly taken to sue for elder abuse. [] Thus, property rights that spring into existence only upon the happening of an event…or that can be unilaterally divested by another (*Estate of Giraldin* (2012) 55 Cal.4th 1058, 1065–1066 [expectation of inheritance from fully revocable living trust]) are too speculative to support an elder abuse claim.[26]

Unfortunately, because *Pynoos* is unpublished, its useful guidance generally cannot be cited in other cases.

Hilliard v. Harbour refused to allow an elder abuse claim for conduct that harmed corporate entities owned by the elder.[27] The court suggested that the Elder Abuse Act should not provide greater rights to elders than those afforded to non-elders:

> It is one thing to say that financial agreements entered into by elders should be "subject to special scrutiny" (*Bounds v. Superior Court, supra*, 229 Cal.App.4th at p. 478, 177 Cal.Rptr.3d 320), but quite another to suggest, as Hilliard does, that a lender has duties to a borrower who resides in this state and is "65 years of age or older" (§ 15610.27) different from those it owes other borrowers. In essence, Hilliard appears to maintain that Wells Fargo's…[conduct], may not *ordinarily* constitute a "taking" or "appropriation" of property "for a wrongful use" and/or "with intent to defraud" within the meaning of the Act, but it does in this case simply because Hilliard is a resident of this state and over 65 years of age.[28]

Mahan v. Charles W. Chan Insurance Agency, Inc., which was decided after *Hilliard,* stretched the financial abuse statutes to cover harm to a trust set up by elders for the benefit of non-elders.[29] There, the elders' estate plan included the

contribution of two life insurance policies to a revocable living trust for the benefit of their children, along with funds to pay the policy premiums.[30] More than two decades later, when the elders were in cognitive decline, the defendant insurance agents manipulated the elders into restructuring the life insurance policies.[31] The restructuring resulted in 1) the draining of cash from the trust, because it had to pay much higher policy premiums and commissions to the defendants, 2) the loss of tax benefits that would have been available under the original structure, and 3) the elders' having to contribute significant amounts of personal funds to the trust to pay the higher policy premiums.[32] The defendants argued that they did not deprive the elders of any "property" because the trust owned the life insurance policies and paid the commissions.[33] The court disagreed, finding that the elders themselves were deprived of "property" in the following ways: 1) damage to their "estate plan"— the defendants' conduct made the elders' unique chosen gift assets in their estate plan (the life insurance policies) more expensive and of lesser value, and 2) the elders "had to reach into their pockets and sell assets to provide more cash to the [] Trust than they ever planned to do" to cover the higher premiums and the defendants' commissions.[34]

It is debatable whether the *Mahan* elders could have pursued their claim in their individual capacities had they been under 65, given that the life insurance policies were owned by a trust.[35] The *Mahan* court did not discuss *Hilliard*, which was decided several months earlier.

The *Mahan* court also went to great lengths to justify its results due to the "unique" nature of the life insurance policies at issue.[36] However, elders are not precluded from applying *Mahan*'s "damage" to "estate plan" theory to other types of estate plan assets.[37]

Probate Estates

In *Ring v. Harmon*,[38] the court found that when an elder is a personal representative of an estate, the elder cannot bring a financial abuse claim for harm suffered in his or her capacity as personal representative.[39] The *Ring* court also indicated that a personal representative of a probate estate cannot bring an elder abuse claim on behalf of an elder beneficiary of the estate because the personal representative is not acting as the elder's representative but is instead acting as the estate's representative.[40]

Moreover, the *Ring* court found that when property is held by a probate estate, and the elder is both the beneficiary and personal representative, the elder may bring a financial abuse claim in his or her beneficiary (individual) capacity based on the defendants' transactions with the probate estate.[41] In the case at hand, the court found that the elder beneficiary had a sufficient interest in the estate's property to be "deprived of a cognizable property right" because the defendants' conduct caused the property to be burdened with additional debt and the beneficiary "may" have to contribute her own funds to service the additional debt.[42]

Back to The Hypothetical

Returning to the hypothetical, the father could cite *Bounds* to claim that his son committed financial abuse by cutting off the father's prospective right to receive benefits from the son's trust after the son died. The father could assert that the son would or should have known that the trust amendment was likely to be harmful to the father, which could satisfy the "wrongful use" requirement.[43]

The son's estate likely would cite *Tepper* to assert that the father has not been deprived of a "property right," given that the son had the absolute right to revoke or amend his trust during his lifetime.[44] At first glance, this argument is appealing. However, the hypothetical discussed in *Tepper* is not necessarily binding, and *Bounds* might support the father's claim. *Bounds* noted that "a will is generally revocable by the testator at any time and for any reason prior to his or her death" but still proceeded to state that the Elder Abuse Act applies to prospective testamentary bequests and donative transfers that have not yet been performed.[45] The broad application in *Mahan* and *Ring* also might help support the father's financial abuse claim.

Based on current published case law, what appears at first glance to be a meritless claim might be viable, particularly given the liberal construction of the Elder Abuse Act in favor of elders.[46] If the father prevailed, he could recover not only the 25 percent of his son's $4 million estate initially provided in the trust, but he also could recover 1) attorney's fees and 2) if bad faith were established, double damages, which could bring his recovery to more than 75 percent of the son's estate.[47]

The Outer Limits

Hilliard suggested that the Elder Abuse Act should not provide greater rights to elders than non-elders.[48] Although this suggestion sounds reasonable, other published case law, such as *Mahan*, *Bounds,* and *Ring*, obfuscate the suggestion.

If the Elder Abuse Act does, indeed, provide greater rights to elders than non-elders, then cases discussing the nature and limits of "takings" and "property rights" are of no use in financial elder abuse cases and could lead to greater unpredictability. For example, a living debtor who changes his or her will to remove a creditor as a beneficiary cannot be liable for fraudulent transfer because of the debtor's absolute right to amend the will.[49] This begs the question of whether the expansive interpretations in *Bounds*, *Mahan* and *Ring* provide a financial abuse claim if the removed beneficiary happens to be over 65. That issue has yet to be decided.

While the current limits of financial elder abuse law are not fully settled, current case law does provide the following guiding principles:

1) If a wrongdoer damages property owned by an elder's revocable trust of which the elder is a beneficiary, the wrongdoer can be liable for financial elder abuse.[50] However, a financial abuse claim also might lie if the elder's trust is irrevocable and the beneficiaries are non-elders.[51]

2) In the context of probate estates, an elder who is the personal representative and beneficiary of the estate can probably bring a financial abuse claim for harm to estate property to which the elder is entitled.[52] However, an elder who is a personal representative, but not a beneficiary, cannot bring a financial abuse claim for harm to the estate.[53]

3) If a wrongdoer damages assets owned by an elder's corporation, *Hilliard* would appear to preclude a financial abuse claim.[54] However, an astute attorney for the elder can easily frame the corporate ownership as a component of the elder's "estate plan" and use *Mahan's* "damage" to the "estate plan" theory, which was enumerated after *Hilliard* was decided.[55]

4) If a person breaches an agreement to provide for an elder in the person's estate plan, the elder would appear to have a claim for financial abuse.[56]

In close cases, the court could very well side with the elder, given that the Elder Abuse Act is liberally construed in favor of elders.[57]

The enhanced remedies for financial abuse can change the whole nature of a case, and potentially convince attorneys

to represent an elder where only a small amount is at issue.[58] The mere possibility of an adverse attorney's fee award can force a defendant to agree to a quick settlement instead of defending even the most meritless case.[59]

Elders also can sue the people who "assisted" the wrongdoer in the "taking," such as a relative who takes a wrongdoer to his attorney's office to sign a trust amendment that removes the elder as a beneficiary, and possibly even the drafting attorney himself.[60] This "assistance" provision allows elders to pursue additional "deep pockets" from which to recover the enhanced remedies.[61]

Unless the legislature or California Supreme Court significantly narrows the scope of financial elder abuse law, attorneys with clients over 65 will continue to pursue financial abuse claims in most civil and probate litigation, and eagerly test the limits of the law with the hope of unlocking the bounty of enhanced remedies. ■

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[1] Bounds v. Superior Ct., 229 Cal. App. 4th 468, 478 (2014).
[2] *Id.*
[3] *See* WELF. & INST. CODE §15657.5(a); PROB. CODE §859.
[4] Mahan v. Charles W. Chan Ins. Agency, Inc., 14 Cal. App. 5th 841, 860-61 (2017).
[5] WELF. & INST. CODE §§15610.30(a)(1) & (3).
[6] WELF. & INST. CODE §15610.30(a)(2).
[7] WELF. & INST. CODE §15610.30(b).
[8] WELF. & INST. CODE §15610.30(c).
[9] Paslay v. State Farm Gen. Ins. Co., 248 Cal. App. 4th 639, 656 (2016); *see* O'Brien as Trustee of Raymond F. O'Brien Revocable Trust v. XPO CNW, Inc., 362 F. Supp. 3d 778, 786 (N.D. Cal. 2018).
[10] *See* Bounds v. Superior Ct., 229 Cal. App. 4th 468, 482 (2014).
[11] *Id.* at 472.
[12] *Id.* at 472, 475-76.
[13] *Id.* at 480.
[14] *Id.* at 480-482.
[15] *See id* at 481 ("the phrases 'donative transfer' and 'testamentary bequest' refer not only to consummated transfers, but also to prospective transfers.").
[16] *Id.* at 481-82.
[17] Tepper v. Wilkins, 10 Cal. App. 5th 1198 (2017).
[18] *Id.* at 1202.
[19] *Id.* at 1207.
[20] *Id.* at 1206.
[21] Bounds, 229 Cal. App. 4th at 472, 473, 479.
[22] Pynoos v. Massman, No. B249711, 2014 WL 5282153 (Cal. Ct. App., Oct. 16, 2014).
[23] *See id.* at *3-4.
[24] *Id.* at *3-4.
[25] *Id.* at *3.
[26] *Id.* at *4.
[27] Hilliard v. Harbour, 12 Cal. App. 5th 1006, 1015 (2017).
[28] *Id.* at 1015-1016.; *see* Strawn v. Morris, Polich & Purdy, LLP, 30 Cal. App. 5th 1087, 1103 (2019) (elder could not sue insurer's attorney/agent for financial elder abuse because it would contravene rule that insurer's agents cannot be liable for bad faith denial of coverage (emphasis in original)).
[29] Mahan v. Charles W. Chan Ins. Agency, Inc., 14 Cal. App. 5th 841 (2017).
[30] *Id.* at 848.
[31] *Id.* at 849-854.
[32] *Id.* at 853.
[33] *Id.* at 857.
[34] *Id.* at 862-65.
[35] *See* O'Flaherty v. Belgum, 115 Cal. App. 4th 1044, 1062 (2004) (trustee of a trust is the real party in interest for purposes of bringing a claim on behalf of the trust).
[36] *See* Mahan, 14 Cal. App. 5th at 862-63 n.21.
[37] *See* Melcher v. Fried, No. 16-cv-2440-BAS-BGS, 2018 WL 2411747, at *5 (S.D. Cal., May 29, 2018) (elder sought leave to amend complaint to claim that partnership in which elder was general partner was created for estate planning purposes); *see also* In Re: AXA Equitable Life Ins. Co. COI Litig., No. 16-CV-740 (JMF), 2022 WL 976266, at *27 (S.D. N.Y., Mar. 31, 2022) (applying California law) (citing *Mahan* and *Bounds* to find that "property held by the Currie Family Trust, of which Mr. Currie was trustee, was Mr. Currie's property for purposes of the [California] Elder Abuse Law").
[38] Ring v. Harmon, 72 Cal. App. 5th 844 (2021).
[39] *Id.* at 851.
[40] *Id.*
[41] *Id.* at 852.
[42] *Id.* at 855-56.
[43] *See* WELF. & INST. CODE §15610.30(b).
[44] *See* Tepper v. Wilkins, 10 Cal. App. 5th 1198, 1206 (2017); Estate of Giraldin, 55 Cal.4th 1058, 1065-66 (2012).
[45] *See* Bounds v. Superior Ct., 229 Cal. App. 4th 468, 482 (2014).
[46] *See* Mahan v. Charles W. Chan Ins. Agency, Inc., 14 Cal. App. 5th 841, 860-61 (2017).
[47] *See* WELF. & INST. CODE §15657.5(a); PROB. CODE §859; Estate of Ashlock, 45 Cal. App. 5th 1066, 1074 (2020).
[48] *See* Hilliard v. Harbour, 12 Cal. App. 5th 1006, 1015-1016 (2017).
[49] *See* Cabral v. Soares, 157 Cal. App. 4th 1234, 1240 (2007).
[50] *See* Bounds, 229 Cal. App. 4th at 472, 479; WELF. & INST. CODE §15610.30(c).
[51] *See* Mahan, 14 Cal. App. 5th at 862-65; Pynoos v. Massman, No. B249711, 2014 WL 5282153, at *3-*4 (Cal. Ct. App., Oct. 16, 2014).
[52] *See* Ring v. Harmon, 72 Cal. App. 5th 844, 852 (2021).
[53] *Id.* at 851.
[54] *See* Hilliard, 12 Cal. App. 5th at 1015-1016; *see also* Melcher v. Fried, No. 16-cv-2440-BAS-BGS, 2018 WL 2411747, at *5 (S.D. Cal., May 29, 2018).
[55] *See* Melcher, 2018 WL 2411747, at *5.
[56] *See* PROB. CODE §21700; Paslay v. State Farm Gen. Ins. Co., 248 Cal. App. 4th 639, 656 (2016)
[57] *See* Mahan, 14 Cal. App. 5th at 860-61.
[58] *See* WELF. & INST. CODE §15657.5(a); Bates v. Presbyterian Intercommunity Hosp., Inc., 204 Cal. App. 4th 210, 216 (2012).
[59] *See* Sen. Comm. on Judiciary, Analysis of S.B. No. 1140 (2007-2008 Reg. Sess.).
[60] *See* WELF. & INST. CODE §15610.30(a)(2); Raicevic v. Lopez, No. D055002, 2010 WL 3248335, at *21 (Cal. Ct. App., Aug. 18, 2010) (potential elder abuse claim against attorney).
[61] *See, e.g.,* Makaeff v. Trump University, LLC, 145 F. Supp. 3d 962, 981 (S.D. Cal. 2015) (elder sued Donald Trump personally for financial abuse based on Trump's assistance of Trump University in taking money from the elder).

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by Benjamin Fenton

Closing Argument

Responses to Claims of Whistleblower Retaliation

Individuals who bring claims of fraud and associated crimes, often called whistleblowers, hold an invaluable role in our legal system. Bringing attention to entities involved in corruption and malpractice, they also serve as catalysts in addressing significant wrongdoing such as overbilling for goods and services, evading taxes, and committing tax fraud.

Whistleblowers may face retaliation after coming forward with their claims, especially if such claims were against their employer. Examples of retaliation against whistleblowers in the workplace include dismissal, unfavorable changes to scheduling or job assignments, ver- bal abuse, poor performance reviews, and reduction of earnings.

To prevent retaliation against whistleblowers and hold employers engaging in retaliation accountable, laws aimed to protect whistleblowers, such as California Labor Code Section 1102.5, are essential. Claims alleging retaliation in violation of the statute should be evaluated carefully and consistently by courts. Until 2022, some California courts inconsistently evaluated retaliation claims. Recent developments have established a clear, consistent framework for evaluating retaliation cases. However, this framework has also made it increasingly difficult for employers to properly defend against retaliation claims.

Many California courts formerly often relied on the *McDonnell Douglas* burden-shifting framework to analyze retaliation claims.[1] The *McDonnell Douglas* test requires the employee to provide prima facie evidence of retaliation, and the employer must then provide a legitimate reason for the "adverse action" in question. The *McDonnell Douglas* framework then requires the burden to once again be placed upon the employee to provide evidence that the reason was a pretext for retaliation.

Enacted in 2003, California Labor Code Section 1102.6 states that employees must first provide evidence retaliation of the claim was a factor in the employer's adverse action. Having established that evidence, the employer must provide evidence the same action would have occurred for legitimate, independent reasons, regardless of the claim. After Section 1102.6 was enacted, some California courts continued to use the *McDonnell Douglas* framework.

Earlier this year, the case of *Lawson v. PPG Architectural Finishes, Inc.*[2] clarified confusion on how California courts should determine the burden of proof in whistleblower retaliation cases by doing away with the *McDonnell Douglas* burden-shifting framework. This ruling confirmed that whistleblowers must only prove that their complaint was a "contributing factor" to an adverse action, substantially relaxing the burden of proof necessary for whistleblowers.

This framework of deciding the outcome of retaliation cases eases a whistleblower's burden of proof while increasing the employers' burden of proof, which emphasizes the importance of employer recordkeeping and internal compliance protocols.

If employers are found liable for retaliation, they may face a number of consequences, including reinstatement for the employee if the employee was dismissed, reimbursement of lost wages and benefits, attorney and court fees, and reimbursement for pain and suffering.

Success in a whistleblower retaliation defense case requires employers to provide evidence that any unfavorable workplace condition would have occurred regardless of the employee's status as a whistleblower, as opposed to the prior standard that required a single explanation for the unfavorable condition to shift the burden back to the plaintiff.

Employers must have proactive measures in place to ensure adequate evidence is available. Employers should implement regular, consistent procedures for documenting employee performance concerns, discipline, write-ups, and other evidence of disputes with employees and records of investigations. Also, employers should implement training to ensure all employees understand which types of actions constitute retaliation. This training should include detailing the correct protocol to follow after a whistleblower complaint. Further, employers should provide employees with multiple methods of reporting illegal activity.

Since easing a whistleblower's burden of proof to show retaliation may encourage an uptick in nonmeritorious lawsuits, California employers should implement these proactive measures as part of compliance and human resource functions to defend themselves in the event a whistleblower retaliation case is brought forward. ■

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[1] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
[2] Lawson v. PPG Architectural Finishes, Inc.,12 Cal. 5th 703 (2022).

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