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Mr. Gleitman has practiced sophisticated estate planning for 26 years, specializing for more than 14 years in offshore asset protection planning. He has had and continues to receive many referrals from major law firms and the Big Four. He has submitted 52 estate planning issues to the IRS for private letter ruling requests; the IRS has granted him favorable rulings on all 52 requests. Twenty-three of those rulings were on sophisticated asset protection planning strategies.
On September 29, 1967, *Time* magazine devoted its cover story to the wedding of Margaret Elizabeth Rusk, daughter of then Secretary of State Dean Rusk. Although news magazines have long held a fascination with the nuptials of the young and elite, what landed Peggy Rusk, a Stanford undergrad and past recipient of a D.A.R. prize, on the cover of *Time* was a particular distinction. A foremost member of President Johnson’s cabinet had, in the parlance of the day, “given his…daughter’s hand to a Negro.” *Time* found the white-gowned Peggy “fetching” and the bridegroom, Guy Gibson Smith, a Georgetown graduate ranked at the top in his ROTC cadet corps, “equally poised.” But, as *Time* observed, this wedding was “social history, rather than society-page fare.”

Only two decades earlier, before the California Supreme Court’s decision in *Perez v. Sharp*, California law would have made the Rusk-Smith union illegal. And, only three months before, when the U.S. Supreme Court in *Loving v. Virginia* eliminated all antimiscegenation laws, 16 states similarly banned interracial marriage. But, while legal authority—and, evidently, the editors of *Time*—unequivocally supported the Rusk-Smith marriage, prevailing social conventions did not. Several publications reported that Secretary Rusk offered to resign from the Johnson cabinet, lest his daughter’s marriage prove too scandalous for the administration. In like manner, the Stanford Chapel dean agreed to a shortened ceremony, the guest list was limited to 60, and the groom’s parents were the only other African Americans in attendance.

The timeline from *Perez* (1948) to the Rusk-Smith wedding (1967) illustrates what is often the relationship between evolving legal issues and day-to-day realities—namely, that legal developments often precede common perceptions, or, more precisely, our comfort levels. Although Dean Rusk supported his daughter’s marriage to the man of her choosing, his sense of loyalty to a Southern president required an offer to relinquish his cabinet position. In preparing this issue of *LAL*, we have been reminded how frequently legal developments have preceded assumptions now taken for granted. The impropriety of a prosecutor summarily dismissing all African Americans from a jury pool, the reality that sexual orientation is not indicative of mental illness, and the manifest unfairness of withholding court access from individuals with disabilities are just a partial list of examples.

Production of this issue also coincided with the California Supreme Court’s decision, *In re Marriage Cases*, striking down the ban on same-sex marriage. In June 2007, the LACBA Board of Trustees voted unanimously to join an amicus brief in support of same-sex marriage. The board members concluded this position was consistent with LACBA’s longstanding commitment to equal justice, and that, upon rereading *Perez*, the ban on same-sex marriage in 2007 was legally indistinguishable from the antimiscegenation law of 1948.

Nonetheless, it is hardly surprising that this legal development has spurred any number of opponents as well as an effort to rouse popular support for a ballot initiative that would curtail, rather than expand upon, civil liberties. After all, most of us grew up with the notion that whatever marriage was (or was not), it was always between a man and a woman. But the lessons of *Perez* and other landmark decisions should make us cautious about opposing legal developments that strike at the heart of our comfort levels.

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The Role of Production Counsel in Independent Film Production

DESPITE ITS RISKS, the film business remains viable, with numerous quality independent films continuing to be made. Production attorneys may not take the artistic risks that an actor or director takes, but their work can improve the odds of a film’s success. In addition to drafting and negotiating contracts for performers and production personnel and handling copyright and other legal matters, the production attorney plays a significant role in keeping the production on schedule and under budget. If the legal issues involved with the production of a film are properly addressed early, the film’s chances for completion and distribution are enhanced.

When the production attorney joins the project, the producer may already have optioned the underlying property or engaged a writer who has delivered a screenplay. Before production commences, even prior to preproduction, the production attorney should make an analysis of the property’s originality and chain of title. An outside search firm may be retained to conduct the search of the chain of title, but the production attorney at least must ensure that clearance is completed with appropriate findings. A later challenge to the producer could halt production or distribution or lead to a lawsuit.

The production attorney is wise to warn the producer against placing too much of a financial stress on the movie before it is made by promising generous compensation to the actors or production staff who sign the first agreements. It will not take long for the production budget to shrink, leaving little for the financial demands that come later. Production counsel may also encourage the producer to hire a financial adviser or accountant familiar with independent productions. Many producers are confused by the details of deferred payments or profit participations, including what triggers deferred payments, how to calculate them, when they are paid (before or after investor payouts), and how to balance back-end participations against up-front fees. These negotiations can delay the start of shooting.

Locations and Contracts

The multifaceted role of the production attorney does not stop with negotiating intellectual property and contract issues before production. Early scouting of locations and obtaining commitments from property owners is essential to avoiding interruptions that can seriously damage the shooting schedule. Producers should be helped and encouraged to secure backup locations in the event that a location is canceled. A location can become unavailable as the result of force majeure or other problems. The disruption of the shooting schedule and the efforts required to notify cast and crew could result in paying people to stay home. In a similar vein, the production attorney must remind the producer to check for trade names, store signs, and product names. If these appear on film before permission has been obtained, exorbitant fees may be demanded, and the names or signs may have to be digitally altered in postproduction, which adds to the cost of the film.

Unless the production will utilize only nonunion talent, the producer must become a signatory to the Screen Actors Guild. The production attorney may need to prod the producer through the signatory process, which can take a few weeks. Before the process ends, the attorney may make sure that the producer has a realistic budget prepared. The budget determines which SAG agreement applies: low budget, modified low budget, or ultra-low budget.

Prior to preparation of the application, the production attorney should review the SAG agreements with the producer. Not all permit non-SAG performers to be hired, for example. There are important differences in the compensation obligations, overtime pay, and other requirements. A production attorney will quickly hear from the manager or agent representing the talent if the producer is not granting the rights afforded under the picture’s SAG contract.

While producers generally love to find music that contributes to the mood and reinforces the story, they often leave the legal clearances for production or even postproduction. Music presents significant legal issues that may cause budget overages or lead to removing music from the soundtrack. Not all production attorneys perform this function, but legal guidance and oversight are necessary. The rights holders must be found and copyright status determined before licenses can be negotiated with music publishers and record labels. Negotiations may go back and forth until a fee is agreed upon that is in balance with the picture’s budget and the licensor’s terms. As an alternative, the producer may hire a composer to create an original score. This choice creates less urgency, because a work-for-hire contract will likely be used. A work-for-hire soundtrack, however, may not be what a producer prefers.

A production attorney for a movie faces challenges similar to those that others in the movie industry face, including considerable legwork under deadline pressure and in the context of budgets that are stretched thin. One central challenge is counseling a producer whose passion project does not always adhere to sound business approaches. Despite these risks, attorneys can find tremendous satisfaction in this unique industry. A producer will long cherish and respect the production attorney whose counsel helped protect the film’s schedule and budget and contributed to a completed picture.

The role of the production attorney does not stop with solving intellectual property and contract issues before production.

Susan Rabin is special counsel to Gareeb Pham, LLP, in Los Angeles. She is cochair of the Beverly Hills Bar Association Entertainment Section and works as production counsel on independent features.
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Effective Representation of Clients with Disabilities

EFFECTIVELY REPRESENTING A CLIENT WITH A DISABILITY requires more than merely complying with the Americans with Disabilities Act.1 A lawyer must conform to the requirements of the ADA, but there are also basic sensitivities regarding a client’s disability that must be followed in order to build and maintain an attorney-client relationship that is successful. The importance of practicing disability sensitivity and understanding cannot be stressed enough. Feeling comfortable and confident with a client is imperative to building trust and rapport.

Many disabilities, such as physical disabilities, are evident on sight. However, other disabilities, such as learning and mental health disorders, are not always apparent. Nonobvious impairments are not always protected under the ADA but may still affect a lawyer’s ability to communicate effectively with a client. Whether a disability is obvious or nonobvious, it is unproductive if an attorney is walking on eggshells and fearful of saying something inappropriate or offensive. Will an inappropriate reference to the client’s disability slip out? If something like that does occur, will it be offensive?

Attorneys can address these questions with a sense of perspective. In most cases, any anxiety experienced is the attorney’s issue and not the client’s. Most people with disabilities have experienced awkward interactions. The experience will not be new to them; it may only be new to the attorney. If an attorney is preoccupied by his or her own insecurities about being politically correct or proper, he or she will be a less effective counselor and adviser. Under no circumstances should an attorney’s fear or awkwardness of how to treat an individual with a disability affect the quality of representation.

Fortunately, because of the ample information available on the Internet, it generally only takes a few minutes to gain understanding about a particular disability. By learning and practicing a few techniques, one can learn to avoid feeling anxious or ignorant. One simple technique is person-first language. Because it is offensive to some people to label by disability, it is appropriate to refer to the person first and the disability second. For example, the attorney could say “individual with a disability” rather than “disabled person.” The use of person-first language is easy and conveys a sense of understanding and sensitivity.

Likewise, unless discussing parking lots or bathrooms, the term “handicapped” is no longer an appropriate term. “Crippled” and “confined to a wheelchair” are also inappropriate and may be offensive. A rule of thumb is to always put the person first and then describe the disability as a possession of the individual. A few more examples are a “person with schizophrenia” rather than “schizophrenic,” and an “individual with autism” rather than “autistic.”2

This type of language requires the use of more words and can sound awkward or repetitive. However, it is the respectful, appropriate method of describing a person with a disability. Utilizing person-first language in court documents, correspondence, and other communications will demonstrate sensitivity, understanding, and professionalism. When communicating and referencing a disability, using person-first language is proper regardless of whether a client has a disability. Any client’s spouse, close friend, or family member may have a disability.

Another method to build client rapport and trust is by ensuring a client with a disability has appropriate accommodations. Most individuals with disabilities do not expect attorneys to be able to read minds. When in doubt about whether someone needs an accommodation, it is appropriate to ask. Being polite and listening will further build rapport. A client may feel uncomfortable asking for an accommodation; therefore, inquiring to his or her needs prior to meeting will ease any fear or anxiety.

Some accommodations are obvious, such as employing a sign-language interpreter for a client with a hearing disability. Other accommodations are not apparent. For example, a nonobvious accommodation may include altering the temperature in the meeting room; some individuals may have discomfort in a cold room because of a medical condition. An accommodation may include conducting meetings at the client’s home where temperature will not be an issue. Without inquiring about needed accommodations, an attorney may find that a client is constantly avoiding meetings. He or she may misinterpret the client’s behavior as avoidance, when, in fact, the client was merely uncomfortable informing the attorney that the air conditioning prevents in-office meetings. Similarly, by asking if a client requires an accommodation prior to the first meeting, an attorney can learn, for example, that a client has concentration and memory dif-

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ficulties and requires short meetings and frequent breaks in order to participate effectively. Simple accommodations can make a big difference in the effectiveness in one’s representation.

In addition to inquiring about any accommodations, an attorney should be proactive and do research prior to the first meeting with a client with a disability. The Internet makes research quick and easy. A simple search can reveal typical needs or accommodations individuals with certain disabilities may require. However, the attorney must absorb the cost of accommodating an individual with a disability and may not pass those costs on to the client. Researching and learning about a client’s particular disability can put parties at ease and allow everyone to focus on the issues of the case rather than causing unnecessary anxiety about being insensitive and alienating a client with a disability.

Physical access accommodations can be tricky. Not all buildings are accessible to individuals with disabilities. Building managers or property owners should be knowledgeable about whether a building is accessible. When in doubt about physical accessibility, ask the building manager. Inquiring whether a structure is accessible prior to a first meeting with a client will reveal any issues that may need to be addressed.

Another step to ensure physical access for an individual with a disability is to ensure that any other structure that the client may visit is accessible. It is not wise to assume that all offices are ADA compliant and accessible. It is useful to call ahead in order to ensure a structure is accessible. It would be embarrassing and awkward to arrive at an office building with a client who uses a wheelchair only to learn that the building does not have an operating elevator.

Additionally, not all courthouses and public buildings are accessible. Again, a little foresight can avoid problems. The attorney should call ahead and make arrangements. It may be embarrassing and a waste of time if an important meeting is organized to take place in a nonaccessible structure. Although it is necessary and appropriate to make inquiries about required accommodations for individuals with disabilities, any inquiries should be professional and courteous. Grandiose gestures of sensitivity are not necessary. After inquiring about accommodations, it is not necessary to ask a second time. The ADA is intended to provide persons with disabilities equal opportunity and to eliminate discrimination. According to an inquiry about accommodations is made, then the client should be treated as any other person.

Places of public accommodation, such as law offices, must meet physical specifications outlined in the ADA to ensure that they are accessible to individuals with disabilities. The purpose is to prohibit discrimination against individuals with disabilities and allow individuals the ability to enjoy goods and services at the same level as those individuals without disabilities. New construction and structures that existed prior to the passage of the ADA are subject to accessibility requirements. The Code of Federal Regulations (Title 28, Part 36) has detailed illustrations of appropriate construction to ensure ADA compliance.

The attorney should consult with the building’s property owner to ensure a particular structure is ADA compliant; a tenant may be responsible for an ADA violation even without owning the physical structure. There are exceptions to the rules. For example, if architectural barrier removal is not readily achievable, the barrier may stay. Barrier removal is readily achievable if it is easy to accomplish and able to be carried out without much difficulty or expense.

If an office is not accessible and cannot accommodate a client with a disability, it is acceptable to arrange to meet at a location that is ADA compliant. It may be acceptable to arrange to meet a client at his or her residence; however, the representation must not be compromised because of having to meet at the residence as opposed to an office building. If an office is not accessible for people with mobility disabilities, steps should be taken before meeting a client. Including a question about the necessity for an accommodation may be added to an intake interview or form to facilitate a smooth first meeting.

Ensuring Communication

Not all accommodations involve architectural barriers. Service animals are trained to perform tasks that assist their owners with daily living. Service animals are not limited to seeing-eye dogs. The general public may or may not be allowed to bring animals to an office, but it is required that persons with disabilities be allowed to bring service animals. Often it will be clear whether an animal is a service animal. However, if it is unclear, a simple inquiry about whether an animal is a service animal will suffice.

Even if an office building is ADA compliant, there are several quick steps to take to ensure there are no barriers in the structure. First, a quick sweep of the areas of ingress and egress can reveal barriers. Boxes or other articles lying on the floor can cause a doorway or hallway to become too narrow for comfortable access by a wheelchair. A meeting room may have a table that is too large for a client to navigate. Additionally, a quick inspection of the bathroom will ensure the availability of an accessible bathroom.

Many people with disabilities require attention to medical needs. Some individuals require the presence of a medical assistant or nurse. Prior to meeting with an individual who requires the presence of a medical assistant, it may be necessary to discuss whether or not the assistant is required to remain in the same room as the client at all times. Sometimes a medical assistant may be able to remain close but not actually present, so that attorney-client confidentiality is not disturbed. In other instances, it may be necessary for a medical assistant to be constantly in the presence of an individual. In such a case, steps should be taken to preserve the attorney-client confidentiality. Additionally, if a medical assistant must accompany an individual to various meetings, calling ahead of time to ensure there is space for both people is important.

Businesses, including law offices, must take steps to ensure that they may communicate with individuals with disabilities as effectively as they would with nondisabled individuals. Effective communication is vital to fulfill the duty to represent clients competently.

Hearing, visual, and speech disorders can affect the ability to communicate. It may be necessary to hire (and absorb the cost of) an interpreter for in-person meetings or phone conversations. Phone companies are required to ensure that individuals with disabilities have functionally equivalent telecommunication services.

Telecommunication devices for people who are deaf, hard of hearing, or have speech impairments can be used with phone lines. Again, the attorney should simply ask the individual whether a telecommunication device or other method of communication is necessary. Today, many people have access to Internet-based communication devices. Some individuals may prefer to use a simple Internet chatting service rather than a more specific technology. Use of a particular communication device or relay service should not cost an individual with a disability an additional amount of money.

For persons with visual disabilities, written documents may not be an appropriate method of communication. Again, a simple inquiry about an individual’s preferred method of receiving communications will reveal what accommodations are necessary. It is possible that an individual will have technology that “reads” printed documents, or “reads” electronic versions of documents. Additionally, there are services and devices that can turn a written document into Braille.

Attention to the little things can make a big difference. For example, when meeting with a client who reads lips, the interaction and communication may run more smoothly.
if the attorney takes a few precautions. The attorney may want to trim facial hair around the mouth, bring paper and pen, ensure proper lighting, and monitor that only one person speaks at a time.

**Hidden Disabilities**

Sometimes, a client may not even know he or she has a disability, such as a learning disorder or mental disability. Regardless of whether the individual is aware of the disability or whether the disability is covered by the ADA, hidden disabilities can influence an attorney's representation if steps are not taken. Learning disorders affect the way a person processes information. Some types of learning disorders affect a person’s memory, organizational skills, written language, and listening skills. Although learning disabilities are usually permanent, many adults have acquired techniques to compensate for areas where they have more difficulty. However, not everyone with a learning disability has developed such skills.

Because learning disorders can affect the way a person understands and organizes information, knowledge of the existence of a learning disability can help facilitate a better attorney-client relationship. For example, if a client discloses that he or she has a processing disorder that affects understanding of written text, communication should be oral. If a client discloses that he or she has difficulty with organization, and as a result his or her storytelling ability is compromised, this will be important when preparing for a deposition or testimony.

Not all clients will reveal a learning disability. Additionally, asking a person if he or she has a learning disability can be offensive. Moreover, a person may not be aware that he or she has a learning disorder. If the relationship between a client and the attorney becomes strained, and communication appears to be breaking down, it is possible that a hidden disability exists and is hindering effective communication.

If a client forgets about appointments or requests, or perhaps does not pay close attention to conversation, it is possible that a learning disability is at fault. Simply ask if the client prefers to receive communications in writing, orally, or both. Additionally, one may try to schedule short meetings or include breaks. Create an environment that fosters communication and allows a client to reveal any preferred methods of learning. Some people benefit from illustrations and charts to demonstrate a particular matter. It may be necessary to have additional face-to-face meetings rather than telephone conversations in order to draw charts and underline particular points.

Mental health disabilities are covered by
the ADA17 so long as they meet the definition of disability (a physical or mental impairment that limits or more of the major life activities). If a person has a mental health impairment that affects a major life activity, he or she is entitled to protection under the ADA. Even if a person’s mental health issue is not protected under the ADA, the condition may nonetheless influence the quality of representation.

If a client discloses a mental health disability, he or she may be trying to convey a need. It is important to follow up by asking whether the client needs an accommodation. For example, if an individual has a mental health disability that causes severe emotional responses, the attorney should spend extra time discussing the emotional aspects of representation or litigation.

Overall, when representing a client with a disability, the key to effective representation is communication. Knowing how the disability can affect the representation will help build trust and rapport. It is as simple as professionally asking an individual with a disability to illustrate appropriate accommodations. In addition, it can be helpful to be in the practice of using person-first language. Proactive steps like calling ahead or ensuring that there are no barriers to physical access can ensure that an individual with a disability is comfortable.

Know that some disabilities, such as learning and mental health, can be invisible but nevertheless influence representation. Although accommodations may not be required under the ADA, accommodations may nonetheless be necessary to foster a successful attorney-client relationship. An individual with a disability should receive the same quality of representation as an individual without one.

3 28 C.F.R. §36.301(c).
4 42 U.S.C. §§12101 et seq.
8 A lease may contain an express agreement regarding the parties’ responsibility for ADA compliance. See Botosan v. Fitzhugh, 13 F. Supp. 2d 1047, 1053-55 (S.D. Cal. 1998) for a discussion of landlord-tenant responsibility.
9 42 U.S.C. §12181(9).
10 Id.
12 See CAL. RULES OF PROF’L CONDUCT R. 3-110 (duty to act competently).
14 28 C.F.R. §35.160.
15 CAL. RULES OF PROF’L CONDUCT R. 3-110.
Accommodating Deaf and Hard-of-Hearing Clients

A RECENT U.S. DEPARTMENT OF JUSTICE settlement agreement offers a glimpse of a far-too-common problem. A deaf woman who uses sign language to communicate sought legal counsel to bring a lawsuit against a university hospital for failing to provide a sign language interpreter during her son’s admission to the hospital. When the client began to work with her attorney, he asked that the client’s nine-year-old son “interpret” their conversations or that they use written notes or e-mail. The attorney did this despite repeated requests by the client for a sign language interpreter. The attorney eventually sent a letter to the client refusing her requests for an interpreter and announcing his withdrawal, stating: “I have never had to pay to converse with my own client…. [Y]ou have a very intelligent son who can [translate] for you.”

Rarely will a violation of the Americans with Disabilities Act (ADA) be so well documented. Nevertheless, discrimination by lawyers against individuals who are deaf and hard of hearing is not a rare occurrence. Indeed, advocates for the deaf and hard of hearing find that lawyers, along with healthcare providers, are some of the most common violators of the ADA. Because communication is critical to legal services, it is likely that some type of accommodation is necessary to effectively work with a deaf or hard-of-hearing client.

Many attorneys believe that achieving effective communication with a client who is deaf or hard of hearing is expensive or complicated. However, it is not necessarily so. As an example, the attorney in the DOJ settlement agreement was a solo practitioner who was likely eligible to have 50 percent of the cost of an interpreter or other assistive measure paid for by a federal tax credit, with the other 50 percent of the cost being tax deductible. Moreover, modern technology is making accommodations less costly and providing a wide array of communication options for working with deaf or hard-of-hearing clients.

Hearing impairments cover a significant range—from those who may not even be aware they have difficulty hearing to those who are deaf and use sign language. Studies suggest that approximately 600,000 people in the United States are deaf; more than half are over 65 years of age. About 6 million people report having significant difficulty hearing, with more than half of these over 65. Over 28 million people claim to have some trouble hearing, with just less than a third over 65 but more than half over 45. Altogether, more than 35 million people, or 13 percent of the population of the United States, report having some degree of difficulty hearing—and only 23 percent of people with hearing loss use hearing aids or other corrective measures to assist with their hearing.

Many attorneys do not recognize that individuals who are deaf or hard of hearing are one more source of prospective clients. Lawyers should avoid thinking of the legal needs of these clients in a compartmentalized way that only focuses on their hearing loss. These individuals need wills drafted, services for their businesses, and help with legal claims similar to any other would-be clients. While there are obviously a number of laws and claims that are more particularly applicable to these individuals, lawyers should remember that an individual with hearing loss or deafness may walk into their office without a claim of discrimination.

ADA Issues

Under Title III of the ADA, individuals with disabilities are entitled to “full and equal enjoyment” of the services of a “public accommodation.” An “office of an accountant or lawyer” is explicitly listed as a public accommodation under Title III. Many smaller law firms and other businesses mistakenly believe that because the ADA’s coverage of employers under Title I extends to those with 15 or more employees that the ADA has a corresponding limitation on the coverage of Title III. However, that is not the case. Title III does not have a limitation on its coverage depending on the size of the employer.

California statutes provide nearly identical protections to the ADA regarding individuals with disabilities. Also, like the ADA, California statutes contain no limit on the size of the entities that are covered. In addition, California’s Rules of Professional Conduct have important implications for attorneys representing clients with hearing loss. The rules require lawyers “to perform legal services competently” and to “keep a client reasonably informed”—duties that will likely be impossible to fulfill without effective communication.

ADA Title III specifically provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.” What this means in practice depends largely on the type of business and the particular individual with a disability.

For lawyers and law firms, this general requirement includes a prohibition and an affirmative duty. First, lawyers may not screen out or otherwise discourage individuals with disabilities from seeking or using their services. Moreover, lawyers have an affirmative duty to “make reasonable modifications in policies, practices, or procedures” and provide reasonable “auxiliary aids and services” necessary to serve individuals with disabilities. For individuals with hearing loss, determining the measures necessary to ensure effective communication is a critical issue.

Lawyers must grasp a few basic principles to comply with the duties arising from the ADA. First, the ADA applies to prospective clients who may contact a lawyer’s firm as well as to those who ultimately become clients. Second, the ADA’s affirmative duties generally do not arise until a request has been made and the firm becomes aware that the individual has a disability. However, the request need not specifically mention the ADA or any other law. Third, the specific practical changes or auxiliary aids and service required depend on the needs of the individual.

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of the individual at issue. Fourth, clients may not be billed for the cost of necessary accommodations.

A lawyer or firm need not make a specific policy or practice modification or provide an auxiliary aid or service if it “would fundamentally alter the nature of [the] services.” Similarly, an auxiliary aid or service is not required if it “would result in an undue burden.” However, the fact that one option would result in an undue burden does not necessarily eliminate the obligation to ensure effective communication. There is likely an alternative auxiliary aid or service that would not result in an undue burden or fundamental alteration but would ensure effective communication to the maximum extent possible.

There are three categories that define when the ADA designates a hearing impairment as a covered disability:

1) The hearing impairment substantially limits a major life activity. For example, hearing constitutes a major life activity.

2) The impairment substantially limited a major life activity in the past. For example, a client’s hearing was substantially impaired in the past but is now improved due to surgery or an assistive device.

3) The hearing impairment is viewed as substantially limiting. For example, clients may use an assistive device—and thus their hearing is no longer substantially limited—but the clients nonetheless may be treated differently because they are believed to be substantially limited.

California law includes a similar but somewhat more expansive definition of disability. A disability need only “limit” rather than “substantially limit” a major life activity in the state. The second and third categories of the ADA definition are the same in California law. Under federal law, mitigating measures—such as hearing aids, cochlear implants, or other devices that improve hearing—must be considered in determining whether an individual has a disability under the ADA. Under California law, mitigating measures may not be considered.

Because hearing loss encompasses a wide range, it is often difficult to tell whether an individual has a covered disability or not. However, regardless of whether a person is covered under state or federal law, it is essential for lawyers to communicate effectively with their clients.

Complying with Legal Obligations

Effective communication with deaf and hard-of-hearing clients is possible, but lawyers should make sure they avoid a few traps. First, do not simply ask a client or potential client to bring a relative to a meeting. It is a common misconception that individuals who are deaf or hard of hearing and communicate using American Sign Language (ASL) have ASL-fluent family members. California service providers are often confused about this issue because they ask family members to interpret with non-English speakers—where no accommodation is legally required. However, using family members to interpret for the deaf and hard of hearing is not advised, except in an emergency, because often family members are not fluent in ASL and because legal services present unique confidentiality and conflict issues.

Lip reading, while helpful to many, has problems as well. Even skilled lip readers are not 100 percent effective. This can cause significant communication breakdowns and will normally require additional communication aids. Similarly, using pen and paper may seem like an appropriate strategy, and it may be the cheapest means available, but it is not reliable. Productive and essential communication cannot be conducted simply via handwritten notes.

However, reasonable and effective resources are available. These should be chosen based on the needs of the individual and the communication necessary for a transaction. Because of the nature and complexity of legal services, it is critical that lawyers consider and plan ahead so that a client, or a prospective client, understands the lawyer’s advice and the lawyer comprehends fully the client’s needs.

The following tools can help lawyers not only establish better communication with clients and potential clients but also provide any legally required accommodation.

Sign Language and Oral Interpreters.

Under the ADA, interpreters are required to be “qualified,” or fully ASL-fluent and able to completely interpret what is being said and being signed. This includes using the correct terminology for the situation. Specific certification is required, but an interpreter must be fluent. Interpreters are available commercially, and it is desirable to find interpreters experienced in interpreting legal issues. Oral interpreters silently enunciate the speaker’s words and use facial expressions, gestures, and articulation to help people who lip read understand every aspect of the proceedings.

Video Remote Interpreting (VRI).

This method involves a computer with an Internet connection, a webcam, and a telephone line to provide services similar to a live interpreter. The deaf person and interpreter communicate via sign language through the webcam. The lawyer or staff person speaks to the interpreter via the telephone. The remote interpreter then interprets as a live interpreter would.

VRI has advantages and disadvantages. A poor Internet connection may result in a breakdown of communication. For this reason, VRI is not guaranteed to meet the ADA’s “effective communications” standard. Communication is generally better with a live interpreter. However, VRI can be less expensive. If a lawyer or organization meets the undue burden standard, which would make providing a live interpreter impossible, VRI can be used as a limited substitute.

Video Relay Service (VRS).

VRS allows deaf individuals to use video phones to connect directly with another deaf person using live ASL through a video connection. VRS offers a visual equivalent of a telephone call. It can also be used to connect to a relay operator and through that operator to a hearing person over the phone. VRS is free to both parties and is subsidized by the federal government as a way to ensure deaf access to the hearing phone system.

Using VRS can be a good way for lawyers to communicate in ASL with their clients. However, legal providers should know that VRS is not intended as a substitute for live interpreting, and VRS operators are not allowed to interpret between two people in the same location. Also, under the ADA, individuals with disabilities may not receive less desirable treatment to avoid accommodation costs. A lawyer may not refuse to have an in-person meeting with a deaf client to take advantage of free VRS rather than pay for an interpreter when the lawyer would have met with a hearing client in person under the same circumstance.

Computer Assisted Realtime Translation (CART).

A stenographer or CART specialist uses software and equipment to produce instant speech-to-text translation to a computer monitor or other display, enabling an individual to read the transcript of the proceedings as it occurs. CART can be effective for individuals who are deaf, do not use ASL, and use speech to communicate, and for people who are hard of hearing.

CART may be used live with a stenographer at the location or remotely via the Internet and a telephone line. Some remote captioning services can be less expensive than live captioning, but the appropriateness of either method depends on the circumstances.

Assistive Listening Systems/Devices (ALS/ALD).

These devices transmit amplified speech by a variety of methods that differ in their transmission mode and installation. Some of these systems are permanent installations, and others are devices that can be used temporarily.
Telecommunication Devices for the Deaf (TTY or TDD). Sometimes called teletypewriter, TDDs are special telephones with keyboards and LED displays. These are used not only by people who are deaf but also those who are speech impaired. Without a dedicated TDD line, TDD callers use a relay service, such as the California Relay Service (CRS), with an operator who reads aloud what is typed by the deaf person and types what is being said by the hearing person. Automated menu systems for telephone access often present difficulties for relay users. To minimize problems, menus should provide an initial option to select an operator or other representative.

**Signal/Hearing Dogs.** People who are deaf sometimes have “hearing dogs” that alert them to important auditory signals. The ADA as well as many state laws require businesses to allow the dogs to accompany their deaf owners into an office or courtroom.

Complying with disability laws and working with clients with disabilities may not be as difficult as lawyers might think. Modern technology is significantly decreasing the cost and increasing the effectiveness of accommodations for the hearing impaired. A number of tools and organizations also are available to help.

Smaller law firms may be eligible for a significant tax credit for additional expenses incurred accommodating individuals with disabilities. The federal Disabled Access Credit covers 50 percent of expenditures over $250 up to a maximum credit of $5,000.27 The credit is available every year and can be used for a variety of accommodation costs, including “to provide qualified interpreters or other effective methods of makingaurallydeliveredmaterialsavailabletoindividualswithhearingimpairments.”28 The credit is available to businesses with gross receipts for the preceding tax year that did not exceed $1 million or with no more than 50 full-time employees during the preceding tax year.29

California’s Disabled Access Credit extends the federal credit to 50 percent of expenditures up to $250.30 Thus, smaller California firms can receive a tax credit of 50 percent of up to $10,250 in expenditures. Of course, expenses for providing necessary accommodations that are ineligible for the credit are tax deductible.

A number of organizations are available to assist lawyers as well. The California Center for Law and the Deaf (CalClAD) provides legal services and advocacy on behalf of the deaf and hard of hearing in California. CalClAD has resources and provides guidance and assistance to lawyers and legal organizations seeking to plan for, and provide, effective legal representation to deaf and hard-of-hearing persons.31 The National Association of the Deaf has staff attorneys who can provide information about legal rights. The Department of Justice’s ADA Web site also contains valuable guidance.32

Ensuring that deaf or hard-of-hearing persons have equal opportunity to receive legal services is not only desirable but also the law. It is also reasonably easy for lawyers to comply with their responsibilities. With the available resources and modern technology, lawyers can not only avoid a Department of Justice enforcement action but also reach out to a significant source of new clients.

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3 See http://research.gallaudet.edu/Demographics.  
4 See id.  
7 See 42 U.S.C. §12111(f).  
8 See 42 U.S.C. §12111(a)(5).  
9 See CIV. CODE §§51, 54-55.2.  
10 Cal. R. of Prof’l Conduct R. 3-110.  
11 Cal. R. of Prof’l Conduct R. 3-500.  
12 See 42 U.S.C. §11218(a).  
13 See id.  
15 See id.  
16 See King v. United Parcel Serv., Inc., 152 Cal. App. 4th 426, 443 (2007) (applying the California Fair Employment and Housing Act); DEPARTMENT OF JUSTICE ADA TITLE III TECHNICAL ASSISTANCE MANUAL §§3.3000-3600 (hereinafter TITLE III MANUAL), available at http://www.ada.gov/taman3.html (noting that the ADA’s Title I “reasonable accommodation” standard is applied similarly to the duty to provide auxiliary aids and services).  
17 TITLE III MANUAL, supra note 16, at §§III-4.3000-3600.  
18 See 42 C.F.R. §36.310(c).  
21 See 28 C.F.R. §36.104.  
22 Gov’t Code §12926(k)(1)(B).  
24 Gov’t Code §12926(k)(1)(B)(i).  
25 This list draws heavily from an unpublished article: Jennifer Pecek, interim executive director, California Center for Law and the Deaf, Technology and Accommodations Information on Deaf and Hard of Hearing Issues in a Legal Setting (provided by Pecek to author).  
27 See 26 U.S.C. §44.  
29 See id.  
IN MAY, same-sex couples obtained the legal right to marry in California as a result of *In re Marriage Cases*. The decision is widely considered to be a big step, but legally it simply bestowed the highly prized term “marriage” upon a type of union that had previously developed over the last decade, under a statutory scheme known as a “registered domestic partnership,” into the functional equivalent of marriage. While gay marriage has only recently become legal in California, domestic partnership law has a longer history.

In 1999, the Domestic Partner Registration Act was enacted by the state legislature, establishing a statewide registry for domestic partners. While stopping short of affording gay and lesbian unions the prized nomenclature and the full range of legal rights and obligations associated with marriage, the Domestic Partner Registration Act bestowed basic legal recognition, rights, and obligations on domestic partner registrants. A “domestic partnership” was defined as “two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.” To form a valid domestic partnership today, two parties are required to:

- Have a common residence.
- Be unmarried and not be members of another domestic partnership.
- Not be related by blood to the extent that the parties would be prevented from being married to each other in this state.
- Each be at least 18 years old.
- Be either of the same sex or over 62 years of age and eligible for social security benefits.
- Be capable of consent.

The Domestic Partnership Registration Act initially established procedural mecha-
nisms and specifics for registering and terminating domestic partnerships, but provided very little by way of substantive rights. The very limited benefits included hospital visitation privileges and the provision of health benefits to domestic partners of certain state employees.

The next several years saw the legislative expansion of the scope of benefits afforded to domestic partners. In 2001, domestic partners became eligible to make medical decisions for an incapacitated partner, to utilize employee sick leave to care for an ill partner or the ill child of a partner, to use unemployment benefits if relocated due to a partner’s job, to use stepparent adoption procedures to adopt a partner’s child, and the right to sue for wrongful death.

In 2002, the Probate Code was amended to afford domestic partners the right to automatically inherit a portion of the separate property of a deceased partner, and the Unemployment Insurance Code was amended to provide for six weeks of paid family leave to care for a sick spouse or domestic partner.

A.B. 205, also known as the California Domestic Partner Rights and Responsibilities Act of 2003 (Domestic Partner Act), significantly expanded the rights afforded to domestic partners “in order to secure to eligible couples...the full range of legal rights, protections and benefits, as well as all of the responsibilities, obligations, and duties to each other, to their children, to third parties and to the state, as the laws of California extend to and impose upon spouses.”

The Domestic Partner Act became effective on January 1, 2005, under Family Code Section 297.5, which provides that “[r]egistered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.” Subdivision (b) of Family Code Section 297.5 provides comparable language equalizing the rights and obligations of former registered domestic partners with those of former spouses; subdivision (c) affords a surviving registered domestic partner upon death of the other partner the same rights and responsibilities afforded to a widow or widower upon the death of a spouse; and subdivision (d) provides that the rights and obligations of a domestic partner, former domestic partner, or surviving domestic partner shall be the same as those of spouses, former spouses, or surviving spouses.

Eight months later, in Koebke v. Bernardo Heights Country Club, the California Supreme Court discussed Section 297.5 in addressing the marital status discrimination claims of a lesbian couple registered under the act against a country club that denied the couple benefits extended to married club members. In finding the couple could state an actionable claim under the Unruh Civil Rights Act, the California Supreme Court stated that “a chief goal of the Domestic Partner Act is to equalize the status of registered domestic partners and married couples.”

In 2006, the California legislature amended Family Code Section 297.5 to afford registered domestic partners another privilege routinely afforded married couples—the opportunity to file income taxes jointly or separately for purposes of state income tax returns, with the earned income of jointly reporting domestic partners to be recognized as community property.

In 2007, a law was passed affording domestic partners the opportunity to effectuate a change of name during the domestic partner registration process.

### In re Marriage Cases

The next step came with the California Supreme Court’s decision in In re Marriage Cases. Same-sex couples who until recently as 1999 enjoyed no cognizable legal rights as partners, and only recently were afforded a host of rights and responsibilities under a separate-but-equal domestic partnership, gained the fundamental right to marry legally in California and have their unions recognized as a marriage under the laws of the state of California. At the outset, the California Supreme Court carefully limited its decision in the marriage cases to determining whether the difference in the official names of same-sex and opposite-sex unions violates the California Constitution.

In analyzing whether the different names provided to these two official family relationships might constitute a violation of the state equal protection clause, the court applied the “strict scrutiny” standard of review, noting that the statute’s classification on the basis of sexual orientation was “constitutionally suspect” and infringed on the fundamental interest of having one’s same-sex family relationship accorded equal respect and dignity as that of an opposite-sex family relationship.

To survive the strict scrutiny standard of review, the state was required to demonstrate that the disparate treatment under the challenged statute was necessary to serve a compelling state interest. The attorney general defended the statutory scheme by asserting it was not significant that different names were assigned to same-sex and opposite-sex unions, because the current domestic partnership legislation provided for the same “core substantive rights” as the constitutional right to marry. The attorney general claimed the nomenclature had no effect on the nature of the constitutional right, and that not calling it “marriage” was an issue of form over substance.

The California Supreme Court disagreed with the attorney general, stating that the right to marry is “one of the fundamental constitutional rights embodied in the California Constitution,” and “must be understood to encompass the core set of basic substantive legal rights and attributes traditionally associated with marriage that are so integral to an individual’s liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process.”

The court opined that with the right to marry comes the right to have one’s family relationship accorded dignity and respect, and the reservation of the “historic designation of ‘marriage’ for opposite-sex couples” at least a serious risk of denying the family relationship of same-sex couples such equal dignity and respect. The Supreme court also concluded that retaining the traditional definition of marriage—between a man and a woman—was not necessary, and did not serve a compelling state interest for purposes of the equal protection clause. Instead, the court expressed its concern that maintaining such a distinction would be considered an official endorsement that same-sex unions are of “lesser stature” than opposite-sex couples, and would perpetuate the stereotyping of gay and same-sex couples as “second class citizens.” Accordingly, the court concluded that the California Constitution guarantees the right to marry to same-sex couples as well as heterosexual couples.

### Public Opinion

After the decision, many same-sex couples began to marry in California. Public opinion has not entirely caught up with them. Earlier this year, Gallup’s Values and Beliefs Poll found that Americans are equally divided on the morality of homosexuality, with 48 percent of interviewees indicating that homosexual relations are “morally acceptable,” and 48 percent responding that they are “morally wrong.” When the issue of homosexuality turns to the topic of same-sex marriage, 56 percent of Americans believe same-sex marriage should not be recognized as legally valid and enjoy the same rights as traditional marriage, with only 40 percent in favor of equal recognition to same-sex unions.

The public’s conflicting views of homo-
sexuality (and same-sex unions) is alive and well in California. Just weeks after the marriage decision, a November 2008 ballot initiative was approved to amend the California Constitution to define marriage as “between a man and a woman.” This initiative seeks to revive Proposition 22, a ballot initiative that defined marriage as between a man and a woman and that passed in 2000 with 61 percent of the vote. Although *In re Marriage Cases* did not contain any express reference to overturning Proposition 22, it implies that it is unconstitutional.

The legalization of same-sex marriage in California is expected to have several very positive side effects for California. A recent UCLA study estimates that the rush of gay weddings will create about 2,200 jobs, as nearly 50,000 of California’s same-sex couples will get married over the next three years, and 68,000 out-of-state same-sex couples travel to California to hold their nuptials. What does this mean for California and its economy? The numbers are significant: an estimated $684 million spent on various wedding services for gay marriages, an additional $64 million in tax revenue to the state, and approximately $9 million in marriage license fees for counties.

**Employer Concerns**

*In re Marriage Cases* can change things in the workplace. One such divide exists even in the ranks of those whose business is marriage—county clerks. In San Diego County, the county clerk has reassigned county employees who have expressed “sincerely held religious objections” to same-sex marriage so that they are not required to perform duties such as issuing marriage licenses, officiating over civil unions, or acting as a witness. As the basis for this decision, the county clerk relied on the antidiscrimination provisions of Government Code Section 12940(l) (part of the California Fair Employment and Housing Act, more commonly known as FEHA), which requires an employer to “explore[] any available reasonable alternative means of accommodating the [employee’s] religious belief or observance and any employment requirement...including the possibilities of excusing the [employee] from those duties that conflict with his or her religious belief or observance or permitting those duties to be performed at another time by another person.”

Not all county clerks are permitting employees to opt out of their duties as they relate to same-sex marriage, despite the fact that this FEHA provision and Title VII (the federal antidiscrimination provision) conceivably afford an opposing employee a right to obtain such an accommodation. In a recent survey, 35 of the state’s 58 counties indicated they either are not permitting clerks to opt out or their staff is objection-free. In Alameda County, a reprieve is afforded to an objecting employee who produces a letter from his or her church. While county clerk recorders may be refusing to accommodate employees on the basis that the county will not “make accommodations for someone to practice illegal discrimination,” it is possible that the hard-line position these counties are taking is required to follow the law in the workplace. Of course, an employee request not to have his or her union or marriage publicized should be honored by an employer, regardless of whether it involves a same-sex or opposite-sex couple.

Second, employers should consider granting employees’ acceptance of the law and its recognition of same-sex unions as equal to a traditional marriage, as well as the company’s willingness to follow the law in the workplace. Employers may want to cool the conversations. While it is not possible or even reasonable to expect to be able to prevent or stop all rumors, insensitive or politically incorrect comments, and awkward foot-in-mouth moments between employees at work, educating employees to be sensitive and curb personal conversations at work, particularly within earshot of other coworkers who may take offense, will aid in fostering a positive work environment.

Employers should remember that even

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the slightest aspects of their employment poli-
cies should not discriminate against an
employee by virtue of his or her participation
in a same-sex marriage or domestic partner-
ship. For instance, if an employer does not
require a copy of a marriage license in order
for an employee to gain insurance coverage
for an opposite-sex spouse, the employer
should not require one (or the proof of domes-
tic partner registration) from an employee
seeking to cover a same-sex spouse. Similarly,
where employee directories identify an
employee’s spouse, that same recognition
should be extended to same-sex spouses and
registered domestic partners. Equal recogni-
tion and equal treatment of all married cou-
uples should naturally be extended by an
employer in all facets of its employment poli-
cies and employee benefits.

Domestic Partnership

Although same-sex couples now have the
right to marry and have that marriage recog-
nized as valid by the state of California, In
re Marriage Cases did not invalidate nor ren-
der obsolete the existing California statutes
pertaining to domestic partnership and
domestic partner registration. Rather, same-
sex couples have not one but two viable
avenues by which to form a family relation-
ship—marriage or a registered domestic part-
nership. Employers should recognize preex-
isting registered domestic partnerships and
newly created domestic partnerships as a
legal equivalent to marriage, and employers
should continue to provide their employees and
their registered domestic partners with all
the rights and privileges afforded under
California domestic partnership statutes for
as long as such statutes remain effective.

To the legal profession, same-sex mar-
mare means new legislation for years to come.
California can expect to see a cottage indus-
try of family lawyers who specialize in same-
sex divorces and custody battles. Furthermore,
if the November ballot initiative is rejected,
the legality of same-sex marriage will be
secured in California for at least the imme-
diate future. That raises novel legal ques-
tions for other states, including whether states
are willing to recognize the marriages of their
citizens that occur in California, and whether
they too will follow suit by legalizing gay
marriage.

Whatever happens politically, however,
California law firms should address their per-
sonnel policies to the new reality of gay
marriage. The majority of Fortune 500 companies
made diversity commitments in the last
decade,39 and those corporations have
expected, and in some circumstances required,
that their legal counsel follow suit in their own
employment practices. Same-sex marriage
still faces legal and societal challenges.

California employers, however, should imple-
ment policies that comply with the law and
recognize In re Marriage Cases.

2. FAM. CODE §297(a).
3. FAM. CODE §297(b)(1).
4. FAM. CODE §297(b)(2).
5. FAM. CODE §297(b)(3).
6. FAM. CODE §297(b)(4).
7. FAM. CODE §§297(3)(A) and (B).
8. FAM. CODE §297(b)(6).
9. FAM. CODE §298.
10. FAM. CODE §299.
11. HEALTH & SAFETY CODE §1261.
12. GOV’T CODE §§22867-77.
14. PROB. CODE §6401.
23. Id. at 780.
24. Id. at 781.
25. Id. at 783.
26. Id. at 785.
27. Lydia Saad, Americans Evenly Divided on Morality of Homosexuality (June 18, 2008), available at
http://www.gallup.com/poll/108115/Americans-Evenly-Divided%20Morality-Homosexuality.aspx. Inciden-
tally, 85% and 90% of these same Gallup Poll partic-
ipants concluded that cloning humans and polygamy,
respectively, were “morally wrong.” Id.
28. Id.
latimes.com/2008/jun/03/local/me-amendment3.
29. Id.
does not have a residency requirement for issuance of
a marriage license. Massachusetts, which legalized gay
marriage in 2004, repealed its residency requirement
effective July 31, 2008. See http://www.foxnews.com
/story/2933,395441,00.html and http://www.mass.
31. Malia Wollan, Study: Same-Sex Weddings Could Boost California’s Economy, June 9, 2008, available
32. Tony Perry, San Diego County Clerk Resigns: Workers Who Object to Gay Marriage, June 20, 2008,
33. Id., see also GOV’T CODE §12940.1.
34. Jean-Paul Renaud, California’s County Clerks’ Policies Vary on Same-Sex Marriage, June 16, 2008,
35. Id.
36. Id.
37. An employer denied time off to attend a same-sex
wedding could potentially claim bias.
38. Nancy Hatch Woodward, New Faces, New Ideas: Diversity in Law Firms Makes Business Sense,
officers of Fortune 500 companies signed a statement to encourage diver-
sity in the workplace, which would come to be known as the Diversity Statement.

11 HEALTH & SAFETY CODE §1261.
10 FAM. CODE §297(b)(6).
9 FAM. CODE §297(b)(5).
8 FAM. CODE §297(b)(4).
7 FAM. CODE §297(b)(3).
6 FAM. CODE §297(b)(2).
5 FAM. CODE §297(b)(1).
4 FAM. CODE §297(a).
3 FAM. CODE §§297(3)(A) and (B).
2 FAM. CODE §298.
1 FAM. CODE §299.
PEREMPTORY challenges are an important tool at trial, enhancing confidence in the jury’s fairness by permitting parties to remove jurors in whom they perceive bias or hostility even if that perception cannot be objectively verified. But as case law increasing demonstrates, peremptories must be used with caution, because they may draw objections that call into question the integrity of the party seeking to exercise them.

Peremptory challenges are “used precisely when there is no identifiable basis on which to challenge a particular juror for cause” and “may be wielded in a highly subjective and seemingly arbitrary fashion, based upon mere impressions and hunches.” 1 The latitude accorded peremptories is essential to their central functions: “to enable a litigant to remove a certain number of potential jurors who are not challengeable for cause, but in whom the litigant perceives bias or hostility,” “to reassure litigants—particularly criminal defendants—of the fairness of the jury that will decide their case,” and to “enhance the right to challenge jurors for cause because they allow litigants to strike prospective jurors who may have become antagonized by probing questions during voir dire.” 2 With this latitude, however, comes the risk that peremptories may be exercised based on impermissible criteria such as race.

The case law that has developed around this risk has established a three-step framework for addressing challenges to the exercise of peremptories based on claims of discriminatory intent. These challenges are known, after the seminal cases, as Batson/Wheeler challenges. 3 Within this framework, to effectively support (or oppose) such challenges, counsel must understand the method of jury selection used by the court and must be prepared to assist the court in developing the necessary record.

In 1965, in the midst of the civil rights movement, the U.S. Supreme Court in Swain v. Alabama first recognized that the exercise of peremptories by prosecutors deliberately

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When exercising peremptory challenges, attorneys should keep in mind the three-step framework of Batson/Wheeler.
to exclude potential jurors “on account of race” violated the equal protection clause. The Court, however, recognized a presumption that prosecutors properly exercise peremptory challenges—and placed on defendants the burden of proving discriminatory intent. Thus defendants were required to show that a prosecutor intentionally used challenges to deny African American potential jurors “the same right and opportunity to participate in the administration of justice enjoyed by the white population” for “reasons wholly unrelated to the outcome of the particular case on trial.”

Applying these standards in *Swain*, the Court found no equal protection violation despite the prosecutor’s striking of all six African American potential jurors and despite evidence that no African American had served on a criminal petit jury in Alabama since approximately 1950. A number of lower courts interpreted *Swain* as requiring defendants to present “proof of repeated striking of blacks over a number of cases,” a “crippling” burden that left prosecutors’ peremptory challenges “largely immune from constitutional scrutiny.”

The California Supreme Court rejected this approach in 1978, holding in *People v. Wheeler* that under the California Constitution, the presumption that peremptories are properly exercised could be overcome with a prima facie showing based solely on the pattern of peremptories in a given case. Once this showing was made, the burden would shift to the other party to “show that the peremptory challenges in question were not predicated on group bias alone.” In 1986, the U.S. Supreme Court followed suit, rejecting *Swain’s* approach in *Batson v. Kentucky*. In *Batson*, the Court reiterated that while a defendant has no right to a jury composed in whole or in part by members of his or her own race, the defendant unequivocally has the right “to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.” The Court held that the required initial prima facie showing of discriminatory intent could be made based “solely on evidence concerning the prosecutor’s exercise of peremptory challenges at the defendant’s trial.” Further, the Court adopted what has developed into the now familiar three-step process for challenging peremptory strikes:

1. **Identify the Race-Based Challenge:** If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

2. **Show Peremptory Strikes Were Made on a Group Basis:** Although *Batson* involved an African American defendant objecting to the prosecutor’s systematic removal of African American jurors, the Court subsequently held that race-based exclusions could be challenged by any defendant, even if the excluded jurors were members of a race different from the defendant’s. Also, *Batson’s* equal protection analysis has been applied to peremptories exercised by defense attorneys.

3. **Assess Whether the Race-Based Exclusions Could Be Overcome:** Subsequent decisions have extended *Batson* to civil cases.

Though *Batson* limited its holding to race, in *J.E.B. v. Alabama ex rel. T.B.*, the Court has extended *Batson* to peremptory challenges based on gender. The Court, however, denied certiorari in a case that would have resolved the applicability of *Batson* to peremptory challenges based on religion.

The California Supreme Court’s holding in *Wheeler* was not limited to race, referring instead to “group bias” and indicating that this meant “members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds.” In accordance with this approach, California courts have held that peremptory challenges based on religion and sexual orientation are impermissible. In 2000, the California Legislature added a statute prohibiting the use of a “peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds.”

### Jury Selection Methods

In California, the exercise of peremptories is governed by statute, which provides that “peremptory challenges shall be taken or passed by the sides alternately,” that “each party shall be entitled to have the panel full and complete before exercising any peremptory challenge,” and that the “number of peremptory challenges remaining with a side shall not be diminished by any passing of a peremptory challenge.” In federal court, there is no similar governing statute and the only rule addressing peremptory challenges, Federal Rule of Criminal Procedure 24(b), “does not prescribe any method for the exercise of those challenges. Rather, ‘trial courts retain a broad discretion to determine the way peremptory challenges will be exercised.’” As a result, federal courts employ a range of differing jury selection methods.
In California state and federal courts, peremptory challenges are subject to challenge under the Batson/Wheeler analysis. A prosecutor’s exercise of peremptory challenges with the intent of excluding potential jurors on the basis of race violates the equal protection clause of the U.S. Constitution.

In California state courts, peremptory challenges may be made based solely on evidence concerning a prosecutor’s exercise of peremptories in a particular case.

Only a defendant of the same race as the juror may oppose a peremptory challenge directed at that juror on the grounds that it is premised on race.

Exercises of peremptory challenges by criminal defense attorneys are subject to challenge under the equal protection analysis set forth in Batson.

Batson and Wheeler only apply to criminal cases.

In California state and federal courts, peremptory challenges may not be exercised on the basis of gender.

In California state courts, peremptory challenges may not be exercised based on the sexual orientation of a potential juror.

When using the “jury box” method of jury selection, a federal district court in the Ninth Circuit may treat the pass of a peremptory challenge as waiving the subsequent ability to reach back and exercise a peremptory challenge against a juror seated in the box at the time of the pass.

The “blind strike” method of jury selection is invalid in federal court because it permits one party to lose a peremptory challenge by exercising it against a juror who that party does not know has also been the subject of a peremptory challenge by another party.

In the Ninth Circuit, under a “struck jury” system of jury selection, sequentially numbering potential jurors so that the parties know who will be the next to enter the box may result in the pass of a peremptory challenge being treated as the exercise of a peremptory challenge subject to challenge under Batson.

Because jury selection is supposed to be color blind, it is always improper to ask the court to note the race of potential jurors for the record.

Once a party raises a Batson/Wheeler challenge to the exercise of a peremptory, the court has the sole responsibility to ensure that the record is sufficient to preserve the point for review.

In federal and state courts in California, “comparative juror analysis” is an important tool in assessing Batson/Wheeler challenges that should be used by the appellate court even if it was not used by the trial court.

Some California state courts have questioned whether comparative juror analysis may be used in assessing whether a prima facie case of discriminatory intent has been made at the first step of the Batson/Wheeler analysis.

In California state courts, absent a subsequent renewed objection, a trial court’s ruling regarding a Batson/Wheeler challenge is reviewed based on the record as it stands at the time the ruling is made.

Demonstrating a prima facie case of discriminatory intent is impossible if a party has used a peremptory strike only one member of a particular group.

In assessing a Batson/Wheeler challenge premised on race, only the race of the jurors against whom the party has exercised peremptories is relevant.

At the second step of the Batson/Wheeler analysis of a claim of racial discrimination, the court may assess the persuasiveness and plausibility of a proffered rationale that is facially race-neutral.

If a court skips directly to the third step of the Batson/Wheeler analysis, it moots the preliminary issue of whether the party asserting the Batson/Wheeler challenge has made a prima facie showing.

Exercising peremptories to remove all members of a particular race from a pool of potential jurors will always demonstrate racial discrimination in jury selection.

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15. True □ False □
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19. True □ False □
20. True □ False □
the initial panel, each party exercises all the peremptories that party chooses to exercise, in writing, at the same time, and all the parties then present their lists of peremptory challenges to the court. This means that contending parties may exercise a peremptory challenge against the same juror. Courts have rejected claims that this results in the denial of a party’s right to exercise a peremptory, and they have repeatedly upheld use of the blind strike method of jury selection.26

In contrast to the jury box method, the struck jury method “emphasizes the overall complexion of the panel” in that, by exercising peremptories, parties “are able to determine from the initial panel not only who will not serve but also who will serve as the petit jury.”27 Thus, the struck jury method “builds in a preference for the parties’ exercising all their allotted challenges” as a means of removing all the jurors the party finds comparatively less desirable than others within the array from which the jury will be drawn.28 Nevertheless, if one or more of the parties does not exercise all its allotted peremptories, the court will be left with more than 12 jurors, and a method of selecting the petit jury from the remaining members of the array must be chosen. Courts generally apply one of two methods. First, the petit jury of 12 may be randomly drawn from the remaining array.29 Second, the entire array may be numbered from the start, with the result that the petit jury of 12 will consist of the 12 remaining jurors with the lowest juror numbers.30

In United States v. Esparza-Garza, the Ninth Circuit addressed the defense’s effort to exercise a Batson/Wheeler challenge to a prosecutor’s waiver of a peremptory under a struck jury approach in which the jurors in the array were sequentially numbered.31 Of the 28 jurors in the array, only juror 28 had a Latino surname; by waiving its second peremptory, the prosecution effectively excluded this juror. The defense sought to challenge the waiver, but, after a “short recess to research case law on whether waiver of a peremptory strike could constitute a Batson violation,” the district court concluded “that the failure to use a peremptory strike, without other evidence of discriminatory intent, cannot constitute a prima facie showing.”32 The Ninth Circuit reversed, holding that because “under this particular method of jury selection waivers of peremptory strikes result in the removal of known jurors, we conclude that such waivers are best viewed as prima facie case of discrimination and likely will go a long way toward satisfying the burden of proving actual discriminatory intent.

Voir dire questions and statements must be examined for substance and consistency. Obviously, statements or questions directly demonstrating group bias can establish a prima facie case of discrimination and likely will go a long way toward satisfying the burden of proving actual discriminatory intent.

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Making the Record
The California Supreme Court noted in Wheeler that the ordinary record on appeal does not contain facts necessary to assess challenges to peremptories on the basis of group bias. The court observed, “Not surprisingly, the record is unclear as to the exact number of blacks struck from the jury by the prosecutor: veniremen are not required to announce their race, religion, or ethnic origin when they enter the box, and these matters are not ordinarily explored on voir dire. The reason, of course, is that the courts of California are—or should be—blind to all such distinctions among our citizens.”38 This blindness to distinctions ends, however, when a group bias challenge is asserted, at which point “it is incumbent upon counsel, however delicate the matter, to make a record sufficient to preserve the point for review.”39 The obligation to make a sufficient record to support or defend against a claim of group bias applies at all three steps of the Batson/Wheeler inquiry.

In determining whether a party has made a prima facie case of discrimination, the Court in Batson provided two examples of “relevant circumstances” courts should consider: “a ‘pattern’ of strikes against black jurors included in the particular venire,” and “the prosecutor’s questions and statements during voir dire examination and in exercising his challenges.”40 Voir dire questions and statements must be examined for substance and consistency. Obviously, statements or questions directly demonstrating group bias can establish a prima facie case of discrimination and likely will go a long way toward satisfying the burden of proving actual discriminatory intent. But even absent facially discriminatory state-
ments or questions, a court can engage in “comparative juror analysis” to identify differences between the questions asked of minority and nonminority jurors. A significant difference may support the inference that the variance reflects an attempt to generate a purportedly nonracial basis for dismissing jurors based on group bias.

The Ninth Circuit has held that comparative juror analysis is appropriately used in assessing a prima facie case; that it is “an important tool that courts should use on appeal” even if it was not used by the trial court; and that it requires examination of the entire voir dire, prior to and after the exercise of the challenged peremptory, to permit a meaningful comparison between what was asked of jurors belonging to varying groups. Both in making and defending Batson/Wheeler challenges, therefore, parties will need to make sure the record reflects the group membership not only of struck jurors but also of any jurors to whom the ties will need to make sure the record reflects a prima facie case; that it is “an important tool that courts should use on appeal” even if it was not used by the trial court; and that it requires examination of the entire voir dire, prior to and after the exercise of the challenged peremptory, to permit a meaningful comparison between what was asked of jurors belonging to varying groups.

Both in making and defending Batson/Wheeler challenges, therefore, parties will need to make sure the record reflects the group membership not only of struck jurors but also of any jurors to whom the party wants to point for comparison of voir dire questions and statements, whether those questions and statements occurred before or after the challenged peremptory.

Demonstrating a prima facie case does not require a showing that a party struck more than one member of a particular group. Nevertheless, a recent Third Circuit decision suggests the crucial importance of developing the record regarding two different measures relating to the pattern of strikes: the “strike rate,” which is “computed by comparing the number of peremptory strikes the prosecutor used to remove black potential jurors with the prosecutor’s total number of peremptory strikes exercised,” and the “exclusion rate,” which is “calculated by comparing the percentage of exercised challenges used against black potential jurors with the percentage of black potential jurors known to be in the venire.”

The case, Abu-Jamal v. Horn, involved the highly publicized death penalty conviction of a black man for the murder of a white Philadelphia policeman. The record revealed the strike rate, which was 66.67 percent, resulting from the prosecution exercising 10 out of 15 peremptories against black jurors. But the record contained no “factual finding at any level of adjudication, nor evidence from which to determine the racial composition or total number of the entire venire—facts that would permit the computation of the exclusion rate and would provide important contextual markers to evaluate the strike rate.” The court found this failing fatal to the defendant’s effort to challenge the state court’s finding of no prima facie case under Batson: “Without this evidence, we are unable to determine whether there is a disparity between the percentage of peremptory strikes exercised to remove black venirepersons and the percentage of black jurors in the venire.” This holding emphasizes the importance of developing a record regarding not only the group identity of the jurors against whom peremptories were exercised but also the numbers of group members in the venire as a whole. This includes, under the jury box method, not only those jurors against whom peremptories could have been but were not exercised but also those members of the venire who did not even make it to the jury box.

Once a prima facie case is established, the second Batson/Wheeler step requires the party seeking to exercise the peremptory to provide a race-neutral reason for exclusion. At this second stage, so long as the proffered rationale is facially race-neutral, a court can evaluate neither its persuasiveness nor its plausibility. But a court is not without the ability to assess the facial credibility of the proffered reason, and, in this regard, development of the record is crucial. Many proffered race-neutral reasons depend on physical characteristics or physical actions that will not be apparent from the transcript of voir dire. Take for example the rationales proffered for the striking of the two jurors at issue in Purkett v. Elem—namely, one juror’s long, curly hair, and both jurors’ facial hair.

Whether challenging or supporting these rationales, a court finding whether or not the jurors at issue actually displayed these features would be critical to evaluating whether a credible, facially race-neutral rationale had been proffered.

Similarly, one of the facially race-neutral rationales proffered for exercise of a peremptory in the Supreme Court’s recent decision in Snyder v. Louisiana was the statement that a juror “looked very nervous to me throughout the questioning.” The record did not contain any finding by the court regarding the juror’s demeanor, so the Court refused to “presume that the trial judge credited the prosecutor’s assertion that [the juror] was nervous” and declined to defer to the trial judge’s denial of the Batson challenge.

The third step of the Batson/Wheeler analysis is the determination whether the party acted with actual discriminatory intent. Courts occasionally skip directly to this third step without making a finding whether a prima facie case has been established, either granting or denying a Batson/Wheeler challenge on a determination that a proffered race-neutral reason either does or does not represent the actual reason the peremptory is being exercised. The law is clear that when this happens, “the preliminary issue of whether the defendant had made a prima facie showing becomes moot.” Nevertheless,
a party cannot neglect to develop the record on points relevant to establishing a prima facie case. To the contrary, developing the record regarding these points may provide the best evidence for supporting or challenging the trial court's determination. Particularly important is developing a record sufficient to support a comparative juror analysis regarding selective questioning of jurors and selective striking of jurors on the basis of the proffered race-neutral rationale. This may provide the best means of demonstrating that a proffered race-neutral rationale is not related to the facts and issues of the case to be tried and rests instead on misplaced assumptions that actually demonstrate group bias.

For example, in United States v. Omoruyi, a federal prosecutor used peremptory challenges to strike two single, unmarried, female prospective jurors. The defendant challenged the second peremptory, a challenge against a black woman, asserting that it was improperly exercised on the basis of race. In his defense to this claim, the prosecutor asserted that he had removed both women not because of their race but because they were single and would be attracted to the defendant, who was, in the prosecutor’s opinion, an attractive young man. The district court allowed the removal of the two women jurors. The Ninth Circuit reversed, finding that the exercise of both peremptory challenges was improperly based on gender, relying in part on a record demonstrating that the prosecutor had not exercised similar challenges against single, unmarried, male prospective jurors.

In like manner, a Massachusetts appellate court found that in prosecuting a defendant for plying teenage girls with alcohol and drugs in order to molest them, defense counsel was properly precluded from peremptorily striking two women over 60 years of age when the proffered rationale for striking them—that they were too old—“amounted to no more than a pretext and that defendant’s real reason for the challenges was to get as many women off the jury as he could.” This finding was based in part on the defendant’s initial explanation for striking eight of the nine female jurors drawn from the venire (including the two over 60), which was that “women with young children would be dangerous to the defendant in a case involving molestation of children.”

Of course, not all comparative juror analysis will result in a finding that strikes are improper, even when they result in the removal of all members of a particular group from the jury. For example, a 2001 Seventh Circuit decision addressed an employer’s peremptory strikes of all three women in the jury pool in a sexual harassment trial. The employer cited as reasons for the strikes one
woman’s unemployment, another’s participation in a lawsuit, and another’s employment with an insurance company and equivocal answers about the level of her education. Also, the employer objected to all three on the basis of their limited work experience. The plaintiff argued that these reasons were pretexts and noted in support that several of the empaneled male jurors had less formal education than the three female jurors. The court held this insufficient to demonstrate discrimination under a comparative juror analysis, explaining that when “a party gives multiple reasons for striking a juror, it is not enough for the other side to assert that the empaneled juror shares one attribute with the struck juror.”

To avoid and defend against claims that peremptories are being exercised on the basis of group bias, counsel should take pains to ensure that their voir dire questions and their exercises of peremptories are used consistently on the basis of valid rationales tied to the facts and issues to be presented in the case at hand. They should also be prepared to explain these rationales and develop a record that will support them under challenge by the court. With this approach, peremptory challenges can continue to serve their intended purpose of ensuring the confidence of parties and the public in the ability of the jury ultimately selected to serve as a fair and impartial trier of fact.

1 United States v. Annigoni, 96 F. 3d 1132, 1144 (9th Cir. 1996) (en banc).
2 Id. at 1137.
5 Id. at 224.
6 Batson, 476 U.S. at 92.
7 Wheeler, 22 Cal. 3d at 280-82, 283-87.
8 Batson, 476 U.S. at 85.
9 Id. at 96.
18 CODE CIV. PROC. §231.5, added by 2000 Cal. Stat. ch. 43, §3 (A.B. 2418). Section 1 of the enacting statute states that it reflects the intent of the legislature to codify the result of People v. Garcia.
19 CODE CIV. PROC. §231(d).
21 See United States v. Esparza-Gonzalez, 422 F. 3d 897, 899 n.3 (9th Cir. 2005) (describing jury box method).
22 See United States v. Blouin, 666 F. 2d 796, 798 (2d Cir. 1981) (“The ‘jury box’ system tends to focus the parties’ attention on one member of the venire at a time,
exercise “backstrikes” a Louisiana law under which parties were permitted to exercise all their peremptory challenges if both sides exercise all their peremptory challenges and consistent with Rule 24(b); United States v. Harper, 33 F. 3d 1143, 1145-46 (2d Cir. 1994). In Ricks, 802 F. 2d at 733-37, the Court considered the prosecutors’ “resort during voir dire to a procedure known in Texas as the jury shuffle,” under which either side had, at various times, the ability to have the court reshuffle the “cards bearing panel members’ names, thus rearranging the order in which members of a venire panel are seated and prompting the prosecutor to excuse 10 of 11 black jurors.” 545 U.S. at 254. What was at issue in Ricks was not the resort to the “blind shuffle” as evidence of discriminatory intent in exercising peremptories, not as a free-standing method to excuse a prosecutor to strike a juror solely because of his or her race—a requirement that would itself implicate equal protection concerns. State v. Amerson, 915 F. Supp. 11, 12-13 (N.D. Ill. 1996) (rejecting defendant’s claim that random shuffling of remaining jurors after exercise of peremptories on oversized array was error when defendants were advised in advance that this would occur). See United States v. Peña-Garza, 422 F. 3d 897, 898-900 (9th Cir. 2005). Miller-El v. Dretke, 545 U.S. 231 (2005). See United States v. Bermudez, 529 F. 3d 158, 164-65 (2d Cir. 2008) (joining “all five circuits that have considered similar challenges to the blind strike method” in upholding the method “as constitutional and consistent with Rule 24(b)”; United States v. Warren, 25 F. 3d 890, 894 (9th Cir. 1994).

See United States v. Harper, 33 F. 3d 1143, 1145-46 (9th Cir. 1994). The Fourth Circuit’s holding in Ricks suggests that this method of selecting jurors from the remaining array may be required if the blind strike method is used or if the initial array is sufficiently large that “more than twelve names will remain” even if both sides exercise all their peremptory challenges. See Ricks, 802 F. 2d at 733-37. But see United States v. Patterson, 915 F. Supp. 11, 12-13 (N.D. Ill. 1996) (rejecting defendant’s claim that random shuffling of remaining jurors after exercise of peremptories on oversized array was error when defendants were advised in advance that this would occur). United States v. Esparza-Garza, 422 F. 3d 897, 898-900 (9th Cir. 2005).

The Arizona Supreme Court had previously reached the contrary conclusion, reasoning that treating a waiver as equivalent to the exercise of a strike would come too close to requiring a prosecutor to strike a juror in order to avoid removing another juror solely because of the latter’s race—a requirement that would itself implicate equal protection concerns. State v. Paleos, 200 Ariz. 42, 22 P. 3d 35, 37 (2001). Subsequently, a Missouri appellate court explicitly rejected Esparza-Garza’s holding, siding with the reasoning of the Arizona Supreme Court. State v. Amerson,
creatin...
TRANSFORMATION

Three myths regarding transgender identity have led to conflicting laws and policies that adversely affect transgender people.

IN RECENT YEARS transgender legal issues have gained increasing visibility. Legislatures of several states, cities, and counties have passed laws forbidding discrimination on the basis of gender identity and enhancing punishments for violent crimes motivated by bias based on gender identity. At the same time, courts have struggled with cases involving transgender litigants that include questions of parental rights, marriage recognition, immigration issues, employment discrimination, prisoners’ rights, juvenile justice, foster care, identity documentation, and more. Many of the legal battles that are being fought address transgender identities and focus on determinations by courts of a transgender litigant’s legal gender, rights to access transgender healthcare, or fitness as a parent.

Three key myths of transgender identity are producing many problematic and sometimes controversial laws, policies, and decisions. As a result of these myths, laws affecting transgender populations are inconsistent and conflicting, resulting in the devastating marginalization of transgender people from employment and social services. These issues cannot adequately be addressed through a traditional antidiscrimination framework. Reducing the legal and policy barriers to transgender survival will require not just the addition of laws prohibiting discrimination on the basis of gender identity and expression but also significant changes in the law regarding the regulation and administration of gender categories.

While these issues have been addressed for decades in the administrative systems of many jurisdictions, the resulting policies often contradict one another and lead to irremediable conflicts for individuals who are subject to divergent policies and laws simultaneously. In part, the reforms of the last four decades that produced new rules recognizing transgender identities relied on new myths and misunderstandings that offered only limited relief to the legal marginalization of transgender people. For that reason, engaging in legal reform work that is primarily focused on inclusion and recognition may not be enough. Building a larger vision of the administration of gender categories is necessary for increasing the life chances of trans people. Understanding that injustice faced by trans people is systemic and requires systemic solutions.

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people stems not only from bias and discrimination but also from structural exclusions based on how gender is regulated by law reveals the significant transformative potential of this area of law.

There are likely innumerable myths, stereotypes, and misunderstandings about transgender people that contribute to discrimination, marginalization, and violence. However, in addressing the obstacles arising from laws and policies, three key myths stand out as regularly generating exclusions and difficulties for trans populations. These myths are not consistent with one another and with many others to which they are related. Still, the burden of these inconsistencies fall on those who are oppressed rather than on those enforcing damaging regulatory frameworks.

Myth #5: Transgender people do not exist.

Behind laws, policies, and administrative practices that deny basic recognition to trans people in a variety of contexts lies the myth that transgender people do not exist. One of these areas is identity documentation. When ID-issuing agencies refuse to change the gender marker on an ID, they are operating on the idea that birth-assigned gender should be permanent and no accommodation is necessary for those for whom such an assignment does not match their lived experience of gender. An example of these policies includes the Tennessee statute prohibiting the change of gender markers on birth certificates for people born in that state.1 An example of jurisprudence that relies on this myth is Littleton v. Prange,2 in which the judge, despite the fact that Christie Lee Littleton had changed the gender on her birth certificate, determined that she would not be considered female for purposes of marriage, and thus her marriage was not valid. The phrasing of the judge’s opening paragraphs was a giveaway of what authority he planned to use to deny the validity of the marriage. He asked, “[Is a person’s gender immutably fixed by our Creator at birth?” and answered the question at the end of the opinion, writing, “Christie was created and born a male....There are some things we cannot will into being. They just are.”

This myth is also visible in the policies of many institutions that use sex segregation to organize their residential programs. The common policy in U.S. prisons of placing people in sex-segregated facilities based on birth-assigned gender, which is one factor leading to the high rates of sexual assault of transgender prisoners,3 refuses recognition of transgender existence by insisting that birth-assigned gender is the only relevant criteria for placement. Similarly, the majority of homeless shelter systems in the United States have no written policies regarding the placement of trans residents and therefore enforce this myth in their daily operations by placing people according to birth-assigned gender. Some jurisdictions—such as New York City, San Francisco, Washington, D.C., and Boston—have adopted policies explicitly stating that transgender people should be able to access homeless shelters based on current gender. These jurisdictions are still in the minority.4 For many transgender people, this means that seeking shelter means becoming a target for harassment and assault in a large facility. This results in chronic homelessness for many who are afraid to face such conditions.5

Sex segregation in youth services is similarly reliant on a model of birth-assigned gender that refuses recognition of transgender youth. When foster care group homes consistently place transgender youth according to birth-assigned gender rather than current gender identity, high rates of running away occur. This is a major contributor to the high incidence of homelessness among transgender youth, which in turn creates barriers to education, healthcare, and employment.6 Homeliness among youth also contributes to their involvement in criminal activities to survive, such as sex work, drug sales, theft, and other crimes of poverty, such as trespassing, loitering, and sleeping outside. These activities by homeless youth can result in their placement in juvenile justice systems. Like foster care systems, juvenile justice systems regularly place youth based on birth-assigned gender, which makes transgender youth highly vulnerable to harassment and assault and concomitant mental and physical health problems.7 These placement issues are also prevalent in schools, where trans youth face problems because schools will not allow them to wear clothing associated with their current gender8 or use bathrooms or locker rooms associated with their current gender.9 The obstacles create a hostile environment in the school for transgender youth, in which their identities are denied by those in authority. This leads to high levels of harassment and attrition.10

The myth that birth-assigned gender is the only gender identity that can be recognized also motivates judicial decisions in which courts deny legal name changes to transgender people based on the assertion that such a name change may allow the petitioner to engage in fraud.11 Changing one’s name is a broad right in the United States, with restrictions generally limited to preventing people from using name changes to defraud creditors or escape criminal prosecution, marital obligations, or child support. However, some judges still deny transgender people’s name-change petitions based on the belief that allowing a person to change from a traditionally feminine name to a traditionally masculine name or vice versa is somehow facilitating fraud. This belief that transgender people’s gender identities are fraudulent or false and that legal obstacles to articulating such an identity publicly should be upheld by judges is based in a fundamental notion that birth-assigned gender is the only “true” gender an individual can have and that transgender identity is not recognizable or legitimate.

Such thinking is also visible in some parental rights cases, in which judges invalidate the parental rights of transgender parents who are not the genetic parent of the children in question. In Kantaras v. Kantaras, the Florida Court of Appeals reversed a circuit court ruling that the father, Michael Kantaras, a transgender man, was the legal parent of the children. Michael’s former wife knew he was transgender when they married, but when Michael filed for divorce, she attacked the validity of their 10-year marriage—and Michael’s history as a legal parent to the couple’s two children—based solely on Michael’s transgender history. The circuit court issued a lengthy opinion finding that the marriage was valid and Michael was legally male, but the court of appeals reversed.12 Thus, despite the fact that the children had been conceived during marriage using a sperm donor—a technique that any couple who could not conceive might use—and despite the fact that several states have explicit case law recognizing heterosexual marriages involving transgender people,13 the Florida court articulated the belief that birth-assigned gender is controlling and transgender identity did not merit legal recognition. In the case of Michael Kantaras, this meant that no number of agreements he had made with his wife and the sperm donor, or anything else, could protect his parental rights.

The myth that transgender people’s identities are fraudulent, false, or legally insignificant, and that all people should be regarded solely through the lens of their birth gender, arises in all of these contexts with harsh consequences. These can include, at a minimum, prison rape, homelessness, lack of access to education, the termination of parental rights, and myriad forms of harassment and violence. Opposition to this myth, and the assertion that transgender people exist and should be recognized in their current gender identities, has been articulated in cultural, medical, and legal arenas with increasing frequency in the past 60 years.

The growing discourse in the United States about this topic and the attendant controversy about trans recognition gained visibility during the 1950s, when Christine Jorgenson became a celebrity based on the media cov-
The most obvious example of the codification of medical evidentiary requirements for recognition of transgender people’s current identities are the gender reclassification rules used by ID-issuing agencies and institutions.

seek to win recognition of transgender people’s identities and show that those identities are “real” through medical verification. Unfortunately, this line of thinking produced a new myth that has created its own obstacles for transgender people.

Myth #2: Trans people can only be understood or recognized through medical authority.

Medical narratives have been a key tool in the legitimization and recognition of trans identities in the last half century. They also have produced hundreds of laws and policies and countless incidences of individual exercises of authority by government workers, employers, and others that make recognition for trans people conditioned on the production of medical evidence. Some of these policies and laws are formal and explicit, with particular medical evidence, such as proof of having undergone a particular treatment, required by an agency or institution for a gender marker to be changed in their records. Other instances of the enforcement of this myth occur on a case-by-case basis, because the basic idea that transgender people need to have undergone some kind of surgery in order to “really” be the new gender is so widely believed that employers, government employees, coworkers, social contacts, media, and others use it as an inconsistent and arbitrary standard in a wide variety of circumstances.

This myth is problematic for several reasons. First, its enforcement is very inconsistent, with different medical evidence being required in different contexts. The result is that people often are classified as male in some settings and female in others. These inconsistencies in documentation and classification lead to obstacles for transgender people in employment, health care, interactions with police, and in commercial activities. When identity documents are required, these inconsistencies can lead to “outing” transgender people and making them vulnerable to discrimination, harassment, and violence.

Moreover, this myth is also highly problematic because it is based on a misunderstanding of transgender healthcare. The cultural belief that transgender people are defined by undergoing certain treatments, particularly surgical treatments, and cannot be considered to have become the new gender until having undergone such treatment, is incorrect. In fact, gender-confirming healthcare constitutes individualized treatment that differs according to the medical needs and preexisting conditions of individual transgender people. Some transgender people undergo no medical care related to their expression of a gender identity that differs from their birth-assigned sex. Others undergo only hormone therapy treatment or any of a number of surgical procedures.

There are several reasons that the majority of transgender people do not undergo surgeries. Most obviously, people have different aims and desires for their bodies and express gendered characteristics in the ways that make the most sense to those needs and desires. For those who wish to enhance the masculinization or feminization of their appearance, changing external gender expressions such as hairstyle, clothing, and accessories is often an effective, affordable, and noninvasive way to alter how they are perceived in day-to-day life. For those who seek medical treatment, the most common medical treatment is not surgery but masculinizing or feminizing hormone therapy, which is an effective step for enhancing feminine or masculine secondary sex characteristics (voice, facial hair, breast tissue, muscle mass). For surviving daily life—work, school, street interactions—these external markers of gender are far more important than genital status.

tus, which is usually only known to one’s closest intimates. Additionally, genital surgeries are not recommended medical treatment for all transgender people. Many do not want to undergo such procedures or may be ineligible because of other medical issues.

Finally, genital surgeries are more expensive procedures than other options and are still not covered by a majority of private insurance or Medicaid programs in the United States. For that reason, they remain inaccessible to most transgender people. This means that the myth that surgery is determinative of a transgender person’s gender has an income-based impact, causing greater obstacles for middle- and low-income people who cannot afford to pay out of pocket for the procedure, if they even want or need it. Statistical information about the transgender population, while scant, reveals economic marginalization. One study found a 70 percent unemployment rate in the transgender population nationwide. Another study found that only 58 percent of transgender residents of Washington, D.C., were employed in paid positions, 29 percent reported no source of income, and another 31 percent reported annual incomes under $10,000. Considering the economic hardships of trans people overall due to discrimination, this means that a vast majority of transgender people do not have surgery and cannot meet surgery requirements for gender recognition under certain laws and policies.

The most obvious example of the codification of medical evidentiary requirements for recognition of transgender people’s current identities are the gender reclassification rules used by ID-issuing agencies and institutions. These include departments of health issuing birth certificates, departments of motor vehicles issuing drivers’ licenses and nondriver IDs, the Social Security Administration (SSA) maintaining its records, the Department of State issuing passports, agencies issuing immigration-related documents, welfare and Medicaid authorities issuing benefits cards, transportation authorities issuing various bus and train passes, and public schools and universities issuing ID cards and maintaining

erage of her gender transition. An argument contrary to the myth that transgender people do not exist emerged in the mainstream media and was reflected in law. This argument asserted that transgender people have a rare medical disorder that can be diagnosed and treated by medical professionals. Further, those who sought out and obtained treatment should be recognized in their identities. This competing argument was and is very much promoted by people who, based on compassion for trans experiences of discrimination, marginalization, and violence,
records. All have policies and practices for addressing gender reclassification in their systems. In the last 40 years, many of these agencies and institutions formulated written policies that include medical evidence requirements. Interestingly, these policies are wildly inconsistent in their requirements, not only between the states but even between different agencies within the same state, city, or county.

For example, California’s gender change policy for birth certificates requires the applicant to show that he or she has undergone any of a variety of gender confirmation surgeries,22 which could include chest surgery (breast enhancement for trans women or mastectomy and reconstruction for trans men), tracheal shave (“Adam’s Apple” reduction), penectomy (removal of the penis), orchietomy (removal of the testicles), vaginoplasty (creation of a vagina), phallopoplasty (creation of a penis), hysterectomy (removal of internal pelvic organs), or any one of a range of other gender-related surgeries. When addressing birth certificate gender reclassification, New York City and New York State each require genital surgery. However, their genital surgery requirements differ entirely. People born in New York City are required to provide evidence that they have undergone phalloplasty or vaginoplasty, while people born in New York State must provide evidence that they have undergone penectomy or hysterectomy and mastectomy.23 The fact that two jurisdictions issuing birth certificates in the same state have come up with entirely different requirements for recognition of gender change alone attests to the inconsistency in this area.

Gender reclassification policies also often tie recognition to the ability to show that other identity documents have already been changed. Massachusetts, for example, will only change DMV ID when an applicant shows both proof of surgery (unspecified) and a birth certificate indicating the new gender. For people born in Tennessee, which does not change birth records, and living in Massachusetts, this would be an impossibility.24 Further, gender reclassification policies often include requirements of recognition by other agencies or institutions.

The SSAs policy requires genital surgery but is nonspecific regarding which surgeries will be accepted.25 Some DMV gender reclassification policies—such as those of Colorado, New York, and the District of Columbia—do not require evidence of surgery but still require medical documentation in the form of a doctor’s letter attesting that the person is transgender and is living in the new gender.26

The results of these varying medical evidentiary requirements by ID-issuing organizations are several. Many transgender people, depending on which state they live in and which state they were born in, cannot get any ID that matches their current gender or can only get some pieces of ID that match current gender, meaning that when an employer or someone else needs to see multiple pieces of ID they will be outed as having a prior gender marker. Not being able to obtain corrected ID can lead to unemployment, difficulty in interactions with the police (including discrimination and violence),27 problems entering age-barred venues or purchasing age-barred products, accusations of fraud in a variety of situations, traveling difficulties, and other complications.

Additionally, recent law and policy changes at the federal level have focused on making increasing comparisons between data-banks of different ID-issuing agencies such as the SSA and the various DMVs, or using SSA records to confirm employment eligibility. These policies seek to find people with mismatching information on various types of records. Many transgender people have gotten caught up in these “no match” problems due to having mismatching gender markers on different IDs due to ID-issuing agencies having different rules regarding gender marker correction.28

The belief that the recognition of trans people’s gender identities requires medical verification is also reflected in case law. Cases in which courts have recognized a transgender person’s heterosexual marriage frequently focus on the person’s successful completion of various surgical interventions.29 Cases in which courts have affirmed that transgender people are covered by antidiscrimination laws often rely on a medical component for trans identity,30 although cases in which courts have found transgender people outside the ambit of antidiscrimination laws have also, at times, relied on a medical framework.31

In general, the association between transgender identity and medical care, especially surgery, is so common that judges frequently use it as the primary paradigm for thinking about trans people’s identities regardless of whether they decide in favor of a transgender litigant or not. The codification of this myth into law means that even the well-intentioned work that some lawmakers, judges, and advocates do to increase transgender recognition and overcome Myth #1 has no beneficial impact on the majority of trans people who do not or cannot have surgery, or not the particular surgery a given rule is based upon, as part of their gender expression.

**Myth #3: Trans people’s gender-confirming healthcare is not legitimate medicine.**

The third myth that causes major obstacles in law and policy for transgender people claims that gender-confirming healthcare for transgender people is not legitimate medicine. This myth can be seen in the policies and practices of a variety of private and public entities that provide or insure healthcare.32 State Medicaid programs and private insurers often have explicit exclusions of this care in their policies. If they do not, they reject individual claims on a case-by-case basis.33 Additionally, state and federal programs that are responsible for providing healthcare for people in their custody, such as foster care programs, juvenile justice programs,34 and prisons,35 frequently deny gender-confirming care either in a written policy or in an unwritten blanket practice.

The denial of gender-confirming healthcare, along with the incorrect assumption that most transgender people undergo surgery, results in several negative consequences. First, the inability to receive this care has severe health consequences for those who need it. Depression, anxiety, and suicide are commonly linked to the unmet need for gender-confirming medical care.36 According to the few studies that have been done on the issue, HIV rates are also extremely high among transgender people.37 One study found sero-prevalence in 63 percent of African American trans women.38 A contributing factor to this may be that many people seek treatments on the black market and receive care without medical supervision because it is not available through more legitimate means. This avenue to care may result in inappropriate dosage, nerve damage, and HIV and hepatitis infection resulting from injections without medical supervision or clean needles.39

Additionally, research has shown that the inability to receive appropriate healthcare may be a contributing factor to the high rates of incarceration of transgender youth and adults.40 Indeed, overrepresentation in the juvenile and adult criminal justice systems is an ongoing issue for the transgender population. Factors contributing to this overrepresentation include participation in black market transgender healthcare and, more broadly, participation in criminalized activity such as sex work to survive.41 This occurs for several reasons. Most centrally, many transgender people turn to informal or illegal economies to get by due to high levels of unemployment, homelessness, and poverty stemming from discrimination and economic marginalization. Transgender imprisonment may also be elevated because of a widespread trend of police profiling that has been documented in the United States.42

Finally, transgender imprisonment is also bolstered by lack of access to alternatives to incarceration. For example, many nonprofit drug treatment programs refuse transgender applicants, sometimes based on an assertion that they lack the experience or expertise to
serve transgender people. In most states, such policies of exclusion are not forbidden by antidiscrimination law. Even those programs that admit transgender defendants typically are segregated by sex and use gender reclassification policies that prevent transgender people from being placed in gender-appropriate settings. Transgender people are at a disadvantage for succeeding in such therapeutic programs when their gender identities are denied and birth-assigned, gender-based rules such as dress codes are applied to them. The result is that these alternative programs are less accessible to the transgender population.

These three myths operate across the spectrum of law and policy and through daily enforcement by individuals often acting on a belief, correct or incorrect, that the law supports their actions to marginalize transgender people. The obstacles to income, housing, social services, public spaces and facilities, educational opportunity, and emergency services created by the simultaneous operation of these myths impede the opportunities and ultimately shorten the life spans of transgender people. In every context in which the myths are at play, clear and straightforward solutions exist that require changing rules about how gender categories are enforced by laws, policies, and practices to reduce the impact on trans people.

Antidiscrimination laws, unfortunately, do not sufficiently address these issues. Discrimination certainly describes some of the conditions faced by transgender people, such as the denial of employment or housing based on bias and stereotype. Still, the framework of discrimination does not adequately address all the concerns. Questions of whether and when gender should be used in government recordkeeping, on IDs, and to segregate people in various facilities, and what criteria should institutions use to determine who qualifies for membership in a given gender category, remain untouched even when a jurisdiction passes an antidiscrimination law. The existence of trans people raises these questions and has resulted in extensive, though inconsistent, policy reform that has brought some relief as well as some increased hurdles to those navigating gender reclassification issues. Similarly, questions of whether the gender-confirming healthcare regularly provided to nontransgender people will be provided to transgender people under various private insurance and state healthcare coverage programs are not addressed by antidiscrimination laws.

These questions remain hotly contested, especially when healthcare is paid for by public funds. They raise fundamental issues about how trans identities are seen and to what degree gender is a matter of personal determination or expression rather than regulation. Moreover, they involve the types of gender expectations that employers, government programs, and schools are permitted to have and enforce. Trans law reform projects must of necessity go beyond celebrating the passage of antidiscrimination laws to focus on a range of controversies that disrupt the law’s most basic acceptance of and reliance upon traditional categorical maleness and femaleness. Individuals misidentified by these categorizations, those who contest their assigned categories, or those who experience multiple and conflicting assignments bring into stark relief the instability of the system of gender classification itself.

With a half-century of attempts to modify the rules of gender classification, it appears that the time has come for a deeper level of change. Tinkering with the rules of classification to allow some people permission to be reclassified has not resolved the many injustices still experienced by transgender people. It may be necessary to inquire whether gender performs the labor it is assumed to perform in various regulatory systems. To resolve these issues, reliance on gender as a method of identity classification and verification must be reduced or eliminated.

4. For a detailed discussion and review of these policies, see Dean Spade, Documenting Gender, 58 Hastings L.J. 731 (2008).
7. Id.
10. See Marksamer & Spade, supra note 6, at 14.
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In recent years, several major public systems have added coverage of this care to their employee benefits packages. This includes the city of San Francisco, the University of California, and the University of Michigan. At the same time, these benefits have come under attack in certain states that have included them in Medicaid coverage, such as Washington and Minnesota, and benefits have been reduced as a result. The medical necessity of this type of care, and questions about whether excluding it constitutes discrimination, are being actively debated with regard to private and public insurance.

23 Sydney Tarzwell, supra note 19; WorkPlace Transitions, supra note 19.

24 Twenty-two states explicitly exclude coverage for gender-confirming healthcare for transgender people. See Documenting Gender, supra note 4.

25 No foster care or juvenile justice system in the United States has a written policy providing for transgender healthcare for youth in their custody. Some jurisdictions currently work to provide transgender healthcare for eligible transgender youth on an individual basis, but denial of such care is the norm. Interview with Jody Marksamer, National Center for Lesbian Rights (Feb. 28, 2007). For more information on the variety of proposed policies in this area, relevant lawsuits, and social science research, see Documenting Gender, supra note 4, and Marksamer & Spade, supra note 6.


28 Id.

29 Id.

30 Id.
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THE ENACTMENT OF THE 1986 DISCOVERY ACT was designed to clean up many of the abuses that then plagued—and unfortunately, some of which still plague—the discovery process. However, the act created some new problems, and others have persisted despite the act’s clear language. One of the problems that existed prior to the act was the propounding of interrogatories with reference to other, unattached documents. The Discovery Act put an end to this abuse by requiring that each interrogatory must be complete. However, too many interrogatories, including some developed by the Judicial Council, ignore the rule of self-containment.

The relevant language of Code of Civil Procedure Section 2030.060(d) states: “Each interrogatory shall be full and complete in and of itself. No preface or instruction shall be included with a set of interrogatories unless it has been approved under Chapter 17 (commencing with Section 2033.710).” The California Court of Appeal has ruled that the requirement that an interrogatory be complete in and of itself is not satisfied when “resort must necessarily be made to other materials, namely both the complemen-
tary and limited jurisdiction cases make use of the defined term “incident” in many of the questions. Both sets give the same two options for how the term “incident” is defined. The first option uses a preprinted definition: “INCIDENT includes the circumstances and events surrounding the alleged accident, injury, or other occurrence or breach of contract giving rise to this action or proceeding.” The second option provides: “INCIDENT means (insert your definition here or on a separate, attached sheet labeled “Sec. 4(a)(2)”.)” The second option allows attorneys to define “incident” as they see fit.

Under the first option, all form interrogatories that use the term “incident” may be incomplete, since one cannot determine the nature of the allegations without resort to the accusatory pleading. Use of

Too many interrogatories, including some developed by the Judicial Council, ignore the rule of self-containment.

1 CODE CIV. PROC. §2030.060(d) (formerly CODE CIV. PROC. §2030(c)(5)).
3 Form Interrogatories 15.1 asks:
Identify each denial of a material allegation and each special or affirmative defense in your pleadings and for each:
(a) state all facts upon which you base the denial or special or affirmative defense;
(b) state the names, ADDRESSES, and telephone numbers of all PERSONS who have knowledge of those facts; and
(c) identify all DOCUMENTS and other tangible things which support your denial and state the name, ADDRESS, and telephone number of the PERSONS who has each DOCUMENT. (emphasis in original).
4 Form Interrogatories 17.1 and 217.1 ask:
Is your response to each request for admission served with these interrogatories an unqualified admission? If not, for each response that is not an unqualified admission:
(a) state the number of the request;
(b) state all facts upon which you base your response;
(c) state the names, ADDRESSES, and telephone numbers of all PERSONS who have knowledge of those facts; and
(d) identify all DOCUMENTS and other tangible things that support your response and state the name, ADDRESS, and telephone number of the PERSON who has each such DOCUMENT or thing. (emphasis in the original).

BY PAUL EISNER

Paul Eisner is with the law offices of Duncan David Lee.
ASTM’s New Standard

ON THURSDAY, OCTOBER 23, the Environmental Law Section will host a program including speakers Robert Ettinger, Karen E. Schmitt, and Edward L. Strohbehn Jr. to answer questions about ASTM’s E2600-08 standard practice for vapor intrusion (VI) assessment—what it is, what it isn’t, when it applies, and what potential liabilities are associated with its use. VI is a current issue for environmental attorneys that frequently arises at new and old (or closed) sites. Now the VI pathway is also being considered in environmental due diligence for property transactions.

This program will provide the tools to understand, evaluate, and address VI issues. The speakers will highlight technical and legal factors, with a focus on how to help clients address these issues. The program will also provide practical recommendations for addressing VI issues to comply with the Federal Superfund’s “all appropriate inquiries” regulatory requirements, which are important to establishing and protecting defenses to Superfund liability. The event will take place at the LACBA Conference Center, 281 South Figueroa Street, Downtown. Reduced parking is available with LACBA validation for $10. On-site registration and the meal will begin at 11:30 A.M., with the program continuing from noon to 1:00 P.M. The registration code number is 010185. The prices below include the meal.

$15—law students and CLE+Plus members
$20—Environmental Law Section government and public interest attorneys
$35—Environmental Law Section members
$50—all others
$55—all at-the-door registrants
1 CLE hour

TAP Witness Examination Workshop

ON MONDAY, OCTOBER 13, the Trial Advocacy Project and the Litigation Section will present a course to provide introductory and advanced level instruction on how to examine a witness under oath. The first part of the program is a lecture with questions and answers, covering the formula for direct examination. Part two is a workshop in which participants conduct direct examination and cross-examination of witnesses and receive constructive feedback on their performance. The workshop will take place at the LACBA/Executive Presentations Mock Courtroom, 281 South Figueroa Street, Downtown. Figueroa Courtyard reduced parking with LACBA validation costs $10. On-site registration and a meal will be available at 8 A.M., with the program continuing from 8:30 A.M. to 12:30 P.M. The registration code number is 009908.

$250—LACBA members
$350—all others
3.75 CLE hours

30-Hour Basic Mediation Training

FROM TUESDAY to THURSDAY, OCTOBER 14 to 16, the Association’s Alternative Dispute Resolution (ADR-DRS) department will hold 30 hours of small group exercises and role-playing for persons who wish to acquire a strong foundation in basic mediation skills and wish to satisfy the classroom requirements of the California Dispute Resolutions Act of 1998. Speakers Lynne Bassis, Gail Nugent, John Rodriguez, and L. Therese White will lead. The training will take place at the Ken Edwards Center, 1527 Fourth Street in Santa Monica, with parking available at the Ken Edwards Center. On-site registration on Tuesday will be available at 5:30 P.M., with the program continuing from 6 to 9. The registration code number is 010132.

$495—DRS associates, early bird registration
$525—LACBA members, early bird registration
$595—all others, early bird registration
$550—DRS associates
$575—LACBA members
$625—all others
26.75 CLE hours

The Los Angeles County Bar Association is a State Bar of California MCLE approved provider. To register for the programs listed on this page, please call the Member Service Department at (213) 896-6560 or visit the Association Web site at http://calendar.lacba.org/where you will find a full listing of this month’s Association programs.
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