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Steven R. Yee is a partner in the Pasadena office of Wolfe & Wyman, LLP, where he is the chair of the firm’s Professional Liability Department and specializes in legal malpractice litigation. In “The Blame Game,” he argues that the anti-SLAPP statute should be applied in malicious prosecution actions. His article begins on page 20.
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Midserve at match point, and one of my Los Angeles Lawyer friends yells a comment across the tennis court about a recent From the Chair column. It is always nice to hear from someone among our 22,000-plus circulation, although not at the expense of a blistering ace of a winner. Off the court, I often get questions about past articles and issues, suggestions for future ones, and interest shown in the people involved in doing the work of the magazine and also the reasons why we do it.

About a year ago I wrote in this column about our nine-person professional staff and the terrific job they do. But publishing this magazine is a collaborative process involving an Editorial Board of volunteers. During my first year as chair, I wanted to share my thoughts about the Editorial Board, but I ran out of From the Chair columns. Now I have the opportunity.

This editorial year there are 41 of us on the board sharing common entry criteria: We are attorneys, dues-paying members of the Los Angeles County Bar Association, and self-selected volunteers. Each spring the Association circulates among its membership a list of committees and other activities for which a member may volunteer. So, at some point in the past, each of the current board members selected Los Angeles Lawyer magazine as a bar activity. We do prefer new board members who have had several years of active practice, and we try to cover as many practice disciplines as possible. (We are chronically thin in a couple of areas: plaintiff’s personal injury attorneys and criminal defense attorneys.) The Editorial Board is not a tough club to join. However, it is a bit tougher to stay because we do ask for dues—in the form of active participation.

The Editorial Board meets 12 times a year, and we ask each member to attend a reasonable number of these meetings. At our monthly meetings, we review a calendar of future issues and monitor the progress of articles scheduled for publication. Each member reports on the status of articles for which the member is responsible. We also review a continuing inventory of each member’s articles in various stages of development and topics for future articles, with the chair calling the roll. With only slightly less verve than traders on the floor of a commodities futures exchange, when called on we cry out, “Good concept, weak or strong first draft, second draft due next week, final in” and the like. We always stay calm. The articles coordinator, who serves with the chair for the bar year and who sits expectantly if not patiently for that year at the chair’s left, keeps score.

We do ask that each member actively develop ideas for articles, suggest or locate authors, and each year edit at least three articles. We let our new members have some time to settle in. Past chairs frequently remain on the board, and their acquired knowledge helps maintain the board’s poise and the magazine’s quality. Editing is a skill that takes time to master. Few of us do, but our past chairs are very good and, of course, we have our professional editors, who apply a final editorial polish to the articles that are published in the magazine.

Editorial board members may not have 41 different reasons for their efforts, but there may be a few they have in common. Each month there is a product, often a very good one, for which we feel pride and satisfaction. There is a continuing professional challenge in producing the best possible articles. There is hopefully some fun in the monthly meetings and the friendships developed. We even get to try our hands at being creative. Sometimes the Editorial Board discusses policy issues or points of law, and I often think what a wonderful opportunity it is to be with so many smart, articulate, and thoughtful people.

The feeling of working with the Los Angeles Lawyer Editorial Board is matchless, like hitting a clean winner. It is not always easy to be chair, but there is always an ease in working with the Editorial Board. This chair has no gavel.

By Steven Hecht

Steven Hecht practices trans- actional business law on the West- side. He is the chair pro tem of the 2002-03 Los Angeles Lawyer Editorial Board.
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Using Experts in Patent Litigation

The success or failure of patent litigation can hinge upon the selection and use of experts

The outcome of patent litigation is often determined by the technical expertise of testifying experts and nontestifying consultants. As a result, selection and proper use of technical experts can cost either party its competitive advantage and, ultimately, its livelihood. Given this importance, it is quite surprising how little planning and consideration sometimes goes into the selection and retention of technical experts.

The Federal Rules of Civil Procedure distinguish between testifying experts and consultants. It is generally accepted that Rule 26 does not require the disclosure of the identity of consultants in response to an opponent’s interrogatory and generally precludes discovery from such consultants, absent some showing of special need. As a practical matter in patent cases, however, disclosure of consultants is often necessary under the provisions of the applicable protective order so that a consultant may be given access to the adversary’s confidential information. Nevertheless, the distinction between testifying expert and consultant remains important and may permit a party to prevent discovery from the consultant or at least delay any disclosure until a decision has been made that a consultant will testify as an expert.

Practitioners should keep this distinction in mind when characterizing the relationship and obligations established in retainer agreements and in correspondence with the consultant.

Hire Early

Whenever possible, the patent owner should hire early, which generally means even before filing. That way, the plaintiff can ensure that its first choice of expert (who may be the only good choice in a given field) is available and under contract. Sometimes, a prefiling inquiry may reveal complications in the expert’s schedule—class assignments, forthcoming expiration of a noncompete agreement, or a sabbatical—that may influence the timing of suit.

Another reason to hire early is that some of the technical expert’s most important work may take place prior to filing. For example, a thorough assessment of claim interpretation, likely validity challenges, and infringement can be more fruitful with the assistance of a consultant who has particularized knowledge and experience. Interaction with an informed expert may also provide the client and counsel with a theoretically impartial view of the case or bring complicating prior art to light before the litigation commences. In many cases, a technical consultant from outside the company may also have information about relationships within the relevant industry that may affect the client’s decisions regarding who and where to sue.

The actual inventors of the patent-in-suit are often asked to serve as expert witnesses at trial. Thus, the patent owner should ensure that each inventor is either still employed by the patent owner or retained as a consultant. Again, these arrangements should take place before filing. Otherwise the patentee may be surprised to find that the accused infringer has retained one or more of the inventors. Even if the inventors are still employees of the patent owner, it may be useful to establish agreements that will ensure their cooperation and availability in the event that they leave the company during the often-lengthy pendency of litigation. If the case is brought by a third party (such as an exclusive licensee), this may be particularly important.

For the defendant, one of the highest priorities following receipt of the complaint should be an identification of potential experts. Wherever possible, the accused infringer should seek to interview and, if appropriate, retain any of the former-employee inventors as consultants. In doing so, be aware that certain employment agreements may be broad enough to prohibit any potential consultant, including inventors, from using confidential information outside of their original employment relationship.

Selection Criteria

Of the many criteria that should be considered in the selection of an expert in litigation, a few patent-specific strategies deserve mention. For either party in patent litigation, it is often advantageous to have the inventor from the closest prior art patent as a consultant. For the plaintiff, prior inventors may be able to tell a convincing story about the tremendous advance facilitated by the patent-in-suit. For the defendant, earlier inventors may be able to minimize the value of the patentee’s contribution to the art. Clearly, such prior inventors may be predisposed to offer one opinion over the other. It is counsel’s job to determine the best way to utilize these prior inventors.

Given the life span of a patent, care should be taken to ensure that the expert is old enough to have been an expert at the time that the invention was made. Otherwise, opposing counsel may revel in making the jury aware that the proffered expert was in junior high school at the time of the invention.

In selecting an expert, counsel also should consider whether it is more likely at trial that a given expert will actually explain the technology or simply offer a highly qualified, but unintelligible opinion. In the case of the former, it is often best to concentrate more on communication skills and less on credentials. Indeed, some commentators say that
jurors forget the expert’s qualifications after the first five minutes of his or her testimony. If you have any concerns, spend the day in a conference room with the potential expert and monitor his or her performance.

Never neglect due diligence. The last thing any lawyer wants is to discover that an expert has lied about his or her credentials, given prior inconsistent testimony in another case, or characterized the patent-in-suit differently in one of his or her patents. At a minimum, counsel should attempt to review any patents obtained by the potential expert and conduct an investigation into the accuracy of the information appearing on the expert’s curriculum vitae. Counsel should also endeavor to perform a similar investigation concerning those items that will necessarily be disclosed under Rule 26, such as publications and testimony given in other litigation.

When the worst happens, do not assume that the case cannot be saved. Rule 26(e) explicitly contemplates such disasters, instructing that the parties are under a duty to remedy materially incomplete or incorrect information provided to the opposing side by an expert. If this becomes necessary, consider substitution of the designated testifying expert with an alternative. If you have anticipated this difficulty, you may even have a prospective expert waiting in the wings. If the withdrawn expert has not yet been deposed, it may be difficult for the opposing party to claim prejudice. Furthermore, in light of the objectives of Rule 26 in promoting fairness and preventing surprise at trial, this type of substitution may prevent your opponent from obtaining discovery from the withdrawn expert. Thus, you may find that what began as a bad situation can resolve itself into an acceptable one.

Since issues relating to testing methodology, errors, or disagreements may evolve over time, consider the use of more than one technical expert. If they are retained preemptively, they may also prevent your opponent from retaining the top experts in the field.

Finally, remember to honor the procedural distinction between consultant and expert. If the lawyer anticipates that a particular person is likely to be a testifying expert, care should be taken to limit disclosures to, and the documents or notes generated by, that person. Materials relating to early brainstorming, in particular, often prove to be menacing distractions once the case later coalesces around particular arguments and theories. A dearth of written materials, coupled with the limited capabilities of the human memory, can often eliminate case-damaging sideshows at depositions taken months or years later.
In a civil RICO lawsuit, a jury may find the defendants liable for violating 18 USC Section 1962(c) but award only a small amount in compensatory damages. Although this amount is automatically trebled under 18 USC Section 1964(c), even this relative victory may disappear if the plaintiff files a motion for attorney’s fees and costs pursuant to Section 1964(c). It would not be exceptional for the plaintiff to seek fees and costs that are far greater than the compensatory damages.

If the defense counsel opposes the fees motion on the ground that the award of fees and costs must be proportional to the amount of damages awarded by the jury, the defendant is not likely to prevail, because courts have considered whether a rule of proportionality should apply in civil RICO cases and have decided that it should not. In light of the general judicial rejection of rules of proportionality in federal fee-shifting cases, defense counsel in civil RICO cases would be wise to find other grounds upon which to attack a plaintiff’s motion for attorney’s fees.

When Congress enacted the RICO statute, it expressly mandated an award of attorney’s fees and costs whenever there has been an injury cognizable under RICO: “Any person injured in his business or property by reason of a violation of Section 1962…shall recover threefold the damages he sustains and the cost of suit, including a reasonable attorney’s fee.” The RICO statute and the Clayton Act (upon which it is based) “share a common congressional objective of encouraging civil litigation to supplement government efforts to deter and penalize the respectively prohibited practices.” Congress passed the civil RICO statute, with its incentive of treble damages and mandatory attorney’s fees and costs, to encourage victims of racketeering acts, such as mail and wire fraud, to become private attorneys general dedicated to eliminating proscribed activities. The objective of civil RICO “is thus not merely to compensate victims but to turn them into prosecutors, ‘private attorneys general,’ dedicated to eliminating racketeering activity.”

Defense counsel should harbor no illusion that courts are unlikely to respect this congressional objective. As stated in Bingham v. Zolt, “It is the trial court, not the jury, that has the responsibility of determining attorney’s fees awards” in civil RICO cases. And as the U.S. Supreme Court held in Hensley v. Eckerhart, the determination of a reasonable fee begins with the court’s calculation of a so-called lodestar figure, which equals “the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” Although the court may increase or decrease the lodestar based upon a number of factors, there is a “strong presumption that the lodestar figure…represents a ‘reasonable’ fee.” Indeed, “a party advocating the reduction of the lodestar amount bears the burden of establishing that a reduction is justified.” As the Court has warned, however, “[a] request for attorney’s fees should not result in a second major litigation.”

The “most critical factor” in determining a reasonable fee “is the degree of success obtained.” This does not mean, however, that a RICO plaintiff will be penalized when its recovery falls short of what it originally sought. For example, in Bingham, the RICO plaintiff sought more than $10...
million but recovered only $800,000 (before trebling). The Second Circuit nevertheless affirmed a $3 million award of fees and costs, notwithstanding the fact that “the jury awarded only a small part of the damages sought by plaintiff, three of plaintiff’s six charges were dismissed as time-barred, and the [plaintiff] prevailed against only three of eight defendants.”12 Citing the Supreme Court’s ruling in *Hensley* that “[t]he result is what matters,”13 the Second Circuit explained that although the “plaintiff did not prevail on all of its claims and the jury did not find all the defendants guilty, the plaintiff obtained a jury verdict and a judgment against defendants. It won the case.”14

Similarly, in *Mittland Raleigh-Durham v. Myers*, District Judge Motley declined to reduce the lodestar amount of $684,450 in fees and $117,697 in costs awarded to RICO plaintiffs who recovered approximately $1 million in damages, since the plaintiffs “succeeded on all claims despite [the defendant’s] extensive fraud.”15

**Fee-Shifting**

There exists some disagreement among courts over the extent to which the *Hensley* lodestar factors should apply to cases that involve, as RICO cases do, mandatory rather than permissive fee-shifting statutes.16 The Second Circuit, in a civil RICO case, noted that the “results obtained” analysis of *Hensley* and *Farrar v. Hobby* “is of limited applicability” to statutes that mandate an award of attorney fees.17 Other courts determining fees and costs in RICO cases, however, have applied the *Hensley* analysis.18 Indeed, given the provision in Section 1964(c) for a reasonable attorney’s fee in civil RICO cases, the courts must make a determination of what is reasonable, and that analysis may be likely to consider generally the same factors as in *Hensley*. For example, in a recently decided case, *System Management, Inc. v. Loiselle*, the district court concluded that it would “not place much emphasis on *Hensley* and *Farrar* when interpreting the fee-shifting provision in RICO.”19 Although the court still calculated a lodestar amount before making its award of fees and costs,20 the district court put virtually no emphasis on the factor of the “results obtained.”21

It is well established that the award of attorney’s fees in federal fee-shifting cases generally should not be reduced simply because a prevailing plaintiff seeks an award that is greater than the damages awarded at trial.22 Indeed, in *City of Riverside v. Rivera*, a civil rights case, the Supreme Court upheld an attorney’s fee award of $245,456 when the plaintiff only recovered $33,350 in compensatory and punitive damages.23 In *United States Football League v. National Football League*, an antitrust case, the Second Circuit affirmed an award of over $5.5 million in attorney’s fees under the Clayton Act, upon which the mandatory fee-shifting provision of the RICO statute is based, even though the jury awarded the plaintiff only $1 in damages (which was trebled).24 The Second Circuit explained, “Because of the importance of the policy of encouraging private parties to bring antitrust actions, recovery of their reasonable attorney’s fees must be sustained regardless of the amount of damages awarded.”25

The rule of proportionality has fared no better in civil RICO cases. In *Northeast Women’s Center v. McMonagle*, the Third Circuit upheld an award of attorney’s fees and costs of $64,964 in a civil RICO case, even though the jury only awarded $875 in RICO damages before trebling.26 The Third Circuit ruled that “the district court properly refused to apply a proportionality rule to reduce the RICO fee award in this case,” expressly rejecting the defendants’ argument that the Supreme Court’s ruling in *City of Riverside* did not control.27 In *FMC Corporation v. Varonos*, the district court refused to award any fees or costs to a prevailing RICO plaintiff, on the ground that “the amount of [the plaintiff’s] request was almost triple the amount of the actual damage award.”28 The Seventh Circuit, relying upon *McMonagle* and *City of Riverside*, reversed and remanded for a determination of the plaintiff’s reasonable fees and costs.29

In *Nu-Life Construction Corporation v. Board of Education*, the district court awarded fees and costs totaling $193,266 to the RICO plaintiff, notwithstanding the fact that the jury only awarded $23,400 in compensatory damages against some defendants and found that other defendants had not violated RICO.30 The district court, relying upon *McMonagle*, *FMC*, and Second Circuit decisions rejecting proportionality in civil rights cases, “decline[d] to reduce [the plaintiff’s] fee application notwithstanding the limited pecuniary success achieved by the plaintiff Nu-Life.”31

*Loiselle* is the most recent case to consider the issue of proportionality in connection with a RICO fees application.32 After announcing it would not place much emphasis on the *Farrar* and *Hensley* factors, the district court calculated and accepted as its award the reasonable number of hours multiplied by the reasonable hourly rates.33 As a result, the court awarded fees and costs totaling $184,232 to the plaintiff, even though the treble RICO damages amounted to $1,018,56.34 The district court, in colorful language, explained its rejection of a proportionality rule in that RICO case: “The better part of valor is discretion.” William Shake-
tive intent and rationales of the fee-shifting statute." As a result, the Second Circuit reversed, holding that "this Court does not follow, and has not suggested that it would be inclined to follow, the billing judgment rule that the district court developed."\(^4\)

Defendants sued under the civil RICO statute must understand that they can succeed in limiting damages but still fail badly by being liable for the plaintiff’s attorney’s fees and costs. Counsel for defendants will not make any headway arguing to the court that the award of fees and costs should be proportional to the damages awarded. The proportionality rule is directly contrary to the societal objectives upon which Congress predicated the RICO statute. Thus, rather than challenging the fees application based upon proportionality, defense counsel should attack the lodestar determination on other grounds, if possible. An attack may target two items as being excessive: the hourly rates charged by the plaintiff’s counsel\(^4\) and the number of hours billed.\(^5\) Defendants may also challenge the lack of support for the application.\(^6\) Furthermore, in cases in which the plaintiff prevails on some but not all claims or against some but not all defendants, defense counsel should argue that the attorney’s fees should be apportioned accordingly.\(^7\)

1. 18 U.S.C. §1964(c).
2. Section 4 of the Clayton Act states that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws…shall recover… the cost of suit, including a reasonable attorney’s fee.” 15 U.S.C. §15(a).
5. Rotella, 528 U.S. at 557-58 (citation omitted).
11. Id. at 436.
16. Compare RICO and Clayton Act mandatory language with 42 U.S.C. §1988(b) ("The court...may award a reasonable attorney’s fee") and 16 U.S.C. §1540(g)(14) ("The court...may award costs of litigation (including...")
reasonable attorney and expert witness fees) to any party.

17 See, e.g., Farmer v. Arabian Am. Oil Co., 31 F.R.D. 191, 238 (S.D. N.Y. 1962), rev’d in part, 324 F. 2d 339 (2d Cir. 1963), rev’d 379 U.S. 227 (1964) (“[P]arties to a litigation may fashion it according to their purse and indulge themselves and their attorneys, but they may not foist upon the court their extravagances upon their unsuccessful adversaries.”).”


Mr. Gleitman has practiced sophisticated estate planning for 24 years, specializing for more than 12 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 36 estate planning issues to the IRS for private letter ruling requests; the IRS has granted him favorable rulings on all 36 requests. Twenty-three of those rulings were on sophisticated asset protection planning strategies.

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The Unique Issues in Shareholder Derivative Litigation

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A limited statutory scheme has led courts to play a key role in shaping derivative lawsuits

few statutes in California are asked to do the kind of heavy lifting that is required of Corporations Code Section 800. Fewer than 1,000 words in length, Section 800 represents the sum total of all legislation on the subject of shareholder derivative litigation in California.1 Yet in light of recent corporate and accounting scandals and the prevailing atmosphere of hostility toward corporate management, few statutes are more important. With Section 800 as their touchstone, both corporate counsel and those who litigate in the corporate arena need to understand and must be prepared to address a variety of issues unique to shareholder derivative litigation in California.2

What is a derivative action? It is an action that is asserted by a shareholder against one or more defendants—typically including the corporation’s own directors—on behalf of the corporation. The first obstacles confronting a prospective shareholder-plaintiff are the “demand” and “notice” requirements of Section 800(b)(2). Failure to satisfy these requirements subjects a shareholder’s complaint to demurrer.3 The applicable statutory language4 permits a derivative lawsuit only if:

The plaintiff alleges in the complaint with particularity plaintiff’s efforts to secure from the board such action as plaintiff desires, or the reasons for not making such effort, and alleges further that plaintiff has either informed the corporation or the board in writing of the ultimate facts of each cause of action against each defendant or delivered to the corporation or the board a true copy of the complaint which plaintiff proposes to file.

Although couched as a pleading requirement, this language imposes upon a would-be derivative plaintiff two separate and distinct affirmative obligations.5 In order to comply with the first (or demand) requirement, the shareholder must make some effort to secure from the corporation’s board of directors whatever action the shareholder wishes the board to take. This will typically be a demand that the board vote to sue in the corporation’s name to redress a wrong that the shareholder believes the corporation has suffered. This demand requirement is, however, a qualified one, since it is excused when there are “reasons for not making such effort.” Courts interpreting this qualification have crafted a “futility exception,” pursuant to which the shareholder’s demand upon the corporation’s board of directors will be excused if, under the particular facts of the case, making such a demand would be useless.6 Futility has been found to exist when, for example, a majority of the board is alleged to have directly participated in, or benefitted financially from, fraudulent or criminal conduct.7

The second (or notice) requirement imposed by Section 800 is that the shareholder either must inform the corporation or its board of directors the ultimate facts of each proposed cause of action against each prospective defendant, or must deliver to the corporation or its board of directors a copy of the complaint which the shareholder proposes to file. While a shareholder may be excused from complying with the demand requirement by demonstrating futility, the structure of the statute makes clear that there is no corresponding futility exception to the requirement of written notice. Written notice is, in all cases, mandatory.

After making a demand (unless one is futile) and giving written notice, the putative plaintiff must then affirmatively plead “with particularity” the plaintiff’s compliance with the statute’s threshold requirements. While pleading actual demand and notice is simple enough, pleading futility, in order to excuse the demand requirement, is clearly less so. As a rule, mere generalities or conclusive allegations of perceived futility will not suffice.8 Courts will instead require specific factual allegations as to why each particular director could not have fairly evaluated the shareholder’s demand.9

In light of these pleading requirements, the better practice for plaintiff’s counsel in all cases is to actually make the demand and give the required notice. Both requirements can be met by, for example, including the proposed complaint as an enclosure to the shareholder’s prefiling demand letter.

The Plaintiff’s Bond

There is no attorney’s fee provision per se in Section 800. The corporation, however, or any defendant who is an officer or director of the corporation, may move to require that the shareholder plaintiff furnish a bond if a moving defendant demonstrates either 1) that there is no reasonable possibility that prosecution of the action will benefit the corporation or its shareholders, or 2) that the moving defendant, if other than the corporation, did not participate in the challenged transaction in any capacity.10 If the court determines that a moving party has established “a probability” in support of any ground upon which the motion is based, the court must fix the amount of the bond, not to exceed $50,000, by considering the reasonable expenses, including attorney’s fees, that may be incurred by the moving party, including the corporation, in connection with defending the action.11

If a derivative plaintiff pleads...
multiple causes of action, security is proper if any one of the causes of action falls within the purview of the statute. The $50,000 bond amount is an aggregate, however, and a court may not require a greater bond regardless of the number of defendants or causes of action. In practice, a plaintiff’s bond is sought in most shareholder derivative actions because the corporation’s board of directors has, in response to the plaintiff’s demand, already determined that prosecution of the action is not in the best interests of the corporation. The motion for security must be filed within 30 days after service of summons upon the corporation or other moving defendant, and the filing of the motion stays all further proceedings in the case until 10 days after the disposition of the motion.

As a practical matter, success on the bond motion often terminates the lawsuit, since few disgruntled shareholders will post a $50,000 bond in the face of a judicial determination that there is no reasonable possibility that further prosecution of the action will benefit the corporation or its shareholders. The additional significance of the motion for security is that the prevailing defendant in a derivative action has no right to recover attorney’s fees, in the absence of a contractual fee provision, unless the defendant is first successful on a motion for security. In that case, the plaintiff’s potential liability for fees is both established and limited by the face amount of the bond.

Peremptory Dismissal

There are procedures that are unique to shareholder derivative litigation that, if successful, will result in the peremptory dismissal of the plaintiff’s claims without the need for a trial on their merits. These include a demurrer or summary judgment motion following the vote of a disinterested board majority against prosecution of the action, and a motion for summary judgment following a like vote by a board-appointed special litigation committee.

Courts have long recognized that a disinterested board majority, exercising its good faith business judgment, can obtain dismissal of a shareholder derivative lawsuit on the ground that the burdens of its further prosecution—including time, money, and the disruption of business—outweigh the likely benefits. The rationale behind this rule is that the management of a corporation’s affairs is properly vested in the duly elected board of directors and may not be usurped by one or more litigious shareholders.

A vote by a disinterested board majority against the prosecution of the action creates a legal presumption that the board’s decision was made in good faith, on an informed basis, and with an honest belief that the decision is in the best interests of the corporation. This presumption—the so-called business judgment rule—is, however, a rebuttable one, and dismissal will not lie if there has been fraud, bad faith, overreaching, or an unreasonable failure by the board to investigate material facts. Faced with a motion for summary judgment by an allegedly disinterested board majority, the court must determine:

- Whether the board majority is truly independent, and not financially or otherwise interested in the challenged transaction.
- Whether the court conducted a reasonable investigation into the operative facts before voting.
- Whether the vote represents a good faith exercise of the business judgment of the board majority.

Plaintiffs seeking to avoid dismissal by this procedure will often implicate the board majority in the challenged transaction or will preemptively allege failure of inquiry or other affirmative misconduct to rebut the presumption arising from the business judgment rule. The court’s role on summary judgment is limited to a determination of whether triable issues of material fact exist regarding these matters. If so, the “directors’ discretion” defense becomes an issue of fact, and while it may be bifurcated from the remaining issues in the case at trial, it may not be the subject of a special pretrial evidentiary proceeding.

Even when there is no disinterested board majority, courts will still entertain a motion for summary judgment when a disinterested special litigation committee appointed by an interested board majority so requests. The special litigation committee must be composed of two or more directors who have not benefited financially from the challenged transaction. The statutory authority for this delegation of responsibility is Corporations Code Section 311, which permits a board of directors to designate committees having the full authority of the board, except for certain enumerated matters.

Just as a disinterested board majority may move for summary judgment, so too may a special litigation committee if the committee determines that further prosecution of the action will not, on balance, benefit the corporation or its shareholders. Courts faced with this type of motion follow the same procedures and apply the same analyses as they would in the case of a motion filed by a disinterested board majority.

Corporate Counsel

Once a shareholder derivative action is filed, the defendants must quickly address the roles to be played by both corporate and special litigation counsel. While a derivative action is ostensibly prosecuted for the benefit of the corporation, the corporation itself, as an indispensable party, must be named as a defendant. As a nominal defendant, the corporation is entitled to have counsel at all stages of the proceeding. The corporation’s dual role as de facto plaintiff and nominal defendant creates conflict-of-interest issues for counsel that are unique to shareholder derivative lawsuits.

The corporation itself, and not its shareholders, is the holder of the attorney-client privilege. Therefore, the shareholders of a corporation cannot waive the privilege on the corporation’s behalf. Building upon this premise, recent case authority holds that a shareholder plaintiff cannot sue a corporation’s outside general counsel for legal malpractice in a derivative action, because doing so would compel corporate counsel to waive the attorney-client privilege in order to mount a meaningful defense to the plaintiff’s claims.

In other words, while a derivative plaintiff otherwise stands in the shoes of the corporation, the plaintiff does not do so with respect to the attorney-client privilege, and a shareholder cannot compel a waiver of the privilege by the expedient of naming both the corporation and its counsel as defendants in a derivative action.

Even if corporate counsel is immune from liability in a derivative action for advice given to the corporation regarding the challenged transaction, corporate counsel may not, in defense of a derivative lawsuit, simultaneously represent both the corporation and the directors whose wrongdoing is alleged to have damaged the corporation. Nor in most cases may corporate counsel continue to represent either the corporation or the defendant directors, because the applicable Rules of Professional Conduct preclude counsel from accepting employment adverse to a current or former client when counsel has obtained confidential information material to the employment—and meaningful consent to representation in these circumstances, while technically allowed by the Rules of Professional Conduct, is often difficult to obtain in shareholder derivative litigation.

Although each case is unique, the better practice in most cases is to retain new, independent litigation counsel for both the corporation and the director defendants. Doing so removes conflict-of-interest issues from the case and leaves corporate counsel in the appropriate role of disinterested percipient witness.

Advancement and Indemnity

When a director, officer, employee, or other agent of a corporation is sued in his or
her corporate capacity and wins a judgment on the merits in defense of a derivative action, indemnification from the corporation for all related defense costs and attorney’s fees actually and reasonably incurred is mandatory.35
In all other cases, a director, officer, employee, or other agent’s right to indemnification from the corporation for litigation-related expenses will depend upon the facts of the case and the language of the corporation’s articles and bylaws.36 The policy behind the statutes and cases authorizing corporate indemnification is to encourage competent individuals to serve as officers and directors of corporations and to discourage strike suits and other frivolous shareholder litigation by assuring a vigorous defense to these actions.37

In the absence of a judgment on the merits in defense of a derivative action, the right to indemnification is governed by Corporations Code Section 317(c). That statute expressly prohibits indemnification for:
1) Amounts paid in settling a derivative action without court approval,
2) Expenses incurred in defending a derivative action that is settled without court approval,
3) Any claim for which the defendant is adjudged to be liable, unless the court determines that, in view of all of the circumstances of the case, the defendant is “fairly and reasonably entitled to indemnity for expenses and then only to the extent that the court shall determine.”

Corporations Code Section 317(c) allows indemnification in the absence of a defense judgment on the merits only if the defendant “acted in good faith, in a manner the person believed to be in the best interests of the corporation and its shareholders.” Such “permissive indemnification” may be authorized by:
1) Majority vote of a quorum of directors who were not parties to the action,
2) Independent legal counsel in a written opinion, if a quorum of nonparty directors cannot be obtained,
3) Approval of the shareholders, excluding the shares owned by the person or persons to be indemnified, or
4) The court in which the proceeding is or was pending, “whether or not the application by the agent, attorney or other person is opposed by the corporation.”38

If a corporate agent is forced to seek and obtain court approval for permissive indemnification, the agent is also entitled to recover his or her reasonable expenses, including attorney’s fees, incurred in obtaining the court order.39

A corporation’s board of directors may vote to advance litigation expenses as they are incurred by any director, officer, employee, or other agent of the corporation who is named in a derivative lawsuit.40 The structure of Corporations Code Section 317 suggests—and at least one influential commentator concurs—that even interested directors may participate in the vote to advance litigation expenses, including to themselves.41 The provisions of Corporations Code Section 315(a), which require a shareholder vote with respect to any loans made to directors or corporate officers, does not apply to litigation advances made under Corporations Code Section 317.42

As a prerequisite to obtaining advancement of litigation expenses, a defendant—whether he or she is a director, officer, employee, or other agent of the corporation—must provide the corporation with “an undertaking” to repay the sums advanced in the event it is determined, at the conclusion of the case, that the defendant is not entitled to indemnification.43 While the statute does not specify the form of the undertaking, the Bond and Undertaking Law presumably applies by reference.

**Attorney’s Fees and Costs**

Since a derivative action is prosecuted on behalf of the corporation, any damages recovered in the action will ordinarily inure to the benefit of the corporation and not to the personal benefit of the plaintiff (other than in his or her capacity as a fractional owner of the corporation). Since derivative actions are equitable in nature, however, courts may tailor their judgments to fit the unique circumstances of each case—for example, to avoid a windfall that might result in the absence of a special allocation of damages.44 The shareholder plaintiff cannot, in any event, settle a derivative lawsuit without first obtaining court approval.45

A shareholder who is a prevailing plaintiff is entitled to recover his or her reasonable attorney’s fees and litigation costs as a charge against the settlement or judgment proceeds. This right to fees is not statutory but is based upon the plaintiff’s creation of a common fund for the benefit of the corporation and the plaintiff’s fellow shareholders.46 In a two-person corporation, attorney’s fees may not be awarded to one shareholder who prevails in a derivative action against the other shareholder, since no common fund results from the action.47

When one or more defendants prevail in the action, and the plaintiff has posted security pursuant to Corporations Code Section 800, the prevailing defendants have recourse to the security for their reasonable expenses, including attorney’s fees. This recourse includes a claim by the corporation for advances or indemnity payments made to corporate agents under Corporations Code Section 317.48

A motion to include attorney’s fees in the defendant’s memorandum of costs must be filed within the time for filing a notice of appeal from the underlying judgment—typically 60 days from notice of its entry.49 Conversely, a motion to enforce the plaintiff’s bond in satisfaction of the fee award may only be filed after the entry of final judgment in the action and after the time for appeal has expired or, if an appeal is taken, after the appeal is finally determined.50 This often requires the prevailing defendant to follow a two-step process, in which a motion to include attorney’s fees in the memorandum of costs is filed first, followed by, if necessary, the filing of a second motion to enforce the bond after the unsuccessful shareholder plaintiff exhausts his or her appeals.

If the derivative action arises out of the breach of a contract that includes an attorney’s fee provision, the prevailing defendant is not limited to recourse against the plaintiff’s bond (if one is posted) under Corporations Code Section 800 and to indemnity under Corporations Code Section 317. Prevailing defendants may also avail themselves of the reciprocal right to attorney’s fees found in Civil Code Section 1717, either in addition to or in lieu of these other sources of potential recovery.51

Because the statutory scheme governing shareholder derivative actions in California is skeletal, and because these actions are equitable in nature, the courts have played a prominent role in shaping the substantive law and procedure in this area. The dot-com implosion and recent flood of corporate and accounting scandals should act as catalysts in the years ahead for a greatly accelerated evolution of shareholder derivative law in California.

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1 Corporations Code §15702, which governs derivative actions in the context of limited partnerships, simply mirrors Corporations Code §800. Corporations Code §316(c) (directors’ joint liability to creditors) and §506(b) (shareholders’ direct liability to creditors) authorize actions in the name of the corporation without regard to the provisions of §800.
2 For an overview of basic principles of shareholder derivative litigation, see 9 WITKIN, SUMMARY OF CALIFORNIA LAW, Corporations §§179 et seq. (9th ed. 1989), and 2 FREEDMAN, CALIFORNIA PRACTICE GUIDE: CORPORATIONS §§6:598 et seq. (2002).
4 Corp. Code §800(b)(2).
10 CORP. CODE §800(a).
14 CORP. CODE §800(c).
15 CORP. CODE §800(f).
18 Id. at 174.
21 Findley, 109 Cal. App. 2d at 177.
23 Finley, 80 Cal. App. 4th at 1158-63.
24 Id. at 1158; CORP. CODE §311.
25 Lewis v. Anderson, 615 F. 2d 778, 781-83 (9th Cir. 1979).
31 This holding raises the question whether counsel can be sued when director defendants assert an advice-of-counsel defense or otherwise waive the attorney-client privilege.
33 Compare CAL. RULES OF PROF. CONDUCT R. 3-600(E) with R. 3-310(E). But see Forrest, 58 Cal. App. 4th at 78-82 (disqualification of corporate counsel from continued representation of individual directors/shareholders not required if the “functioning of the corporation has been so intertwined with the individual defendants that any distinction between them is entirely fictional”).
34 Indemnification beyond that allowed by Corporations Code §317 is authorized, within limits, by Corporations Code §204(a)(11) if a corporation’s articles and bylaws so provide.
36 CORP. CODE §317(e).
37 Compare CORP. CODE §317(e) with CORP. CODE §317(f). See also 1 MARSH’S CALIFORNIA CORPORATION LAW §11.22[1], at 11-217 (4th ed. 1999).
38 CORP. CODE §317(f) (last sentence).
39 Compare CORP. CODE §317(f).
40 The Bond and Undertaking Law, CODE CIV. PROC. §§995.010 et seq.
44 Id.
45 CORP. CODE §800(d).
46 Id., 2d of Cr. R. 870.2.
47 CODE CIV. PROC. §896.440.
if being sued for legal malpractice and paying the skyrocketing premiums for professional liability insurance were not enough for lawyers to worry about, they also have to be concerned about the threat of being sued for malicious prosecution. When a plaintiff loses an underlying action, the plaintiff’s attorney frequently becomes a candidate for defendant in a subsequent malicious prosecution suit.

Malicious prosecution actions have become more commonplace despite the consistent holdings of the California Supreme Court that the tort of malicious prosecution is “disfavored” because of its potential to create an undue chilling effect on a citizen’s willingness to report criminal conduct or to bring a civil dispute to court. The supreme court’s preferred approach is to adopt “measures facilitating the speedy resolution of the initial lawsuit and authorizing the imposition of sanctions for frivolous or delaying conduct within that first action itself.”

Unfortunately, strong case law holdings have not been sufficient to inhibit the filing of malicious prosecution cases. Traditionally, attorneys have opposed malicious prosecution actions by presenting arguments based on the elements of the tort (specifically, the lack of probable cause) and the tort’s disfavored status. However, because of the reluctance of trial courts to dismiss cases at the initial pleading stage, defendants have often been forced to litigate malicious prosecution actions at least through a motion for summary judgment. Only then would plaintiffs have to create a triable issue of fact through the use of admissible evidence. As a result, defendants in malicious prosecution actions have often expended substantial resources in time and money defending themselves against meritless actions.

In addition to the costs involved, malicious prosecution actions are troublesome for attorneys for several other reasons. First, the California Evidence Code does not recognize a doctrine that would allow attorneys to waive the attorney-client privilege when defending themselves against lawsuits. This becomes problematic when an attorney is sued for malicious prosecution but the attorney’s client in the underlying action is not. In that situation, the sued attor-

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ney cannot unilaterally waive the attorney-client privilege in order to defend himself or herself in the malicious prosecution action—even though that may be the only effective way to mount a defense. This raises the question: How is the sued attorney supposed to present a defense without waiving the attorney-client privilege?

Moreover, malicious prosecution suits against attorneys are especially dangerous because unlike legal malpractice actions, there is no right to indemnity—a fact that a surprising number of attorneys do not know. Indemnity coverage is precluded because Insurance Code Section 533 bars indemnity for “willful acts” of an insured. Thus, although professional liability insurance can cover defense costs in a malicious prosecution action, it cannot indemnify the attorney for damages. This places the sued attorney at great risk.

Finally, malicious prosecution actions are particularly vexing for lawyers because they often trigger a legal malpractice action. In this scenario, when plaintiffs in unsuccessful underlying actions are named as defendants in a subsequent malicious prosecution action, they often sue their attorneys for advising them to pursue the underlying action.

A New Weapon

Fortunately, a new weapon has emerged that may allow attorneys to combat malicious prosecution actions far more effectively. This weapon, which may ultimately curtail the filing of malicious prosecution actions altogether, is Section 425.16 of the Code of Civil Procedure, otherwise known as California’s Anti-Strategic Lawsuit Against Public Participation (SLAPP) statute. Through the use of the anti-SLAPP statute, trial courts can finally put some muscle behind the well-settled proposition that malicious prosecution actions are disfavored. The anti-SLAPP statute enables defendants to force a trial judge to determine if the plaintiff can establish a reasonable probability of prevailing on each element of each cause of action through the use of admissible evidence and to move to have malicious prosecution actions dismissed at the initial pleading stage of the litigation.

The filing of an anti-SLAPP special motion to strike also triggers an automatic stay on discovery so that the defendant will not have to incur the attendant costs if the malicious prosecution action is determined to be meritless. A stay of discovery also means that the plaintiff must have admissible evidence in hand that proves the required elements of a malicious prosecution case: 1) the underlying action at issue ended favorably for the plaintiff, 2) the underlying action was initiated and maintained without probable cause, and 3) the underlying action was brought with malice. Plaintiffs, accordingly, will not be allowed to conduct fishing expeditions when a special motion to strike is pending.

The reach of the anti-SLAPP statute is limited. It was enacted to allow a trial court to “dismiss at an early stage non-meritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in connection with a public issue.” The anti-SLAPP statute thus requires the trial court to undertake a two-step process when determining whether an anti-SLAPP motion meets these statutory requirements.

First, the court must decide whether the defendant has made a threshold prima facie showing that the defendant’s acts of which plaintiff complains were taken in furtherance of the defendant’s constitutional rights of petition or free speech in connection with a public issue. The California Supreme Court has, however, recently held that a defendant invoking the anti-SLAPP statute does not have to prove that the party filing the SLAPP suit had the actual intention to chill the defendant’s exercise of these constitutional rights.

If the court finds that the defendant has made the requisite showing, the second step shifts the burden to the plaintiff to establish a reasonable probability of prevailing on the merits by making a prima facie showing of facts that would, if proved, support a judgment in favor of the defendant. The court does not weigh the evidence or make credibility determinations. In assessing the probability the plaintiff will prevail, the court considers only evidence that would be admissible at trial.

In other words, the anti-SLAPP statute operates like a “summary judgment in reverse”—with the burden on plaintiffs to demonstrate under oath a “reasonable probability of success.” This is quite a burden for a plaintiff pursuing a malicious prosecution action. How, for example, does one prove malice without the benefit of any discovery?

Until recently, it was very much an open question whether the anti-SLAPP statute actually applies to malicious prosecution actions. Given its general language, the anti-SLAPP statute has typically been used in actions involving First Amendment issues such as libel, slander, and defamation. Although arguments existed favoring the application of the anti-SLAPP statute to malicious prosecution actions, many trial judges consistently ruled that the anti-SLAPP statute did not apply to these suits. Creative lawyers nevertheless persevered, utilizing the broad language that the California Supreme Court used in decisions like Briggs v. Eden Council for Hope and Opportunity to argue that the anti-SLAPP statute did apply to malicious prosecution actions. In
The supreme court stated:

Thus, plainly read, Section 425.16 encompasses any cause of action against a person arising from any statement or writing made in, or in connection with an issue under consideration or review by an official proceeding or body.13

The supreme court continued, “As pertinent here ‘the constitutional right to petition…includes the basic act of filing litigation or otherwise seeking administrative action.”14

Using this language in Briggs, a court of appeal held in 2001—for the first time—that Code of Civil Procedure Section 425.16 applies specifically to malicious prosecution actions. In Chavez v. Mendoza,15 the appellate court held:

It is well established that filing a lawsuit is an exercise of a party’s constitutional right of petition…. Further, the filing of a judicial complaint satisfies the “in connection with a public issue” component of Section 425.16, subdivision (b)(1) because it pertains to an official proceeding.16

Importantly, a defendant making a special motion to strike pursuant to the anti-SLAPP statute does not have to prove first that the activity is constitutionally protected as a matter of law. The moving party merely has to make a prima facie showing that the action arises from constitutionally protected activity.17 The Chavez court held that “under the statutory scheme, a Court must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis, and then permit the parties to address the issue in the second step of the analysis, if necessary.”18 The Chavez court also pointed out that this analysis is “consistent with the disfavored nature of the malicious prosecution tort, and the view that such claims are too frequently used as a dilatory and harassing device…”19 In so many words, the Chavez court was instructing trial court judges that they have the tools to stop the increase in frivolous malicious prosecution actions.

The Burden of Proof

Because of the Chavez decision and court of appeal decisions following it, malicious prosecution actions will be much more difficult to maintain past the initial pleading stage. Only when the plaintiff can prove a reasonable probability of prevailing on the merits at the outset of the case (without any discovery) will the suit survive. This burden is particularly difficult to meet in the context of malicious prosecution actions. In other actions, plaintiffs are more likely to have the necessary admissible evidence at the outset to oppose a special motion to strike made pursuant to the anti-SLAPP statute. For example, in a defamation action, a plaintiff can oppose a special motion to strike with proof of the defamatory statement (by copy of the written statement or by declaration of the witness who heard the defamatory statement) and a declaration from the plaintiff attesting that the statement is false.

The Anti-SLAPP Statute

Code Civil Procedure Section 425.16, commonly known as California’s anti-SLAPP statute, reads as follows:

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

(c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney’s fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney’s fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, “act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue” includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (5) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (6) any written or oral statement or writing made in connection with an issue of public interest; (7) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (8) any written or oral statement or writing made in connection with an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court’s discretion, at any later time upon terms it deems proper. The motion shall be noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, “complaint” includes “cross-complaint” and “petition,” “plaintiff” includes “cross-complainant” and “petitioner,” and “defendant” includes “cross-defendant” and “respondent.”

(i) On or before January 1, 1998, the Judicial Council shall report to the Legislature on the frequency and outcome of special motions made pursuant to this section, and on any matters pertinent to the purposes of this section.

(j) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(k)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or fax, a copy of the endorsed-filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.—S.R.Y.
More importantly, the plaintiff in this action would not need evidence from the sued party.

However, in a malicious prosecution action, it is much more difficult for a plaintiff to prove malice by the sued attorney at the initial pleading stage. Without any discovery, it will be very difficult for a malicious prosecution plaintiff to dispute a declaration from the sued attorney that states that the sued attorney did not know the plaintiff before initiating the underlying action, that no settlement demands were made in the underlying action, and that the sued attorney had no ill will or malice toward the plaintiff.

It is still difficult at this time to tell whether the anti-SLAPP statute will strike a mortal blow against malicious prosecution claims. Pursuant to Code of Civil Procedure Section 425.16(k) (1), the Judicial Council is required to keep detailed records of anti-SLAPP motions and their disposition. The party who files a special motion to strike and the party who opposes the motion are both required to notify the Judicial Council of their action, and the Judicial Council is supposed to receive a conforming copy of order granting or denying a motion brought pursuant to the anti-SLAPP statute. However, a review of the information provided by the Judicial Council is not revealing. According to Judicial Council statistics, a total of 275 anti-SLAPP motions have been filed in Los Angeles County since the inception of the statute. Of those, 18 were granted, 14 were denied, and 243 were listed as “disposition not reached.” These statistics suggest that attorneys are simply not notifying the Judicial Council of the results after special motions to strike are filed.

Of the special motions to strike granted in Los Angeles and Orange Counties, the majority involved traditional anti-SLAPP actions like defamation. Thus, the effect on trial courts of the anti-SLAPP appellate decisions involving malicious prosecution remains to be seen. That effect will obviously be magnified when the California Supreme Court rules explicitly on whether the anti-SLAPP statute applies to malicious prosecution actions, an issue that is now pending before the court.

In addition, another wrinkle on the use of the anti-SLAPP statute to defend against malicious prosecution actions has emerged. But this twist is directed not at attorney-defendants but at those attorneys representing plaintiffs in malicious prosecution actions. The anti-SLAPP statute provides that a prevailing defendant on a special motion to strike “shall” recover “his or her attorney’s fees and costs.” Thus, if a plaintiff’s attorney fails to inform a potential malicious prosecution client that the client may be liable for attorney’s fees if the defendant prevails through the anti-SLAPP statute, the plaintiff’s attorney...
could be exposed to a legal malpractice action.

Claims of this nature against attorneys representing malicious prosecution plaintiffs have recently been made. It is surely disconcerting for a plaintiff who brings a malicious prosecution action to wind up paying the defendant-attorney after the plaintiff has prevailed in the underlying action. An attorney who brings a malicious prosecution action now arguably has a duty to inform the client of the anti-SLAPP statute prior to bringing the action. Placing this additional burden on plaintiffs and their attorneys is another way in which applying the anti-SLAPP statute to malicious prosecution actions will serve the strong public policy disfavoring these lawsuits.

In California, malicious prosecution actions have long been disfavored. Before the application of Code of Civil Procedure Section 425.16 to these actions, however, malicious prosecution defendants were forced to engage in expensive and time-consuming litigation. By applying the anti-SLAPP statute to malicious prosecution actions, the courts have kept in mind the disfavored status of malicious prosecution actions. Accordingly, a special motion to strike pursuant to California’s anti-SLAPP statute can be used as a very powerful tool on behalf of malicious prosecution defendants.

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1 Sheldon Appel Co. v. Albert & Oliker, 47 Cal. 3d 863 (1989); see also Wilson v. Parker, Covert & Chidester, 28 Cal. 4th 811 (2002).
2 Sheldon Appel Co., 47 Cal. 3d at 873.
3 To properly state a cause of action for malicious prosecution, a plaintiff must plead and prove three essential elements: 1) the underlying action was commenced by or at the direction of the defendant and was pursued to a legal termination in favor of the plaintiff in the malicious prosecution action and against the defendant, 2) the underlying action was brought without probable cause, and 3) the underlying action was initiated with malice. Downey Venture v. LMI Ins. Co., 66 Cal. App. 4th 478, 494 (1998) (citing Bertero v. National Gen. Corp., 13 Cal. 3d 43, 50 (1974)).
5 Id., at 503.
6 CODE CIV. PROC. §425.16(b)(1).
7 CODE CIV. PROC. §425.16(g).
13 Church of Scientology, 42 Cal. App. 4th at 654-55.
16 Id., at 1115 (citing Dow v. Audio v. Rosenfeld, Meyer & Susman, 47 Cal. App. 4th 777, 784 (1996)).
18 Id., at 1087. See also Stroock & Stroock & Lavan v. Tendler, 102 Cal. App. 4th 318 (2002) (holding that plaintiff’s malicious prosecution action arising from defendant’s filing of the underlying malpractice suit against plaintiff was on its face constitutionally protected petitioning activity) and Jarrow Formulas, Inc. v. La Marche, 97 Cal. App. 4th 1 (2002), rev. granted (holding that malicious prosecution complaint directed at a defendant because she filed a cross-complaint falls within a person’s right of petition) and White v. Lieberman, 2d Civil No. B147327, WL 31421097 (Cal. Ct. App. Oct. 29, 2002) (in accord with Chavez).
19 Stroock & Stroock & Lavan, 102 Cal. App. 4th 318.
20 Chavez, 94 Cal. App. 4th at 1089.
21 Id.
22 CODE CIV. PROC. §425.16(k).
24 Jarrow Formulas, Inc. v. La Marche, 97 Cal. App. 4th 1 (2002), rev. granted. The supreme court initially indicated that it would defer consideration of this case until disposition of several other anti-SLAPP statute-related cases (including Equilon Enterprises v. Consumer Cause, Inc., 29 Cal. 4th 53 (2002), all of which were decided on Aug. 29, 2002. In deciding these cases, the supreme court cited Chavez v. Mendoza, 94 Cal. App. 4th, 1083 (2001), in a manner that would appear to indicate approval of that decision. This suggests that the court will approve the appellate court’s ruling in Jarrow that the anti-SLAPP statute applies to malicious prosecution cases. The supreme court only recently ordered briefing in Jarrow and has not yet scheduled oral argument, so a ruling is not expected soon.
25 CODE CIV. PROC. §425.16(c).
Confidentiality is the central feature of the unique relationship between attorney and client. Confidentiality enables lawyers to function as lawyers, promotes client autonomy and dignity, and generally is viewed as essential to an effective and impartial system of justice. No other duty of professional responsibility is so important to the function of lawyering yet so misunderstood by commentators, the public, and lawyers themselves.

Jurisdictions throughout the country have varying rules on confidentiality. Considerable debate exists as to the parameters of the duty of confidentiality and the relationship of confidentiality as a principle of professional responsibility and the attorney-client privilege.

Unlike most states, California does not have an ethics rule on confidentiality. Instead, California lawyers are obliged to follow a seemingly inflexible statute that has not been materially changed since 1872. As a result, some commentators view California as being out of step with the rest of the country by not allowing or requiring lawyers to make disclosures in certain situations. Justification for strict confidentiality has been questioned, particularly in nonlitigation matters, and recent legislation has encroached on the duty of confidentiality. As California lawyers deal with the impact of terrorism, corporate scandals, and the more global practice of law, greater clarity on the duty of confidentiality is needed. (See “New Challenges to Confidentiality,” page 28.)

The duty of confidentiality is related to the duty of loyalty, and together they define the primary role of the lawyer in his or her representative capacity. In essence, the duty of confidentiality precludes an attorney from either disclosing confidential information about a client or using that information adversely to the client.

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be held inviolate or the disclosure of which would be embarrassing or likely detrimental to the client’s interests.3

The duty of confidentiality, therefore, covers much more than communications protected by the attorney-client privilege.4 The duty to protect client secrets may, depending on the circumstances, include all information relating to the representation, whatever its source, and even includes matters of public record that might cause a client or a former client public embarrassment.5 The duty of confidentiality extends to potential clients seeking the attorney’s assistance with a view toward employing the attorney professionally even if no client-lawyer relationship ensues.6 Confidentiality also continues after the attorney-client relationship has ended and, with limited exception, survives the client’s death.7

Although the statute that codifies California’s duty of confidentiality is reputed to be the strictest in the country, the scope of the duty in California is actually not as broad as in states that follow the ABA Model Rules of Professional Conduct, which were originally adopted in 1983. ABA Model Rule 1.6(a) protects all “information relating to the representation of a client”—a protection that is even more sweeping than the earlier ABA Model Code of Professional Responsibility, which was adopted in 1953.8 In contrast, the California statute provides that the lawyer must preserve the client’s “secrets,” which may or may not include everything learned in the course of representing a client. Implicit in Section 6068(e) is the requirement of a reasonable expectation of confidentiality on the part of the client, which, depending on the circumstances, may narrow the scope of the attorney’s duty as compared to the Model Rules.9

The ABA and California were more closely aligned on the concept of client secrets before the Model Rules superseded the Model Code. The ABA Model Code defined the scope of the duty of confidentiality as the sum of the information protected by the attorney-client privilege—in other words, a client’s confidences—and information gained in the professional relationship that, although not protected by the privilege, would be embarrassing or detrimental to the client if revealed, or was information the client had expressly requested to be held inviolate—that is, the client’s secrets.10 ABA Model Rule 1.6(a) eliminates the Model Code’s two-prong approach to the duty of confidentiality.11

**Ethics Rules and the Attorney-Client Privilege**

The law of confidentiality has its origins in two distinct but related sources: ethics rules and the attorney-client privilege. The original ABA Canons of Ethics, adopted in 1908, did not directly address the issue of confidentiality. The only reference was in Canon 6 on conflicts of interest, which precluded a lawyer from accepting employment that might require the disclosure of the client’s “secrets” or “confidences.” Canon 37 was added in 1928 to impose on the lawyer a duty to preserve a client’s confidences.

The origin of California’s Section 6068(e) is the code of civil procedure developed by David Dudley Field for the New York legislature in 1849. The concepts in the Field code were brought to California, most likely by Steven J. Field, who was David Dudley Field’s brother and who later served as a chief justice of the California Supreme Court.15 In 1872, Section 511 of the New York Code of Civil Procedure became Section 282 of the new California Code of Civil Procedure. In 1937, the statute became part of Business and Professions Code Section 6068.16

Codes of legal ethics dealing with confidentiality are relatively recent compared to the attorney-client privilege, which can be traced back to the time of Elizabeth I.17 The attorney-client privilege and confidentiality have the same roots and share similar goals; yet, there are also important distinctions between the two. The attorney-client privilege is codified in the Evidence Code followed by a list of exceptions.18 The duty of confidentiality is codified in the State Bar Act and is a substantive duty.19 The attorney-client privilege and the work product doctrine apply in judicial and other proceedings in which the attorney may be called as a witness or otherwise called to produce evidence concerning the client. The duty of confidentiality protects client information from disclosure in situations other than those in which evidence protected by the privilege and often includes all information relating to the representation that is obtained by the attorney from any source.20 As a result, the ethical duty of confidentiality is more protective than the attorney-client privilege. For example, because the privilege interferes with the truth-finding function of the courts, the party seeking to invoke the privilege has the burden of establishing each of its elements.21 In contrast, an attorney has a fiduciary obligation to preserve client secrets “at every peril to himself or herself,” which includes avoiding the representation of interests adverse to the client or former client when the attorney possesses confidential information material to the matter at issue.22

**Public Policy**

The duty of confidentiality in California is often erroneously characterized as absolute. Although Section 6068(e) contains no express exceptions, limitations on the duty of confidentiality have long been recognized by case law, other rules, and ethics opinions. Consequently, disclosure of otherwise confidential information is permitted with the client’s informed consent.23 A lawyer may not sup-
press evidence under a claim of client confidentiality that the lawyer or the lawyer’s client has a legal obligation to reveal or to produce. It is also an established principle of professional responsibility that a lawyer may not counsel, assist, or advise a client regarding conduct that the lawyer knows is criminal or fraudulent.

A lawyer may be required by law to disclose information otherwise protected under Section 6068(e). Examples include reporting large cash transactions and the right of courts to inquire of counsel regarding a client’s competence in criminal proceedings. Section 6068(e) does not permit attorneys to violate their duty of candor to the court. For example, a lawyer is not required to stand idly by when the client insists on committing perjury, even in a criminal case; instead, the lawyer may advise the client that the lawyer will seek to withdraw from representing the client. Information protected under Section 6068(e) may also be disclosed as necessary in responding to a client’s claim against the attorney and in pursuing a contested claim for fees. Finally, it is generally accepted that a lawyer cannot avoid complying with a final order of a court of competent jurisdiction based on Section 6068(e). The duty of confidentiality, however, may obligate the attorney to seek appellate review of the order before making disclosure.

The interplay between the attorney-client privilege and confidentiality has been a source of confusion not only for lawyers but for judges and commentators as well. Both the testimonial privilege and the ethical obligation exist to protect the client as opposed to the interests of the lawyer or a third party. Preserving client confidences facilitates a full development of essential facts, encourages people to seek early assistance from lawyers about their legal problems regardless of how embarrassing or legally damaging the subject matter, and aids clients in making informed decisions about their affairs. The law has become increasingly complicated, and clients require the assistance of competent counsel for meaningful access to the legal system to resolve their problems. As the California Supreme Court has stated, the duty of confidentiality is not simply a rule of professional conduct but reflects a public policy of paramount importance.

Ethical principles are generally based on the concept of client autonomy. This means that a fully informed and adequately represented client is able to make his or her own decisions and is not required to be under the control of the lawyer. The traditional role of the lawyer, both as advocate and as a confidential counselor, is to competently advise the client about the law and its consequences. The right of the client to control information disclosed to the lawyer is consistent with this principle. Conversely, rules that allow lawyers to make disclosures of confidential client information over the client’s objection in order to protect the interests of a third party tend to change the lawyer’s role from the client’s fiduciary to a law enforcement officer or free agent.

Broadly construed confidentiality has gained greater acceptance in the criminal context. The Sixth Amendment assures that criminal defendants receive the effective assistance of counsel, which necessarily includes a high degree of confidentiality. The Fifth Amendment right against self-incrimination prohibits the government from requiring individual defendants or their attorneys to provide certain evidence. However, the distinction between the application of confidentiality principles in the criminal and civil arenas is not always clear and not necessarily warranted. Many activities in which a client seeks a lawyer’s advice involve

New Challenges to Confidentiality

Recent events have created more issues regarding the application of the duty of confidentiality. These legal developments could have a significant impact on several areas of practice.

Monitoring Certain Attorney-Inmate Conversations. The U.S. Bureau of Prisons has adopted regulations permitting the monitoring of attorney-client conversations under certain circumstances to prevent attorneys and/or their interpreters from being used by detainees, either willingly or unwillingly, to send messages to those outside of prison about committing future acts of terrorism. The lawyer and inmate must be given advance written notice unless the Justice Department has received court permission to conduct secret monitoring. The regulations provide for a “privileged” team composed of persons not involved in the underlying investigation to review the monitored conversations for potentially privileged information.

Gatekeeper Regulation. In response to the problem of international money laundering and its connection to terrorism, one of the options being considered by the Justice Department is the imposition of federal requirements on accountants and lawyers to file suspicious activity reports (SARs) if they learn of a known or suspected violation of federal law, especially in connection with money laundering and financial crime.

ABA Task Force on Corporate Responsibility. In its preliminary report, the ABA Task Force on Corporate Responsibility has recommended that Model Rule 1.6 of the ABA Model Rules of Professional Conduct be amended to permit disclosure of client confidential information if the client’s conduct has resulted in substantial injury to the financial interests or property of another. The proposed amendment would also require lawyers to disclose the confidential information of clients to prevent felonies or other serious crimes, including violations of the federal securities laws, if lawyers have knowledge of this conduct.

Sarbanes-Oxley Act of 2002. The recent revelations of corporate accounting abuses led to congressional passage of the Sarbanes-Oxley Act of 2002, which President Bush signed into law on July 30. Section 307 of the act provides that the Securities and Exchange Commission must issue rules requiring private attorneys who represent public companies before the SEC to report evidence of violations of securities laws, breaches of fiduciary duties, or similar violations to the company’s audit committee or board of directors. The act also mandates that the SEC create federal rules of professional conduct for attorneys who practice before the SEC.

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1 28 C.F.R. §601.3(d).
2 R. Christian Bruce, Justice Eying Attorneys, Accountants for Anti-Money Laundering Duties, ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT, Vol. 18, No. 4, at 93.
With KeyCite® Alert, you’re always on top of the law. This exclusive tracking service automatically notifies you of breaking developments in the law – via wireless device, e-mail or fax – so you always have the most current information to support your case. Differences that matter.

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of any confidential communication relating to the representation is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm. This provision, which is found in Evidence Code Section 956.5, confines its application to the evidentiary privilege and is not a rule of professional conduct. The legislative history is murky, and the tension between Evidence Code Section 956.5 and Business and Professions Code Section 6068(e) remains unresolved.

The controversy over whether a lawyer should be permitted to disclose client confidences to prevent physical harm to another often revolves around a discussion of Tarasoff v. Regents of the University of California, in which a psychotherapist was subject to tort liability for failing to disclose communications protected by the psychotherapist-patient privilege when the disclosure was reasonably necessary to prevent threatened danger. Although the application of Tarasoff to lawyers has been heavily debated, in the 25 years since the case was decided, no court has held a lawyer to a similar duty of disclosure, particularly to a person who is not the lawyer’s client. However, new ABA Model Rule 1.6(b)(1) and Evidence Code Section 956.5 could lead to an analogous liability for lawyers.

The crime-fraud exception is another matter. In California, the exception applies to the attorney-client privilege and is recognized as such by federal courts, among other jurisdictions. The exception is based on the rationale that the attorney-client privilege belongs to the client, and that a client who obtains the lawyer’s assistance in committing a crime or fraud has not consulted the lawyer in the lawyer’s representative capacity. As U.S. Supreme Court Justice Cardozo explained, “The privilege takes flight if the relationship is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law.” In this sense, the crime-fraud test is
7. The duty of confidentiality permits a lawyer to suppress evidence even when the lawyer or the lawyer’s client has a legal obligation to reveal or to produce that evidence.
   - True.
   - False.

8. Business and Professions Code Section 6068(e) does not permit an attorney to violate his or her duty of candor to the court.
   - True.
   - False.

9. Information protected under Business and Professions Code Section 6068(e) may be disclosed:
   - A. In responding to a client’s claim of legal malpractice against the attorney.
   - B. In pursuing a contested claim against the client for the attorney’s fees.
   - C. Both A and B.

10. The attorney-client privilege and the duty of confidentiality share a common purpose in helping clients make informed decisions about their affairs.
    - True.
    - False.

11. ABA Model Rule 1.6 was revised in 2002 to give a lawyer the discretion to disclose confidential information to the extent the lawyer reasonably believes necessary when:
    - A. The client intends to commit an act that is likely to result in reasonably certain death or substantial bodily harm.
    - B. The client intends to commit a criminal act that is likely to result in reasonably certain death or substantial bodily harm.
    - C. The client intends to commit an act that is likely to result in imminent death or substantial bodily harm.

12. The attorney-client privilege does not apply in California if a lawyer reasonably believes that disclosure of confidential information relating to the representation of the client is necessary to:
    - A. Prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.
    - B. Prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.
    - C. Prevent the client from committing an act that the lawyer believes is likely to result in reasonably certain death or substantial bodily harm.

13. The court in People v. Dang held that Evidence Code Section 956.5 is an exception to the duty of confidentiality under Business and Professions Code Section 6068(e).
    - True.
    - False.

14. A party asserting the attorney-client privilege has a right to notice and an opportunity to be heard before disclosure of information protected by the attorney-client privilege can be ordered in a civil proceeding.
    - True.
    - False.

15. The ABA adopted the ABA Ethics 2000 Commission’s recommended changes to Model Rule 1.6 that allow a lawyer the discretion to disclose confidential information of the client to the extent the lawyer reasonably believes necessary to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another and involves the use by the client of the lawyer’s services in the furtherance of the crime or fraud.
    - True.
    - False.

16. The State Bar proposed a rule of professional conduct on confidentiality to the California Supreme Court on:
    - A. Three occasions.
    - B. Two occasions.
    - C. Four occasions.

17. The Sarbanes-Oxley Act of 2002 requires the SEC to issue rules requiring private attorneys representing public companies before the SEC to report evidence of securities laws violations to the company’s audit committee or board of directors.
    - True.
    - False.

18. The crime-fraud exception applies to:
    - A. Future crimes and frauds.
    - B. Past crimes and frauds.
    - C. Ongoing crimes and frauds.
    - D. All of the above.
    - E. Both A and C.

19. Attorneys are required to preserve confidential client information in seeking to withdraw as counsel of record in proceedings before a court or other tribunal.
    - True.
    - False.

20. Lawyers in California must comply with Business and Professions Code Section 6068(e) in protecting a corporate client from the wrongful acts of its agents.
    - True.
    - False.
actually an exclusion rather than an exception to the privilege.50

The lawyer’s duty of confidentiality and the attorney-client privilege are not the same. A party claiming that the evidentiary shield against compelled disclosure of a confidential client communication does not apply bears the burden of proving the elements of the crime-fraud exception in a judicial proceeding. The court, and not the lawyer, is the decision maker and must invoke procedural safeguards in deciding whether the exception applies.51 Even in civil proceedings, a party asserting the privilege has a right to proper notice and an opportunity to be heard before disclosure of privileged information can be ordered.52

The ABA has not been a model of consistency on the issue of disclosing client crime or fraud as an exception to the duty of confidentiality. Early versions of the ABA rules permitted discretion to disclose confidential information to protect third parties from being victims of a crime.53 The ABA Model Code obligated a lawyer to rectify client fraud by, if necessary, revealing the fraud to third parties.54 However, after the SEC’s reliance on ABA Model Code DR 7-102(B)(1) in a highly publicized investigation that led to Sullivan v. National Student Marketing Corporation,55 the ABA amended its rule to preclude disclosure of client fraud “when the information is protected as a privileged communication.”56 The next year the ABA changed its rule to define “privileged communication” as including “all confidences and secrets” learned during the attorney-client relationship.57

The controversy over the application of the crime-fraud exception to the duty of confidentiality was played out again in 1983 with the adoption of the ABA Model Rules and the rejection of the Kutak Commission proposal that Model Rule 1.6 permit disclosures to prevent or rectify client crime or fraud. Another proposal to restore much of the Kutak recommendation was again rejected in 1991.

Most states have not adopted Model Rule 1.6 as recommended by the ABA. As a result, there is substantial disagreement among the states on the scope of a lawyer’s duty of confidentiality as it relates to client crime or fraud.58

The ABA Ethics 2000 Commission recommended changes to Model Rule 1.6 in 2001 that would allow a lawyer the discretion to disclose confidential information of the client to the extent the lawyer reasonably believes necessary to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and involves the use by the client of the lawyer’s services in the furtherance of the crime or fraud. The rule would also allow disclosure to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud that involves the client’s use of the lawyer’s services. The ABA House of Delegates rejected these proposed revisions by approximately 2 to 1. However, more recently, the ABA Task Force on Corporate Responsibility has recommended, in a preliminary report filed July 16, 2002, that Model Rule 1.6 be amended to expand permissive disclosures to prevent or rectify the consequences of client crime or fraud that are reasonably certain to result, or have resulted, in substantial injury to the financial interests or property of another or from committing a crime or fraud that is reasonably certain to result, or have resulted, in substantial injury to the financial interests or property of another.59

The rationale for these proposals is that a client who uses a lawyer’s services to perpetrate a crime or fraud forfeits the protections afforded by the client-lawyer relationship. It is also argued that a lawyer will be better able to persuade the client to refrain from wrongdoing by threatening to disclose the client’s secrets. However, applying the crime-fraud exception to the lawyer’s duty of confidentiality changes the traditional role of the lawyer as client fiduciary and imposes on the lawyer the function of judicial decision maker. Even the crime-fraud exception to the attorney-client privilege does not allow an attorney to act as the sole arbiter on whether to become a whistle-blower regarding client misconduct. Without judicial intervention, the client risks the loss of rights without due process at the hands of the lawyer in whom the client has been encouraged by the law to reposer trust and confidence.

The crime-fraud exception applies only to communications that are in furtherance of the crime or fraud.60 Communications regarding past crimes and frauds remain protected under the privilege. The crime-fraud test—whether the crime or fraud occurred in the past, is ongoing, or will occur in the future—may be useful in a judicial determination of the crime-fraud exception to the attorney-client privilege, but it is not a very practical tool for attorneys in actual practice.

There is uncertainty in California whether the exceptions to the attorney-client privilege apply equally to the duty of confidentiality. In General Dynamics v. Superior Court, the California Supreme Court suggested in dicta that Evidence Code Section 956.5 represents a situation in which the legislature decided that “the principle of professional confidentiality does not apply.”61 More recently, the court of appeal in Fox Searchlight Pictures, Inc. v. Paladino62 found that Business and Professions Code Section 6068(e) must be read in conjunction with other statutes and ethics rules that permit the attorney to depart from strict confidentiality requirements, including Evidence Code Section 958, which applies to communications that are relevant to an issue of breach, by the lawyer or client, of a duty arising out of the attorney-client relationship. Relying on In the Matter of Lilly,63 the Fox Searchlight court found that the State Bar Court has determined that the duty of confidentiality under Section 6068(e) is modified by the exceptions to the attorney-client privilege contained in the Evidence Code.64 This assertion was repeated in People v. Dang.65 However, In the Matter of Lilly opinion does not support the conclusion that Section 6068(e) is modified by the Evidence Code.66

Certainty and Predictability

Lawyers often experience problems in applying the law of confidentiality. For example, attorneys are required to preserve client confidences in seeking to be relieved as counsel.67 At the same time, confidential information can be disclosed as necessary to pursue a contested action for fees following withdrawal.68 If the duty of confidentiality precludes an attorney from representing another client, it may or may not lead to the vicarious disqualification of the attorney’s law firm.69

Also, lawyers must abide by Section 6068(e) in protecting a corporate client from the wrongful acts of its agents.70 At the same time, lawyers must meet the standard of care in protecting the interests of the corporate client.71 Circumstances may arise in the representation of a government client when disclosure of otherwise confidential information may be in the public interest.72

Confidentiality pervades the field of professional responsibility. Yet there is no national or ethical standard on confidentiality today among the states. Instead, there is confusion—some would say chaos—on the duty of confidentiality. California, therefore, is not out of step with the rest of the country and could take the lead in clarifying the law of confidentiality through a rule of professional conduct that will provide adequate guidance for lawyers to follow in the increasingly complex practice of law.
Clients and the public are entitled to certainty and predictability with respect to confidential information shared with lawyers. As the U.S. Supreme Court has stated, “[A]n uncertain privilege [or confidentiality rule], or one that purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”

One of the principal obligations which binds an attorney is that of fidelity, the maintaining inviolate of the confidence reposed in him by those who employ him, and at every peril to himself to preserve the secrets of his client. This obligation is a very high and stringent one.


Geoffrey C. Hazard Jr., The Law of Lawyering §9.15 (ABA Model Rule 1.6(a) creates a presumption of confidentiality that operates automatically in all cases without any signal from the client.).

The interpretation of “secrets” in Business and Professions Code §608(e) generally has followed the definition under the ABA Model Code of Professional Responsibility DR 4-101(a), in which “secrets” is defined as information the client requested to be held inviolate or information that would be embarrassing or likely to be detrimental if revealed. See also Forrest v. Baeza, 58 Cal. App. 4th 65, 82 (1997) (disqualification of attorney for two of three officers/shareholders denied when confidential information attorney received while representing corporation was not conceivably different from information attorney received from officers/shareholders) and Christiansen v. U.S.D. Court for Cent. D. of Cal., 884 F. 2d 694, 698-699 (9th Cir. 1989) (substantial relationship test inapplicable when former client had no reason to believe that the information given to attorney would not be disclosed to attorney’s current client).

ABA Model Code of Prof’l Responsibility DR 4-101.

See ABA Model Rules of Prof’l Conduct R. 1.6(a) and cmt. 3 (2002).

Justice Field also served as an associate justice on the U.S. Supreme Court.


See 8 J. Wigmore, Evidence in Trials at Common Law §2290, at 3194 (1933); see also Hazard, An Historical Perspective on the Attorney-Client Privilege, 86 Cal. L. Rev. 1061, 1069-91 (1978).


The State Bar Act, Bus. & Prof. Code §§6000 et seq. The act includes Bus. & Prof. Code §6068(e).

See California Practice Guide: Professional Responsibility §7.9 (2002); ABA Model Rules of Prof’l Conduct R. 1.6 cmt. 3.

Trammel v. United States, 445 U.S. 40, 50-51 (1980) (Privileges should be construed strictly because they contravene the fundamental principle that the public has “a right to every man’s evidence.”).


PENAL CODE §§1367.1, 1368.

BUS. & PROF. CODE §§6068(d); CAL. RULES OF PROF’L CONDUCT R. 5-220.

BUS. & PROF. CODE §6068(d); see ABA MODEL RULES OF Prof’l Conduct R. 1.6(d).

I.R.C. §6050I (returns relating to cash received in trade or business).

See also 8 J. Wigmore, Evidence in Trials at Common Law §2290, at 3194 (1933); see also Hazard, An Historical Perspective on the Attorney-Client Privilege, 86 Cal. L. Rev. 1061, 1069-91 (1978).

PENAL CODE §§1367.1, 1368.

See Los Angeles County Bar Association Prof’l Responsibility and Ethics Committee Formal Op. 396 (1982).


BUS. & PROF. CODE §6068(a); see BUS. & PROF. CODE §6103.


In re Jordan, 7 Cal. 3d 930, 940-41 (1972).

It is likely the legislature intended to overrule v. Clark, a decision by the California Supreme Court. People v. Clark, 50 Cal. 3d 583 (1990) (testimony during penalty phase of murder case about client’s threats protected by the attorney-client privilege).

See also v. Zolin, 41 Cal. App. 4th 1290, 1298 (2001) (conflict between cal. r. of proc. §6068(e) and cal. r. of prof. code §6068(e) not raised by the parties and decision therefore was limited to the admissibility of lawyer’s testimony at trial).

Titmus v. Superior Court (Lavarone), 87 Cal. App. 4th 728, 740 (2001). ABA Canon 57 (1928) provided that “the announced intention of the client to commit a crime is not included within the confidences which he is bound to respect.” See also ABA Canon 41 (1928).

ABA MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102(B)(1).


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LOS ANGELES LAWYER / DECEMBER 2002 37
Regulating the Availability of Public Records Online

By Carole Levitt

**Computer Counselor**

Federal and state courts are working to balance issues of privacy and public access

By definition, public records are available to anyone who takes the time to go to the appropriate source and ask for them. Privacy advocates are not pleased, however, that these records are becoming more increasingly accessible over the Internet. Without the effort of traveling to the source, anyone with a computer and Internet connection can access public records from home or from the workplace. With this ease of access, public records—including sensitive information—are now much more public.

Almost anything that a person files with a government agency—from a divorce decree to property records—is a public record. A careful search of public records can indicate the price paid for a house, the names of those being booked by the Los Angeles sheriff, the names of those who have been assigned to pay child support, and even the Social Security and credit card numbers of those who file for bankruptcy.

For those who argue that access to public records is part of our open, democratic tradition and our free speech rights, nothing short of full access to public records via the Internet, sensitive information included, is acceptable. On the other hand, those in favor of the right to privacy want sensitive information taken off the Internet, especially in light of crimes such as identity theft and stalking.

**A Standard Policy**

As a result of this controversy, courts are drafting rules to address public access to court documents. For example, in an effort toward a consistent state policy for access to electronic court documents, the National Center for State Courts and the Justice Management Institute submitted a white paper, *The Public Access to Court Records: Guidelines for Policy Development by State Courts*, to the Conference of Chief Justices and the Conference of State Court Administrators at their Annual Conference this past summer (visit http://www.courtaccess.org/modelpolicy/). The document advocates electronic access to court records but seeks to limit access to information that is not accessible to the public pursuant to federal or state law, court rule, or case law.

In California, Section 37(b)(12) of the Rules of Court simply states: “The public should have access to electronically filed documents as required by law.” (See www.courtinfo.ca .gov/rules/2002/appendix/) And the Judicial Council of the California Administrative Office explains that “should have access” means only “to the extent it is feasible,” which includes consideration for counties that simply lack the funds to establish online databases (http://www.courtinfo.ca .gov/rules/reports/documents /rules06.pdf). Thus, online access has general support, but it has been limited by practical concerns as well as questions of privacy. Ultimately, for example, the council decided to limit the court data that is freely available to the public over the Internet.

Consequently, Rules 2070 through 2077 were added to the California Rules of Court, effective July 1, 2002 (see http://www .courtinfo.ca.gov/rules/). Privacy concerns are addressed in Rule 2073, which states that records from all the following types of proceedings are not to be accessible over the Internet by the public: juvenile court, guardianship or conservatorship, mental health, criminal, and any proceedings under the Family Code and Code of Civil Procedure Section 327.6 (civil harassment).

What can be accessed via the Internet is the register of actions (as defined in Government Code Section 68845), which includes the title of each cause, with the date of its commencement and a memorandum of every subsequent proceeding in the action with its date, calendars, and indexes and other records from civil cases, except those listed above. Court rules regarding the accessibility of information online do not affect public access to paper copies or to computer terminals at courthouses. These rules apply only to the public and not to parties to an action or their attorneys. Additionally, these rules apply only to trial courts; appellate courts and the supreme court have fully searchable online dockets.

In the Los Angeles Superior Court, an important limitation on online access is that cases may only be searched by number. However, the Los Angeles County Bar Association has created a Searchable Superior Court Civil Register, which is accessible through its Web site (www.lacba .org). Users may search this register by a number of criteria, including the names of judges and parties, types of cases, and motions filed.

At the federal courts, the Report of the Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files was adopted in September 2001. It can be viewed online at www.privacy .uscourts.gov/Policy.htm. Of particular concern to federal courts was public access to bankruptcy filings, because of the large amount of sensitive information contained in these filings, including Social Security numbers, financial account numbers, detailed profiles of personal spending habits, and medical information. However, the administrative office of the U.S. courts recognized that in order for the public to hold the bankruptcy system accountable, access to records that show whether an individual has filed for bankruptcy, the type of proceeding, and the identities of the parties in interest should be available. A debtor’s personal, identifying
information and financial account numbers should not be included in electronic or hard copies of filings. In practice, this means that only the last four digits of Social Security and financial account numbers are to appear in public records, and the names of minor children are to be omitted. Unlike the wholesale ban on electronic access to some records that the California court system has imposed, the federal courts are leaning toward partial publication from case files.

**Other Public Records**

Other public records are publicly available and free over the Internet. The Los Angeles Sheriff’s Inmate Information Center booking log is available, containing one year of historical data. Search by name and the following information will unfold: full name, gender, race, age, date of birth, weight, hair color, eye color, reason for arrest, bail amount, and housing location (http://pajis.lasd.org/ajis_search.cfm). To the fear of public knowledge of one’s arrest, one may now add the fear of publication of one’s weight and age at the time of arrest.

A list with pictures of deadbeat dads and moms is available at http://childsupport.co.la.ca.us/dlparents.htm. This site announces to the world that Maximillian Rudolf Lobkowicz is delinquent and provides the following details: He owes more than $500,000 in back child support, was born in 1943, weighs 220 pounds, and was last seen in Beverly Hills. Records of all marriages taking place in Las Vegas are freely searchable on the Web by name or certificate number (http://www.co.clark.nv.us/recorder/mar_srch.htm). Marriage records in Los Angeles, however, are not so freely accessible. In Orange County, copies of marriage certificates are not freely available on the Web, but they can be ordered over the Internet (click on Online Transactions at http://www.oc.ca.gov/).

Death records can be found in the Social Security Index at http://rootsweb.com/ or http://ancestry.com/—both are free sites that require registration. Search by last name and you can learn date of birth, date of death, last known address, Social Security number, and place of issuance. The death records of 9,366,786 Californians (from 1940 to 1997) are also available at rootsweb. These records provide much of the same information that is found on the Social Security Index but not Social Security numbers. They do provide, however, an additional piece of information— the mother’s maiden name—that answers one of the most common questions asked for security and privacy purposes. After September 11, the governor requested that the death and birth records found at rootsweb .com be taken down. That request was com-
Sex offender registries have been one of the more litigated areas of free public records on the Web. Every state and county handles the matter differently (http://www.fbi.gov/hq/cid/cac/states.htm). In Los Angeles there is no Web database that is searchable by offender’s name. Recently, however, a Web database was created to search by location, but it does not attach names or precise addresses (http://gismap.co.la.ca.us/sols/default.htm). This site is experiencing such heavy usage that users may have considerable access problems.

There is also no consistency among states and counties regarding access to real property records and the amount of information to be found on these records. In Los Angeles, free searching by an address or assessor number is possible, but searching by a person’s name is not (http://assessor.co.la.ca.us/). Even after one conducts a search by address or assessor number at the county assessor’s site, the property owner’s name is still not shown. In sharp contrast, the free assessment database in Tennessee allows for name searching (http://170.142.31.248/). It is impossible to ascertain all of an individual’s real property assets using free publicly accessible records, but one can search by name using a pay database such as Lexis, Westlaw, Choicepoint, or Accurint. If one owns California property but does not know it, the unclaimed property database for California can help. This site can be accessed via the controller’s office site at http://www.sco.ca.gov/. (I have found unclaimed money for others but never myself.) A local attorney found $60,000 when he searched under the name of a client who owed him money.

The Internet has undoubtedly tipped the balance in favor of the public’s right to know over the person’s right to privacy. Although courts have a duty to provide access, no statutory obligation exists for the dissemination of case files electronically. Internet access to public records is not mandated by the federal courts, and in California, it is mandated only to the extent feasible because some smaller counties simply do not have the funds to implement Web access. Web access to sensitive information, such as Social Security numbers, can be obtained from investigative databases. These databases are not available to the public but only to groups such as attorneys and law enforcement who can prove that they have a legitimate business purpose for the information. If some privacy advocates have their way, even this may not be an option. At the very least, everyone should be aware of just how public their public records can be.
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C.L.E. Preview

Mastery of Legal Research

ON SATURDAY, DECEMBER 13, the Los Angeles County Bar Association and the Los Angeles Paralegal Association will present a LexisNexis training program on research proficiency. This course will cover initial case analysis and how to conduct factual discovery using the Lexis system, including locating and profiling people and conducting company research. Participants will also receive The Updated Rules of Court and other valuable reference material. The event will be held at the LACBA/LEXIS Publishing Conference Center, 281 South Figueroa Street, Downtown. The registration code number is 7102L05.

$400—CLE+PLUS members
$475—Barristers and all LACBA section members
$550—LACBA members discount (CLE+PLUS card, 2002 Nuts and Bolts Conference)
$650—“Become a Member” discount, which includes LACBA membership, CLE+PLUS card, and the 2002 Nuts and Bolts Conference
$900—all others
18.5 CLE hours, including 2 ethics hours

Entertainment Industry Labor and Employment Law

ON FRIDAY, DECEMBER 6, the Labor and Employment Law Section will present a program for attorneys involved in labor and employment in the entertainment industry. After introductory remarks by Deborah C. Saxe, Arnold Peter, and Vicki Shapiro, the first session will feature speakers Arnold Peter and Vicki Shapiro. From 9:30 to 11 A.M., the topic will be the basics of labor and employment issues in sports, featuring speakers Santiago Fernandez, Ted Fikre, Adam Katz, James Perzik, and Richard Brown. Next, Mike Farrell, Richard Levy, Zino Macaluso, Daniel Savage, and Peter Kiefer will discuss the future of talent representation in Hollywood. The luncheon panel speaker will be A. Robert Pisano.

After lunch, speakers Ronald H. Gertz, Lawrence Mayberry, Grace Reiner, and Laurence Zakson will examine developments in technology. Then, speakers Adam Levin, Dan Schechter, and Ann Calfas will discuss restrictive covenants. The conference will take place at the Sheraton Universal Hotel, 333 Universal Terrace Parkway in Universal City. On-site registration will begin at 8 A.M., with the program continuing from 9 A.M. to 5 P.M. The registration code number is 7106L06.

$95—CLE+PLUS members
$195—Labor and Employment Law Section members
$210—LACBA members
$255—all others
6.25 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://forums.lacba.org/calendar.cfm. For a full listing of this month’s Association programs, please consult the December County Bar Update.
A Cloud over Arbitration Decision Appeals

A state court ruling changes the calculus when considering contractual arbitration clauses

Until recently, it was a generally held belief that parties to a contract for binding arbitration in California could preserve their right to judicial review provided that the right was expressly stated and adequate consideration existed. While that belief remains well grounded if the arbitration agreement is subject to Ninth Circuit interpretation of the Federal Arbitration Act (FAA), it is now misplaced for agreements interpreted pursuant to California law. In other words, when counseling clients on arbitration agreements, a new variable has arisen: What court will likely interpret the agreement?

The recent decision by the California Court of Appeal in Crowell v. Downey Community Hospital Foundation has eliminated the right to contract for judicial review of arbitration awards governed by California state law. The court’s ruling, however, flies in the face of California precedent, makes no logical sense, is contrary to Ninth Circuit law, and creates significant ambiguity for practitioners. This will only serve to deepen what parties fear most about arbitration: that an arbitrator will act capriciously or without regard to the law.

In California, private arbitration, as provided in Code of Civil Procedure Sections 1280 et seq., is a creature of contract. The majority in Crowell nevertheless held that negotiated contractual provisions allowing for judicial review are unenforceable because the Code of Civil Procedure specifically excludes review outside the grounds set forth in the code. Unfortunately, these grounds are very narrow, involve serious misconduct or outright fraud on the part of the arbitrator, and are rarely, if ever, applicable. In essence, the court in Crowell held that because strong public policy favors finality of judgment, the use of private arbitration presumes nonjudicial review of a decision.

The court ignores, however, the fact that private contractual arbitration is a matter of agreement between the parties whereby the powers of the arbitrator are necessarily determined by agreement or stipulation. The court also ignores that parties may agree to expand or constrict statutory rights.

The dissenting opinion in Crowell provides a more thorough and practical application of California law, including persuasive Ninth Circuit federal authority, which the Crowell majority refused to consider. As a result, the dissenting opinion provides a logical rationale as to why the courts, when faced with this issue in the past, have qualified their rulings limiting judicial review provisions in contractual arbitration. By basing such findings upon the “intentions of the parties, as expressed” in the particular agreement, the courts recognize that the parties should be allowed to freely contract for judicial review of arbitration awards.

The dissenting opinion focuses on this critical issue when it correctly states: “At the core of binding arbitration is the parties’ freedom to contract for resolution of disputes in a forum and pursuant to rules of their choosing. Absent the parties’ agreement, binding arbitration cannot occur because it involves the decision to waive fundamental constitutional rights, including the right to trial by jury.”

The sad truth is, the majority ruling in Crowell forces parties to choose between their right to freely contract and their right to a quick, economical, and fair forum outside the civil court system. The dissenting opinion recognized this conundrum and noted that it raises the fear that parties will refuse binding arbitration as an option because the cost becomes too high if a capricious arbitrator issues an award that is unsupported by law or evidence. Given that the current statutory scheme does not require arbitrators to follow the law, it seems that binding arbitration is now far too risky an endeavor. Parties can just as easily preserve their rights to appeal by opting for a bench trial while at the same time saving the cost of an arbitrator.

When disputes are governed by federal law, a practitioner could avail the client of the broader provisions for judicial review in the FAA as provided in current Ninth Circuit law. However, this option could prove impractical and ineffective unless the contract includes a choice of forum provision that would require application of law from a jurisdiction (such as the Ninth Circuit) favorable to broader judicial review, since precedents disallowing judicial review exist in other federal circuits. Even more troubling, in multiple-party arbitrations crossing numerous jurisdictions, some parties may have the right to judicial review while other parties to the very same agreement would not.

Regardless of how we feel about the current state of the law, we must now carefully counsel our clients on all aspects of binding arbitration and clearly explain the significant rights they could be waiving before recommending the “cheaper and quicker” alternative to the civil court process. With binding arbitration, it seems more and more that you get what you pay for.

1 Crowell, 2002 Daily Journal DAR at 1018 (dissenting op.).
4 Lapine Tech. Corp. v. Kyocera Corp., 130 F. 3d 884 (9th Cir. 1997).
6 Crowell, 2002 Daily Journal DAR at 1015; see also id. at 1018 (dissenting op.).
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The Charitable Family IRA

Planned Giving Explore the Options.

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