Los Angeles lawyers Mark Mermelstein and Joel M. Athey offer strategies for dealing with witnesses who invoke the Fifth Amendment in civil cases.
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Mark Mermelstein (left) and Joel M. Athey are associates in the litigation practice group and the business crimes and investigations practice group in the Los Angeles office of Gibson, Dunn & Crutcher. In their article, “In the Fifth Dimension,” they describe the problems posed when an important witness asserts the Fifth Amendment privilege in a civil proceeding. It begins on page 28.

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With the death of Bil Tavares a dull ache has settled in the heart of the Los Angeles Lawyer community. We miss him very much.

Abilio “Bil” Tavares Jr. was to be chair of the Los Angeles Lawyer Editorial Board for the 2002-03 bar year. Bil walked out of his downtown office at lunchtime on Monday, July 15, suffered a heart attack, and was taken by ambulance to Good Samaritan Hospital, where he died in the early afternoon. Bil was 46. His funeral was held that week on Saturday near his family home in East Providence, Rhode Island.

Bil had officially begun his work as chair on July 1. He had met with the professional staff to plan his year. He had written and circulated his introductory memo to this year’s Editorial Board. He had written his first From the Chair column, published in the July/August 2002 issue, in which he wrote of his honor in being chosen to lead the Editorial Board and of his privilege in serving as chair. Bil was a member of the Editorial Board for six years, during which he was one of the coordinating editors of the annual Entertainment Law Issue, and was last year’s articles coordinator.

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Bil Tavares was a wonderful person. He was a thoughtful person. He was a kind person. He was a very good lawyer. For many of us who knew him less well, we saw these qualities but did not experience the fullness of them. For his family, friends, and clients who knew him fully, they experienced the richness of his qualities, and having shared his life with him, they shared some of their thoughts of Bil with us.

On the afternoon of July 30, we held our first meeting of the new editorial year. We spoke of Bil, remembering his friendliness, his openness, his humor, and the excellence with which he edited so many articles with an always generous spirit.

On the evening of July 30, Bil’s law firm, Negele & Associates, hosted a celebration of Bil’s life. Those of us from the magazine—

Steven Hecht

Steven Hecht practices transactional business law in Century City. He is the chair pro tem of the 2002-03 Los Angeles Lawyer Editorial Board.
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Letters

I found Steven Hecht’s column (From the Chair, LAL, June 2002) on why the public lacks respect for lawyers somewhat puzzling. My limited experience and observations make it abundantly clear: There are too many greedy lawyers working to perfect the art of lying at the public’s expense while 1) pursuing cases that often have little merit and only serve to enrich the attorneys, and 2) pushing unnecessary and overly complex legislation in order to create new legal subspecialties.

Let me provide four examples:
1) I was recently chosen to serve as an alternate juror in a case held at a courthouse in Redondo Beach. The plaintiff claimed she was injured while delivering a pizza to the defendant’s house in Palos Verdes after the defendant’s dogs barked at her and allegedly pushed her over. There were no witnesses, and no proof of an actual medical injury was furnished to the jury by the two MDs who testified. The plaintiff had been living in her car with her two daughters prior to bringing the suit and had tried to secure permanent disability before retiring from the U.S. Air Force.

That jurors must take four days out of their work schedules to hear these types of cases, and that taxpayers fund such litigation, are outrages. No other profession is empowered to take over taxpayers’ lives in order to perpetuate itself at the public’s expense. Unfortunately, this was not an aberration but is an example of a typical fact pattern.
2) Class actions are another abuse. Paying 30 to 40 percent of a multimillion-dollar verdict reached against publicly traded corporations to the trial attorneys provides little benefit for the class members.

Have you ever actually tried to be included as a class member? The attorneys and their firms are unresponsive and have no regard for you as an individual class member. Self-enrichment is the objective.
3) The personal injury plaintiff judgment grab bags permitted by the State of California and City and County of Los Angeles are a continuing abuse of taxpayers’ resources. How many injuries resulting from high- or low-speed police and sheriff chases must Los Angeles have to pay for in order to have daily media fodder?
4) The workers’ compensation premium at our company is increasing from $370,000 last year to almost $800,000 this year. It is costing us about $2,000 per employee per year just for this coverage (and we have an excellent claims history). The workers’ compensation attorneys are going to strangulate California business.

Here are six suggestions:
1) The loser pays all costs in personal injury litigation.
2) The state, county, and municipalities should have sovereign immunity except in the most egregious of circumstances, such as criminal or grossly negligent conduct by government employees.
3) Class action attorneys only get paid on a reasonable hourly basis or no more than 5 percent of all judgments in excess of $10 million. The attorneys receive nominal fees unless the class members recover a reasonable percentage of their loss.
4) No juries in civil trials and only in serious felony criminal trials.
5) Jury instructions in criminal cases that introduce DNA evidence include a statement to the effect that there is a billion-to-one chance that two individuals have the same DNA.
6) The cost of certain nonroutine investigations (for example, regarding private plane crashes) performed by governmental agencies be netted out against the amount of the judgment awarded to personal injury plaintiffs and their attorneys.

These are six pragmatic and equitable solutions that the State Bar and Sacramento should work toward implementing. Regrettably, self-interest and greed will prevent this.

Daniel L. Hess

The EFF and Napster

I read with interest Donald E. Biederman’s article titled “Entertainment Law: Playing Catch-up with New Technologies” in the March 2002 edition of Los Angeles Lawyer, until the point where he mentioned my organization, the Electronic Frontier Foundation, and made unfounded factual assertions.

Biederman states: “Self-styled free speech/fair use advocates such as the Electronic Frontier Foundation had taken up the cause of MP3.com and Napster, claiming that the practice of taking an artist’s recording and transmitting it willy-nilly to strangers around the world somehow constituted ‘expression.’”

This statement is false and could have been corrected by rudimentary fact checking. First, the EFF played no role in either the MP3.com or the Napster case. A review of the case on the federal court Pacer system or a call to our offices would have quickly revealed this fact.

Second, and more important, the EFF has never claimed that the sharing of copyrighted works in peer-to-peer systems always constitutes “expression.” The EFF has instead argued that technologists should not have to beg permission from content holders whenever they create new ways for consumers to interact with copyrighted works. Specifically, we have argued that the Morpheus computer program (owned by Streamcast Networks, whom we do represent) is protected by the Betamax doctrine because it is capable of substantial noninfringing uses. Our briefs on this issue before the court in the MGM v. Grokster case are available on our site at http://www.eff.org/IP/P2P/MGM_v_Grokster/.

In addition, the exact nature of our claims are a matter of public record in our court filings and are available through a Google search or a call to our offices. It is difficult to believe that anyone checked the veracity of this statement before you printed it.

Note that the EFF, along with the Dean of Stanford Law School, Kathleen Sullivan, 46 law professors, the ACLU, and many others have raised arguments concerning the loss of freedom of expression due to provisions of the Digital Millennium Copyright Act, but this issue is quite separate, legally and factually, from the legal issues that arise from peer-to-peer systems. See, e.g., http://www.eff.org/IP/Video/MPAA_DVD_cases/.

Cindy A. Cohn
EFF Legal Director

Correction

In “The Need to Rethink Reifler” (Closing Argument, LAL, April 2002), the case Reifler v. Superior Court, 39 Cal. App. 3d 479 (1974), was cited incorrectly. Los Angeles Lawyer regrets the error.

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Samuel Lipsman
Publisher and Editor
Writing Motions for Summary Judgment

Clarity of fact and argument can dispel judicial doubt regarding whether a triable issue exists

It is easy to experience anxiety when considering the significance to your client of filing a motion for summary judgment. As a result, a motion for summary judgment is perhaps the most feared pleading of them all. This pleading, however, is less daunting if the attorney who is filing it remembers some basic rules. Recently, Judge David A. Garcia, a widely respected member of the San Francisco judiciary, was leading a seminar on summary judgment pleadings and indicated what he had gleaned from his experience. The judge explained what he looks for in the moving papers and what attorneys can do to improve their chances of success.

The basic rule for writing and arguing a summary judgment motion is: Make the judge’s job easy. This means 1) condensing your basic argument down to one sentence (“The undisputed facts of the case show that Plaintiff has failed to establish Mr. Smith worked with or around product X”) and 2) presenting a straightforward separate statement of facts.

Your moving papers will either establish that the plaintiff’s action has no merit or that your client, the defendant, has a complete defense to a particular cause of action. In the first instance—which is a more common filing—the defendant must prove that the action has no merit because the plaintiff cannot establish a particular element of the complaint. This is not easy to prove, so it is wise to get the case’s facts in order before starting to write the motion. Facts are the backbone of the motion, and they must be presented with care. There is no need to throw in every available fact or to believe that more evidence is a better argument. The reverse is actually true: a pile of evidence implies that a triable issue lies buried within. The more facts presented, the greater the chance of a finding that will defeat the motion. Uncovering the key facts may also allow a lawyer to avoid spending time and money on an unnecessary pleading and uncover issues and evidentiary problems before trial.

With a list of facts compiled, the next step is to review whether the foundation for each of the facts is admissible. For example, sworn deposition testimony is admissible, but hearsay contained in letters and other documents is not. Whittle away the weaker facts and leave the strongest possible fact pattern as a finished product. This leaves you ready to devise the separate statement of undisputed facts.

The Separate Statement

A measure of the statement’s significance is that judges often ask their research attorneys to turn directly to the separate statements submitted by each party and then compare them side by side, ignoring the other moving papers. Accordingly, it may be a good habit to write this part of the motion first. Another reason for this approach is that writing the points and authorities before the separate statement is like getting into a car without knowing where you are going. In short, a motion for summary judgment will be defeated by a triable issue of fact, so the summary of the undisputed facts—in clear, concise language, supported by easily identifiable evidence—is paramount.

For this reason, state your facts as simply as possible: “Mr. Smith did not work with or around product X at his job site in Sacramento, California,” is preferable to “On January 1, 2002, the fifth day of his deposition, plaintiff, Mr. Smith, testified he did not recall working with....” Concerning discovery propounded between the parties, it is worth remembering that unverified discovery responses are not admissible evidence.1 If the plaintiff has not sent verifications by the time the motion for summary judgment is due, do not mention the facts stated in the discovery responses. Instead, indicate only that the responses are unverified, attaching excerpts from the discovery as proof. Fewer facts mean fewer possible triable issues.

Once the fact pattern has established the route, the points and authorities can serve as the vehicle. This section should be short and easy for the judge to decipher. Condense your argument into one introductory sentence (which you will reiterate to the judge during the hearing on the motion).

When the time comes, keep your argument to the point. If discovery is concluded, argue that the plaintiff will not obtain new evidence to establish an element of the cause of action. It is tempting to refute every argument that the plaintiff has offered in opposition to your motion, but this can be counterproductive because it takes the spotlight away from the four corners of the pleadings.

Motions for summary judgment can be overwhelming, but they afford an excellent opportunity to get to know the case, warts and all. It can be exciting to prepare a separate statement of facts based on solid evidence. You begin to realize the possibility of getting your client out of the action. (You may also consider keeping separate statements handy as references in case the client calls.) Having these statements is like having a summary of the case. Learning to present a case with clarity is a rare and rewarding skill.

1 See Code Civ. Proc. §2030(g) (“The party to whom the interrogatories are directed shall sign the response under oath.”) and Laguna Auto Body v. Farmers Ins. Exchange, 231 Cal. App. 3d 481, 489 (1991) (“Unverified discovery responses are ‘legally invalid.’”).
How Prevailing Parties May Obtain Contractual Attorney’s Fees

By Donald P. Wagner and Megan L. Wagner

Who the prevailing party is and how contractual fee clauses apply are not simple matters

The high cost of litigation has led many experienced trial attorneys to recognize and counsel their clients in business disputes that, absent an enforceable contractual attorney’s fees clause, a case may be too expensive to pursue. Thus, attorney’s fees provisions have become increasingly important in business contracts. But often it is not enough simply to win the case to invoke the right to fees.

The ordinary attorney’s fees clause generally provides for the prevailing party in any litigation to recover reasonable attorney’s fees. The language of an attorney’s fees clause, however, does not alone determine the right of a litigant to fees. According to the California Supreme Court, a “party’s entitlement to attorney fees in a lawsuit based on a contract containing an attorney fees provision often depends not just upon the language of the contractual provision but also upon the complex interaction of several statutes that affect a party’s contractual right to attorney fees.” In practice, that complex interaction means that winning the case will not always assure an award of attorney’s fees.

More than 150 statutes authorize an award of attorney’s fees to one of the parties. However, Sections 1032 and 1033.5 of the Code of Civil Procedure and Section 1717 of the Civil Code are the statutes most relevant to a contractual fee case. Unfortunately, inconsistencies between these statutes have bedeviled California courts.

Section 1032 provides for the recovery of “costs” to the prevailing party. Specifically, Section 1033.5(a)(2)(A) defines as an item of those recoverable costs “[a]ttorney fees, when authorized by...[c]ontract.” On the other hand, Civil Code Section 1717 states that “[i]n any action on a contract, where the contract specifically provides for attorney fees and costs...the party who is determined to be the prevailing party on the contract...shall be entitled to reasonable attorney’s fees in addition to other costs.”

Problems arise, however, because the definition of “prevailing party” is not the same in the Civil Code and the Code of Civil Procedure. In fact, one party can be the prevailing party under Civil Code Section 1717 and the other can be the prevailing party under Code of Civil Procedure Section 1032. Specifically, under Section 1032, the prevailing party, unless the context clearly requires otherwise, includes the party with a net monetary recovery, a defendant in whose favor a dismissal was entered, a defendant in cases in which neither plaintiff nor defendant obtains any relief, and a defendant against whom the plaintiff does not recover any relief. In cases in which factors “other than monetary relief” apply, the prevailing party is to be determined by the court.

Yet under Civil Code Section 1717, the touchstone of net monetary recovery is wholly omitted. Except when the defendant tenders full payment and so alleges in the answer, “the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section.” Finally, Section 1717(b)(2) specifically provides that “[w]here an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section.”

In a case within the scope of Code of Civil Procedure Section 1032, however, the statute’s application seems mandatory. The court is to identify a prevailing party, and that party will typically be the one to have obtained the net monetary recovery. The court’s discretion regarding the identity of the prevailing party arises only if something “other than monetary relief” needs to be considered. But the court still must make the finding that one of the parties prevailed. Moreover, unlike under Civil Code Section 1717(b), under Code of Civil Procedure Section 1032 a voluntary dismissal does not foreclose the court from finding a prevailing party and awarding attorney’s fees.

On the other hand, in a case falling within the scope of Section 1717, the issue of monetary relief need not arise. The court can decide that greater relief was obtained by one party even if more money went to the other party. These differences between Code of Civil Procedure Section 1032 and Civil Code Section 1717 make it essential for counsel seeking fees as a prevailing party to determine which provision applies.

Breach of Contract

In a straightforward breach-of-contract claim, “[S]ection 1717 is the applicable statute when determining whether and how attorney fees should be awarded under a contract. It is the statute that expressly deals with attorney fees under a contract, and to apply Code of Civil Procedure Section 1032 in such cases would obviate Civil Code Section 1717.” However, a defendant who recovers neither money nor any affirmative relief on the contract may in fact be the prevailing party under Section 1717. In Hsu v. Abbara, the supreme court held that the trial court abused its discretion when it failed to award fees to a defendant who obtained a “simple, unqualified win.” The Hsu court approved of National Computer Rental, Ltd. v. Bergen Brunswig Corporation, which upheld an attorney’s fees award to a defendant who prevailed on the only disputed contractual claim, even though a money judgment was entered against him on an amount the parties had nei-
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Goodin contract action is voluntarily dismissed. That there is no prevailing party when the Code Section 1717(b) specifically provides applies in cases of pretrial dismissal. Civil the noncontractual claim. Additionally, Civil mitigates such recovery if the attorney's fees clause applies to recover fees incurred in pursuing or defending against noncontract claims. 

Code of Civil Procedure Section 1032 also applies in cases of pretrial dismissal. Civil Code Section 1717(b) specifically provides that there is no prevailing party when the contract action is voluntarily dismissed. However, the Section 1032 right to fees incurred on tort causes of action is not limited by pretrial dismissal. The California Supreme Court made precisely this point in Santisas v. Goodin. According to the court: “Under Section 1717, the…defendants are not ‘[p]arties prevailing on the contract’ because that section specifies that there is no party prevailing on the contract when, as here, the plaintiffs have voluntarily dismissed the action, and therefore, defendants may not recover the attorneys fees thereby incurred in the defense of the contract claim. But this conclusion does not affect the…defendants’ right to recover as costs the attorney fees they incurred in defense of the tort claims. Because Section 1717 does not apply to those claims [citations], it does not bar recovery of attorneys fees that were incurred in litigation of those claims and that are otherwise recoverable as a matter of law.”

Adding to the complex interaction of the statutes is the fact that the contractual right of a party to fees does not necessarily depend upon contractual language explicitly giving the right. The right to fees is reciprocal irrespective of any contrary contract limitation. If one party would be entitled to fees were that party to prevail, the opponent is equally so entitled, even if the opponent is not a party to the contract or proves that no contract actually exists.

For example, in an unlawful detainer action involving a standard commercial lease with a boilerplate provision for attorney’s fees, the tenant might assert that the written lease expired and that the tenant continued to occupy on a holdover month-to-month basis. If the tenant establishes the lease expiration, no written contract governs the relationship. But the absence of a valid contract does not defeat the tenant’s right as prevailing party to a fee award. Because the landlord would have deserved a fee award under the alleged written agreement asserted by the landlord, the tenant deserves an award of its own attorney’s fees incurred in proving the nonexistence of contractual fee provision. However, reciprocity is limited. According to the California Supreme Court, only fees incurred in defending against the contract action are subject to reciprocity. There is no reciprocity if the sole statutory basis for a fee award is Section 1032.

One Suit, Two Winners

It is clear that one party can prevail on the contract and deserve fees under Section 1717, while the other party can prevail on the tort claims by obtaining a net monetary recovery and thus deserve fees under Section 1032. It is also clear that a litigant can prevail on the contract for fee purposes by disproving the existence of the contract. These conflicting circumstances form the basis for battles over attorney’s fees in which counsel argue whether a win was a win or whether it was a big enough win.

Under Section 1717, the court has discretion to find that neither party has prevailed. This determination will be disturbed only on a clear showing of abuse of discretion. Courts have held there to be no prevailing party in cases in which the opposing sides could each claim some success. As explained in Deane Gardenhome Association v. Denktas, “Typically, a determination of no prevailing party results when both parties seek relief, but neither prevails, or when the ostensibly prevailing party received only a part of the relief sought. In other words, the judgment is ‘considered good news and bad news’ as to each of the parties.”

In such “good news and bad news” cases, the supreme court’s Hsu decision provides some general instructions to courts that are considering fee arguments. These instructions essentially amount to the admonition to do justice and are at least as useful as anything else courts have said in this area of the law:

Contractual provisions for attorneys’ fees will not be inflexibly enforced[,] and…the form of the judgment is not necessarily controlling, but must give way to equitable considerations. The trial court is to compare the relief awarded on the contract claim or claims with the parties’ demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by “a comparison of the extent to which each party ha[s] succeeded in its contentions.”

Enforceable Attorney’s Fees Clauses

The many cases analyzing attorney’s fees under Civil Code Section 1717 and Code of Civil Procedure Section 1032 do not always quote the contractual language that serves as the basis for the fee request. However, enough cases do discuss enforceable language to give the practitioner guidance in drafting an effective attorney’s fee clause. In a real estate contract, Section 1032 allowed for the recovery of fees to a plaintiff who proved fraud and negligent misrepresentation in which the contract read: 

Attorney Fees: In any legal action, proceeding or arbitration arising out of this agreement, whether instituted by or against the BUYER or SELLER, or the Broker named herein, the prevailing party(s) shall be entitled to reasonable attorney’s fees and costs. Fees were permitted under Section 1717 in a case involving a homeowners’ association when breach of contract was proven and the contract (the association’s codes, covenants, and restrictions) provided:

In any legal or equitable proceeding for enforcement or to restrain the violation of these [codes, covenants, and restrictions], the losing party or parties shall pay the attorneys’ fees of the prevailing party or parties in such amount as may be fixed by the court in such proceeding.

Attorney’s fees were available under both Civil Code Section 1717 and Code of Civil Procedure Section 1032 in an action in which the contract awarded the prevailing party its fees in any “lawsuit or other legal proceeding [to which] this Agreement gives rise.”

Finally, in a lease dispute in the lease stated that the prevailing party “shall be entitled to his reasonable attorney’s fees to be paid by the losing party as fixed by the court,” fees were properly awarded even though the prevailing party had not in fact incurred such fees because a separate insurance policy gave a defense.

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If justice so requires after this analysis, the court can ultimately rule that no party prevailed.

A similar rule applies to fee requests arising under Section 1032, with the difference, at least in the final step of the analysis, that the court must find a prevailing party. In *Sears v. Baccaglio*, the First District Court of Appeal interpreted Section 1032’s qualifying language “unless the context clearly requires otherwise” to provide much the same equitable discretion the *Hsu* court found in Section 1717 cases. While the *Sears* court recognized that clearly prevailing parties, even if “less than sympathetic,” must be awarded fees, Section 1032 otherwise is properly interpreted to permit trial court discretion to “consider all factors which may reasonably be considered to indicate success in the litigation.”

The most likely situation in which, by arguing that a win is not a win, an attorney can defeat a motion to award attorney’s fees arises when the prevailing party obtains a Pyrrhic victory along with its net monetary recovery. Such victories arise, for example, where a party seeks an unreasonably large sum in the litigation and yet wins only a de minimus judgment. This is especially so if the prevailing party’s demand was so out of touch with reality as to frustrate settlement efforts. Pyrrhic victories are also found in cases in which the only cause of action on which the plaintiff wins is for declaratory relief. The plaintiff technically has won in this situation, but when the case was actually about much more and clearly would not have been brought only on such a declaratory claim, the victory is indeed Pyrrhic. The court’s discretion to deny fees in such cases should caution overreaching litigants and their counsel; one cannot bill high fees in confidence that a fee award will be made because at least one valid cause of action will be found.

The courts agree that Civil Code Section 1717 and Code of Civil Procedure Section 1032 are not entirely harmonious. Ultimately, whether a party deserves an award depends upon the facts of a specific case. Even if the court is not examining equitable factors, a strict application of the attorney’s fees statutes can produce counterintuitive results. An example of these statutes and legal principles in action is instructive.

Consider a case in which tort and contract claims are asserted by a plaintiff against several defendants. Two of those defendants then deny that the contract binds them, and discovery proves these defendants have the better argument. Before trial, the plaintiff therefore voluntarily dismisses all claims against these defendants. If the defendants make a motion for fees, it would properly be denied.
As nonparties to the contract, the defendants could get fees under the reciprocity provisions of Reynolds. However, Reynolds reciprocity only applies to the contract action.22 No award would be permitted on the contract, because Civil Code Section 1717(b)(2) denies fees if there is a pretrial dismissal. Similarly, fees under Section 1032 would not be available because the former defendants are not—by their own admission—parties to the contract providing for an award of fees. Thus, under the statutes they are not prevailing parties, despite their vindication. On the other hand, the result of their motion for an award of attorney’s fees would have been completely different regarding the tort claims if the defendants were parties to the contract and could have invoked Code of Civil Procedure Section 1032.23 Accordingly, it is not enough to win. For a litigant to invoke a contractual right to attorney’s fees, counsel must consider why the party won and how much was won to sort through the complex attorney’s fee scheme.

5 Sears, 60 Cal. App. 4th at 1157.
6 Civil Code §1717(b).
7 CODE CIV. PROC. §1717(b).
12 Reynolds Metals Co. v. Alperson, 25 Cal. 3d 124, 129 (1979) (“[A]ttorney’s fees incurred solely for defending…against the tort cause of action are not recoverable.”).
14 Id. at 619.
16 Id. at 129.
19 Deane Gardenhome Ass’n, 13 Cal. App. 4th at 1398.

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5 Sears, 60 Cal. App. 4th at 1157.
6 Civil Code §1717(b)(2) provides a safe harbor to a defendant facing an overreaching plaintiff. If there is no dispute that some money is owed by the defendant on the contract, that amount can be tendered to the plaintiff. If the tender is made and alleged in the answer, the plaintiff will not, upon prevailing at trial for the tendered amount, be considered the prevailing party.
7 CODE CIV. PROC. §1717(b).
12 Reynolds Metals Co. v. Alperson, 25 Cal. 3d 124, 129 (1979) (“[A]ttorney’s fees incurred solely for defending…against the tort cause of action are not recoverable.”).
14 Id. at 619.
16 Id. at 129.
19 Deane Gardenhome Ass’n, 13 Cal. App. 4th at 1398.
The Distinction between Judicial Dicta and Obiter Dicta

Unlike obiter dicta, which are not binding, judicial dicta carry great authority.

Lawyers are familiar with the distinction between a case’s holding, also called its ratio decidendi, and its dicta. The ratio decidendi is that part of a court’s opinion that judges deciding later cases are required to follow, and the dicta generally are the statements from the court that do not have to be followed. There are two types of dicta, however: judicial dicta and obiter dicta. The former carry greater authority than what are commonly referred to as mere dicta; the latter are mere dicta. The failure of some judges to understand the distinction between judicial dicta and obiter dicta has led to some confusion in case law.

Obiter dicta are “by the way” statements. Since courts usually do not give as serious consideration to the statements they make in passing as they do to the ratio decidendi, the statements do not constitute the binding part of a judicial precedent. Therefore obiter dicta are viewed as those statements by a court that can be safely ignored. But judicial dicta are the product of a comprehensive discussion of legal issues and therefore should be granted greater weight than obiter dicta. Judicial dicta should be followed unless they are erroneous or there are particularly strong reasons for not doing so.

Among recent cases one had to look outside California to find courts that follow the explicit nomenclature of obiter dicta and judicial dicta. Only one California case has used the correct nomenclature: People’s Lumber Company v. Gillard, which was decided in 1907. People’s Lumber also is the only California case that explicitly notes the distinction between obiter dicta and judicial dicta. The court in People’s Lumber stated that a court’s statements in response to issues directly presented and argued by attorneys should be classified as judicial dicta as opposed to obiter dicta.

The Lozano court was referring to judicial dicta. So was the court in County of Fresno v. Superior Court, which observed in a 1978 decision, “Dicta are not to be ignored. Dicata may be highly persuasive, particularly where made by the Supreme Court after that court has considered the issue and deliberately made pronouncements thereon intended for guidance of the lower court upon further proceedings.”

Judicial dicta generally are statements reflecting a court’s thorough analysis of an issue. More specifically, as noted by People’s Lumber, courts make statements that are judicial dicta when responding to an argument made by attorneys in the case, especially where, according to an English authority, “had the facts been otherwise, [the court’s response] would have formed part of the ratio.” Judicial dicta also arise when an opinion provides guidance to the lower court upon remand or to courts about future conduct.

In United Steelworkers of America, Local 8599, AFL-CIO v. Board of Education, the court failed to make the distinction between judicial dicta and obiter dicta and as a result conflated ratio decidendi and judicial dicta. At issue was a part of an opinion from the California Supreme Court. In response to an argument that the passage in question was dicta, the court of appeal decided that the passage was in fact ratio decidendi.

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appeal cited Paley v. Superior Court\textsuperscript{35} for the proposition that part of an opinion responsive to an argument raised by the attorneys and intended for guidance for the trial court and the attorneys upon a new hearing “probably cannot be put aside as mere dictum.”\textsuperscript{17}

A mere dictum is an obiter dictum, not a judicial dictum. But those unfamiliar with the two types of dicta could conclude that a proposition of law that is not a mere dictum must be a holding. Such reasoning takes the deductively valid form known as disjunctive syllogism.\textsuperscript{38} What the court did not realize, however, was that there was a third alternative; that the statements in question were neither obiter dicta nor a holding but were judicial dicta. Perhaps the court could have avoided this confusion if it had more carefully studied People’s Lumber, one of the cases it cited.\textsuperscript{19} However, the result is that United Steelworkers has developed an unorthodox view of ratio decidendi. It recognized as a holding what other courts and scholars would clearly classify as dicta.

**Applicability of Judicial Dicta**

An example of judicial dicta eventually becoming a ratio decidendi occurred in the cases of *In re Prewitt*\textsuperscript{20} and *In re Olson*.\textsuperscript{21} Both cases were habeas corpus actions litigating the right of prisoners to gain access to documents given to prison authorities that contained statements by third parties that had been used to deny the prisoners release on parole. In *Prewitt*, the California Supreme Court stated that prisoners should be given access to these documents pursuant to principles enunciated in *Morrisey v. Brenner*, a U.S. Supreme Court case.\textsuperscript{22} However, Prewitt’s petition for a writ of habeas corpus was denied because his parole rescission occurred 14 months before the date that *Morrisey* was to apply to cases like Prewitt’s.\textsuperscript{23} The ratio decidendi of *Prewitt* is that the rights provided by *Morrisey* apply only to parole revocation or rescission hearings held after June 29, 1972.\textsuperscript{24}

However, the *Prewitt* court expounded, in the form of judicial dicta, its view of the rights that prisoners and parolees were entitled to in parole rescission and revocation hearings. The court clearly indicated that its statements on prisoner rights were dicta by this statement: “We are nevertheless constrained to remark, although the issue is not now before us....”\textsuperscript{25} The supreme court further noted:

At a minimum, and subject to limitation only when an informant will be exposed to an undue risk of harm, an inmate should be provided with a copy of any document submitted pursuant to sections 3022 and 3042, and should be afforded a reasonable opportunity to respond thereto, either in person or in writing. Nothing less will satisfy standards of fundamental fairness required by the due process clause.\textsuperscript{26} These judicial dicta in *Prewitt* were to become a holding in *Olson*.\textsuperscript{27}

The *Olson* court stated that “the rationale of *Prewitt* is that a policy of not giving documents to inmates is unfair because an inmate cannot prepare his or her case or challenge false or inaccurate information unless the inmate learns what information prison officials are considering in determining the length of incarceration or whether to grant parole.”\textsuperscript{28} The *Olson* court stated:

We are dispose to accept the foregoing rationale of *Prewitt* as applicable to the present case even though the statements alluded to do not possess the force of a square holding. They are persuasive and were concurred in by the whole court after careful consideration. Accordingly, they are entitled to great weight.\textsuperscript{29}

In California, the question of the authoritative status of judicial dicta is particularly important. This is due to Rule 976.1 of the California Rules of Court, which allows the California Court of Appeal and the appellate division of the superior court to certify only a part of an opinion for publication in the law reports. It is theoretically possible for a court to issue an opinion in which the ratio decidendi appears only in its unpublished portion. Does that mean that the part of the opinion that is published can be dismissed as mere dicta, with no precedential value whatsoever? The case of *People v. Trout* highlights this dilemma.\textsuperscript{30}

In *Trout*, the defendant, who had a prior conviction, was convicted of burglary. The court of appeal reversed Trout’s conviction on the ground that he was denied his constitutional right to represent himself.\textsuperscript{31} However the part of the opinion presenting the court’s reasoning in support of reversing the conviction was not published pursuant to California’s partial publication rule.\textsuperscript{32} The published portion of the opinion addressed the defendant’s claim that his prior conviction could not be used to enhance his sentence on the ground that he had not been advised of the constitutional rights he relinquished when he entered the guilty plea that resulted in the prior conviction. The court of appeal announced that it would address this issue for the guidance of the trial court should the defendant be convicted after a retrial,\textsuperscript{33} and the remainder of the published opinion contains a thorough discussion of the court’s views on the issue. Several cases are cited in the opinion, and the *Trout* court discussed a conflict of California authority regarding the issue.\textsuperscript{34}

The California Supreme Court correctly holds that a statement is a dictum when a court has already decided to reverse a judgment before reaching the issue the statement in question addresses.\textsuperscript{35} Thus all of the propositions of law contained in the *Trout* opinion, as it appears in its published form, are dicta. Insofar as the court’s discussion was a thorough one that gave future guidance to the trial court, the dicta are classified as judicial dicta. *Trout* is an example of a case published under the partial publication rule that has no true published ratio decidendi.\textsuperscript{36} Does that mean that California practitioners can disregard the *Trout* case? Given that the opinion is dicta, does it lack any authority whatsoever? An answer of yes to this last question would constitute a very good reason for at least the modification, if not the abolition, of California’s partial publication rule. However, the correct answer to the question is no, because judicial dicta ordinarily have to be followed.

**Weight and Authority**

Courts have discussed the authoritative nature of judicial dicta, noting that they are “entitled to substantial weight,”\textsuperscript{37} “entitled to great weight,”\textsuperscript{38} “generally entitled to weight and should be followed unless found to be erroneous,”\textsuperscript{39} “entitled to much greater weight than mere obiter dictum and should not be lightly disregarded,”\textsuperscript{40} or “should be followed in the absence of some cogent reason for departing therefrom.”\textsuperscript{41} According to an English case, judicial dicta have a weight nearer to a ratio decidendi than to obiter dicta and “carry[y] [their] own intrinsic authority.”\textsuperscript{42}

To say that judicial dicta should be followed unless clearly erroneous distinguishes judicial dicta from a holding, at least with respect to following the precedents of higher courts, because lower courts are required to follow even the erroneous holdings of higher courts.\textsuperscript{43} It seems reasonable that the authority of various judicial dicta might be weighted differently depending upon the thoroughness of the analysis that leads to the dicta.\textsuperscript{44} At a minimum, a judicial dictum should be given great weight because it is an “expression emanating from the judicial conscience and the responsibilities that go with it.”\textsuperscript{45} If a court’s judicial dicta are the product of a thorough analysis of an issue, the dicta should be treated as having almost as much authority as a ratio decidendi.

There are some cases in which judicial dicta will have as much authority as any statement emanating from a court can have. For example, the only statements from the U.S. Supreme Court declaring that arrest warrants allow police to enter a house are dicta.\textsuperscript{46} No one, from a rookie police officer to a griz-
“Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning.”

—Sir Winston Churchill

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zled public defender, will doubt for a minute that an arrest warrant gives the police the right to enter a private residence in order to make an arrest. There is even a theory to explain why an arrest warrant empowers the police to enter a house. According to Payton v. New York, "If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law." According to Steagald v. United States, "Because an arrest warrant authorizes the police to deprive a person of his liberty, it necessarily also authorizes a limited invasion of that person's privacy interest when it is necessary to arrest him in his home." The existence of the theory bolsters the fact that there is no real doubt that an arrest warrant empowers the police to enter a house in order to make an arrest. Yet the fact remains that the ultimate authority for this proposition of law is still based upon dicta.

It is instructive to think about what it would take for a case to actually have as its ratio decidendi the proposition that an arrest warrant gives the police the power to enter a private residence in order to make an arrest. An attorney arguing to the contrary would risk his or her credibility by doing so. Indeed, the issue that has concerned the courts is whether the police can enter a house to make an arrest without a warrant. Given the current state of our legal culture, it is self-evident that an arrest warrant authorizes the police to enter a house. Thus, it is not surprising to find that the most unquestionable propositions of law sometimes will be expressed by judicial dicta.

Finally, one should not overlook the possibility that the dicta one wishes to use, whether judicial or obiter, have evolved into a ratio decidendi in subsequent cases. The court of appeal in People v. Fields points to an example of this type of evolution, as does the fact that the judicial dicta in Prewitt became the holding in Olson.

There is a research technique that can be used to track if judicial dicta have become a ratio decidendi. Both the official and unofficial reports of a case should be compared. Very often a case published in West's California Reporter will have more headnotes than the same case published in the official reports. This is because the unofficial reports have a tendency to place language in an opinion that sounds like black-letter law into a headnote even though the proposition of law is fairly far removed from the ratio decidendi. If one finds a dictum in an official report of a particular case, and that dictum is not found in a headnote in the official report, then one should look in the California Reporter version...
of the case to see if the dictum is found in the unofficial headnotes. If it is, one can then Shepardize or Key Cite the headnote to see if the dictum has become a holding in a later case.


21 Other types are suggested by the discussion in CROSS & HARRIS (Ill. 1999); State v. Rainier, 103 N.W. 2d 389, 396 (Minn. 1960). See also People v. Cline, 722 N.E. 2d 755, 762 (Ill. 1999).

22 A disjunctive syllogism can be expressed as follows: Premise 1: Either P or Q Therefore: Q


24 In re Prewitt, 8 Cal. 3d at 470 (1972).


26 See Prewitt, 8 Cal. 3d at 473-75 (applying Morrissey v. Brewer, 408 U.S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972)).

27 Id. at 477.

28 Id. at 476-77.

29 Id. at 475.

30 Id. at 476.


32 Id. at 789.

33 Id. (emphasis added).


35 Id. at 813-14.


38 In re Olson, 37 Cal App. 3d 783, 789 (1974).


40 State v. Rainier, 103 N.W. 2d 389, 396 (Minn. 1960).


44 Cf. CROSS & HARRIS, supra note 2, at 77-81.

45 State v. Rainier, 103 N.W. 2d 389, 396 (Minn. 1960).

46 See Payton v. New York, 445 U.S. 573, 603, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980). According to the California Supreme Court, the statement of the U.S. Supreme Court in Payton that an arrest warrant allows the police to enter a house is dicta. See People v. Jacobs, 43 Cal. 2d 472, 480 n.4 (1967).

47 Payton, 445 U.S. at 602-03.


50 Nor should one be surprised by statements like the following in reference to a particular point of law: “The law, although often stated as dicta or appearing as the unstated premise of a related discussion, clearly is contrary to respondent’s position.” People v. Collins, 59 Cal. App. 4th 988, 995 (1997). (emphasis added).

Making Effective Use of Section 998 Offers to Compromise

By Frank E. Marchetti and Eric A. Schneider

Effective Section 998 offers hinge on thorough evaluation of the case and statute

California Code of Civil Procedure Section 998 was enacted to encourage the early settlement of lawsuits and penalize litigants who fail to accept reasonable settlement offers. However, before attorneys decide to serve an offer to compromise pursuant to Section 998, they need to give careful consideration to the timing of the offer, its reasonableness, and the potential benefits to the client. It is in this context that the particular provisions of the section come to the fore.

Section 998 penalizes litigants who fail to accept reasonable offers by 1) shifting the recovery of costs normally awarded pursuant to Code of Civil Procedure Section 1033 from plaintiffs to defendants, 2) making prejudgment interest available to plaintiffs in personal injury actions, and 3) enabling the offeror to recover the fees of expert witnesses (and, in limited jurisdictions, attorney's fees from the offeror).

Under provisions of Section 998, if a plaintiff obtains a judgment or award that is less favorable than an offer previously made by a defendant, the plaintiff is precluded from recovering postoffer costs pursuant to Section 1033 and must pay the defendant's postoffer costs, even if the plaintiff was the prevailing party. The court or arbitrator also has the discretion to order the plaintiff to pay the defendant's expert witness fees that were incurred while preparing for and attending trial or arbitration.

On the other hand, if a defendant fails to obtain a judgment or award that is more favorable than a statutory offer that was made by a plaintiff, the court or arbitrator has the discretion to require the defendant to pay the costs and fees incurred by the plaintiff for expert witnesses. The plaintiff can also recover prejudgment interest from the time of the offer for all personal injury damages pursuant to Code of Civil Procedure Section 3291. Additionally, as the prevailing party, the plaintiff will be entitled to recover costs pursuant to Section 1033.

A statutory offer to compromise may be served at any time 10 or more days before a trial or arbitration begins. A plaintiff may, for example, serve a Section 998 offer along with the summons and the complaint, and a defendant may serve a Section 998 offer in conjunction with the answer to the complaint. The service of a Section 998 offer along with the initial pleading enhances the likelihood of obtaining an early settlement, because the offer starts the process of negotiation and carries with it the chance of higher costs if the offeree makes the decision to go to trial. However, a Section 998 offer will effectively shift costs and fees only in cases in which the merits of the plaintiff's claims and damages are already well known by each side. Otherwise, the offer may be deemed unreasonable under the circumstances and invalid.

General principles of contract law govern the interpretation of Section 998 offers and acceptances, but only if such principles are in accord with Section 998 and the legislative purpose of encouraging settlements. There are no exceptions, however, to the rule that a Section 998 offer must be in writing and must be served on the other party. This means that orally making an offer to settle, such as during a deposition, cannot be treated as a Section 998 offer, even if the offeror specifically cites the provisions of Section 998. This also means that serving the offer on a nonparty (a defendant's insurer, for example) fails to invoke Section 998.

There is no limit to the number of Section 998 offers that parties may make during litigation, and as they learn of new facts that change the likelihood of success, they may serve a new offer that is more likely to be accepted (or shift costs and expert fees if it is not accepted). Only the last rejected Section 998 offer will be compared to the final judgment or award for purposes of determining whether to apply Section 998 sanctions. For instance, if a plaintiff's first Section 998 offer is for $15,000 and later the plaintiff discovers favorable evidence that increases the potential value of the case, and if the plaintiff serves a second Section 998 offer of $30,000, a judgment of $20,000 will be deemed more favorable for the defendant, and the plaintiff will not be able to recover expert witness fees and prejudgment interest.

The Section 998 offeree must accept the offer within 30 days after it is served or before trial or arbitration begins, whichever occurs first, unless the offeror revokes the offer in writing before it is accepted. Acceptance of a statutory offer to compromise must be communicated in writing, but it need not be served on the offeror. A faxed letter of acceptance is sufficient.

The recipient of a Section 998 offer should consider the pros and cons rather than reject it outright. For example, letting the offer expire has the same effect as a rejection, but a rejection before the deadline limits the opportunity of the client to settle the case should circumstances change in the time remaining. When rejecting an offer, the rejection is ineffective unless it is unequivocal. Mere criticism of an offer (for example, complaining that the amount offered is insulting and demeaning) does not constitute rejection, and the offer can still be accepted so long as it has not expired.

Likewise, counteroffers—including those that are served pursuant to Section 998—do not constitute rejections of the original offer. This rule makes a clear departure from general common law contract principles that a counteroffer that deviates from the original offer generally operates to revoke the original offer.
Section 998 can be used in most types of litigation, and the statute expressly allows for its use in actions in arbitration as well as in court. This would appear to include disputes in which the parties agree to arbitrate and neither party initiates an action in court. However, Section 998 does limit the effects of statutory offers to compromise in actions for eminent domain. The only effect Section 998 has in an eminent domain action is to preclude a plaintiff from recovering postoffer costs and to award a defendant postoffer costs when the plaintiff fails to obtain a judgment that is more favorable than the defendant’s offer.

**Multiple Parties**

Attorneys need to take special care in drafting Section 998 offers when the case involves multiple defendants or multiple plaintiffs. Because Section 998 offers must be unconditional, they cannot be conditioned on acceptance by all parties to whom they are offered. This can be particularly troublesome for defendants who have been sued by more than one plaintiff in the same action. If one plaintiff accepts the offer and another does not, the defendant must honor the settlement agreement with the settling plaintiff and still litigate whatever claims remain against it by the nonsettling plaintiff. A single Section 998 offer made to multiple plaintiffs may be valid, however, if its terms can be accepted by each plaintiff and the amount offered to each plaintiff is clearly allocated. In order to avoid a later determination that an offer was conditional and invalid, it is usually best for a defendant to make separate offers to each plaintiff.

Multiple plaintiffs who consider making a Section 998 offer face similar problems. California courts have been reluctant to award expert witness fees and prejudgment interest to plaintiffs when it is impossible to determine whether each of the plaintiffs recovered more after trial or arbitration than they jointly offered to the defendant under Section 998. In the case *Gilman v. Beverly California Corporation*, the plaintiffs in a wrongful death action made a joint statutory offer to compromise the action for $150,000, which the defendant rejected. The plaintiffs received a judgment in excess of $228,000, but the court declined to award them expert witness costs and prejudgment interest because it was impossible to determine whether each plaintiff obtained a judgment that was more favorable than the offer. The *Gilman* court concluded that each plaintiff had suffered a separate and distinct loss as a result of the decedent’s death, and the joint offer improperly precluded the defendant from evaluating each plaintiff’s claim.

The courts have not yet fully addressed the effect of Proposition 51 on offers to or from multiple defendants. Under Proposition 51 (codified at Civil Code Section 1431.2), defendants who have been sued on theories of comparative fault are no longer severally liable for noneconomic damages suffered by the plaintiff. Rather, each defendant is liable only for that amount of noneconomic damages that is allocable to that defendant in proportion to percentage of fault. Therefore, in actions in which Proposition 51 is applicable, codefendants will rarely, if ever, be jointly and severally liable for the entire amount of a plaintiff’s damages. As a result, in situations involving defendants who are not jointly and severally liable for the plaintiff’s injuries and damages, settlement offers made to the defendants and joint settlement offers made by the defendants must apportion among the defendants the amount that is being offered. A plaintiff that makes a single, unapportioned statutory settlement offer to multiple defendants who are not jointly and severally liable cannot recover Section 998 penalties if the plaintiff receives a judgment against one of the defendants that is more favorable than the joint offer to multiple defendants.

On the other hand, California’s courts have held that when defendants in a particular lawsuit are jointly and severally liable for a plaintiff’s injuries and damages, a Section 998 offer to compromise does not need to specifically apportion the settlement amount among the separate defendants, because they are each fully liable for the entire judgment. For instance, in *Steinfeld v. Foote-Goldman Proctological Medical Group, Inc.*, the plaintiff made a statutory offer of $225,000 to two defendant doctors she was suing, on an agency theory, for medical malpractice. Steinfeld was eventually awarded $1,164,400 in damages against both defendants, and the court thereafter awarded her expert costs and prejudgment interest. The *Steinfeld* court opined that because the defendants were sued as joint tortfeasors and were each liable for the entire judgment against them, the offer did not need to apportion the amount sought in settlement from each individual defendant.

**Reasonableness Requirement**

Section 998 does not have an express good faith requirement, but California courts have uniformly read one into the statute. They have held that Section 998 penalties are not allowed if the statutory offer is not realistic and reasonable under the circumstances at the time the offer is made. The courts enforce a reasonableness requirement because imposing sanctions against a party that failed to accept an unreasonable offer would not promote the legislature’s intent to settle lawsuits before trial.

The test for determining whether a statutory settlement offer meets the good faith requirement was first stated in *Elrod v. Oregon Cummins Diesel, Inc.* First, the reasonableness of the offer is measured by determining whether it represents a reasonable prediction of liability to the plaintiff following trial, discounted by an appropriate factor for how early in the litigation the settlement can be achieved. In making this determination, the court will examine what facts the offeror knew or should have reasonably known at the time of the offer and whether, in light of those facts, the offer was reasonable. If a statutory offer is reasonable under the first part of this test, the court then examines what facts the offeror knew or reasonably should have known at the time the offer was open for acceptance. If the offeror had or reasonably should have had knowledge of sufficient facts to know that the offer was reasonable but did not accept it, then the court may impose sanctions against the offeree pursuant to Section 998. The courts charge parties with knowledge of facts they reasonably should know so that parties do not attempt to protect themselves against Section 998 sanctions by waiting until the last minute to conduct discovery and claiming that, at the time the offer was made, they did not have sufficient information to know that the offer was reasonable.

Normally, under the *Elrod* test, a token or nominal offer will not satisfy the good faith requirement, because there is no reasonable prospect that it will be accepted. However, the *Elrod* test is not meant to preclude defendants with no reasonable likelihood of losing from making a nuisance value Section 998 offer to extract themselves from a case. California courts have accordingly held that, under the appropriate circumstances, an offer for a waiver of costs in one case, and an offer for $100 when the plaintiff’s claim is for approximately $89,000 in another, were valid under Section 998.

The reasonableness requirement reduces the opportunity that parties would otherwise have to make statutory offers early in the litigation. A Section 998 offer that is served together with a summons and complaint or with an answer may later be deemed to be unreasonable if the offeror lacked sufficient information about the merits of the lawsuit to be able to determine whether the offer was reasonable. Therefore, attorneys who make an early settlement offer should maintain an open channel of communication with the offeree and convey the information that the offeree is going to need in order to realize that the offer is reasonable.
Another matter for litigators and clients to consider, in conjunction with determining what would be a reasonable statutory offer, is what costs and fees are to be added to the judgment before it is compared to the statutory offer. Section 998 is silent on whether the court is to exclude or include particular items in determining whether the judgment obtained by the plaintiff is more favorable than the offer to compromise. However, courts have addressed this issue and held that certain items are to be added to the judgment before it is compared to the offer to compromise. Therefore, before making an offer to compromise, attorneys should examine whether attorney's fees are available—whether by statute or contract—to the prevailing party, what costs have already been incurred by the plaintiff, and whether prejudgment interest is available to the prevailing party. Punitive damages should also be examined because they are part of the judgment that will be compared to the 998 offer. However, there is no need to be concerned about whether there are liens on the judgment, such as by a workers' compensation carrier or a treating physician, because liens are not considered when determining whether the judgment is more favorable than the offer to compromise.

Calculating the Costs

Before comparing the judgment to the offer, the court will first add to the judgment certain costs (identified in Code of Civil Procedure Sections 1033 and 1033.5) that the plaintiff has incurred. What costs are added to the judgment depends largely on who made the statutory offer to compromise and when the plaintiff incurred the costs. If the judgment is being compared to a statutory offer made by a defendant, the court will add only those costs that the plaintiff incurred before receiving the defendant's 998 offer. When a judgment is being compared to a statutory offer made by a plaintiff, the plaintiff's preoffer and postoffer costs will be added to the judgment before the judgment is compared to the statutory offer. Defendants will likely benefit more by making an offer before the plaintiff incurs significant costs.

In analyzing whether to make or accept a statutory offer to compromise, some attorneys will need to consider the attorney's fees that the plaintiff has incurred at the time of the offer. Many contracts provide that the prevailing party shall be entitled to recover reasonable attorney's fees. Likewise, a number of statutes provide that if the plaintiff prevails, reasonable attorney's fees are recoverable in addition to damages or restitution. For example, Government Code Section 12965(b) gives the court the discretion to award attorney's fees to the prevailing party in an action for unlawful employment practices, and Code of Civil Procedure Section 1021.5 provides the court with the discretion to award attorney's fees, under the private attorney general doctrine, to parties that successfully bring claims of unfair competition or other unfair business practices.

Before the judgment is compared to a statutory offer made by a defendant in an action in which attorney's fees are available to the prevailing party by contract or statute, the attorney's fees incurred by the plaintiff before the plaintiff or defendant made the statutory offer are added to the judgment and then the total amount is compared to the statutory offer in order to determine whether the offer is indeed more favorable than the judgment.

The appellate courts have not yet addressed how attorney's fees should be added to a judgment when that judgment is being compared to a plaintiff's statutory offer to compromise, but the courts will likely hold that the plaintiff's preoffer and postoffer attorney's fees should be added to the judgment before comparing it to the plaintiff's offer to compromise to determine whether the plaintiff has received a more favorable judgment. By allowing the plaintiff to add the preoffer and postoffer attorneys' fees to the judgment, the courts may encourage early settlement of claims. Defendants will be more inclined to accept reasonable offers to compromise if their likelihood of receiving a more favorable judgment is reduced.

Civil Code Section 3287 provides that in actions in which the plaintiff's damages "are capable of being made certain by calculation," the plaintiff is entitled to recover prejudgment interest. In determining whether the judgment exceeds a defendant's Section 998 offer to compromise, prejudgment interest that accrues prior to the offer is added to the judgment, but postoffer prejudgment interest is excluded.

In tort actions for personal injury, Civil Code Section 3291 permits the plaintiff to recover prejudgment interest at a rate of 10 percent, calculated from the date on which the plaintiff served the Section 998 offer, when the plaintiff receives a judgment that is more favorable than the offer. If the plaintiff receives a judgment that compensates for personal and nonpersonal damages, the burden is on the plaintiff to prove what portion of the total award represents damages for personal injuries, to which interest will apply. Therefore, when dealing with mixed damages, attorneys representing plaintiffs should request a special verdict that specifies how much is being awarded to the plaintiff for personal injuries.
Occasionally, a mistake is made in an offer to compromise. If the offer has not yet been accepted, the mistake is best fixed by immediately faxing a revocation. However, if the offeree accepts an erroneous offer, the offeror needs to seek relief from the court if the offeree insists on pursuing the offer. The appropriate procedure to challenge a judgment that has been entered upon the acceptance of an offer is to request that the trial court vacate the judgment pursuant to Code of Civil Procedure Section 473(b). A judgment entered pursuant to Section 998 cannot be appealed, because the trial court retains jurisdiction and an appeal would be meaningless without a record to review. Thus, in requesting that the judgment be vacated, the party seeking relief needs to establish that the judgment was entered as a result of mistake, inadvertence, surprise, or excusable neglect and that a reasonably prudent person under the same or similar circumstances might have made the same error.

In Pazderka v. Caballeros Dimas Alang, Inc., the First District Court of Appeal reversed the trial court’s decision to set aside a judgment entered pursuant to the acceptance of a statutory offer to compromise. The defendant in this action for breach of a lease had requested relief because it mistakenly omitted language dealing with the issue of attorney’s fees. After accepting the defendant’s offer and obtaining a judgment, the plaintiff moved for attorney’s fees under the attorney’s fees clause in the lease and was awarded almost $30,000 in attorney’s fees. The California Court of Appeal reversed, holding that failure to include a provision regarding attorney’s fees and costs in a statutory offer to compromise is not the type of mistake that is ordinarily made by a person with no special training or skill. Therefore, the defendant was not entitled to relief from the judgment pursuant to Section 473(b) and had to pay the plaintiff’s attorney’s fees.

Many attorneys use statutory offers to compromise aimlessly or not at all. These attorneys are failing to use an effective tool for resolving cases before trial and for obtaining an added advantage should the case go to trial. Section 998 should give parties some additional comfort that if their opponent fails to obtain a more favorable judgment, the offeror will receive the benefits offered by Section 998.

2 Effective Jan. 1, 2002, the legislature reinstated Code of Civil Procedure §1021.1, which—on a trial basis in Riverside County only—expressly gives litigants the ability to recover attorney’s fees under §998 if their offer to compromise is not accepted and the offeree does not petition the court for judgment by stipulation in writing within five days after the offer is made.
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not obtain a more favorable result. Prior to expiration on Jan. 1, 2001, §102.1 applied to Riverside and San Bernardino Counties.  See also Code Civ. Proc. §102.1(c) (e): “Nothing in this section shall be construed to repeal or modify any other statutory provision for the award of attorney's fees….”

3) If the judgment for the plaintiff is for personal injuries and other damages, such as property damages, the burden is on the plaintiff to prove what portion of the final judgment was intended to compensate for personal injuries. See Lakin v. Watkins Associated Indus., 6 Cal. 4th 644, 650 (1999).


6) Moffett v. Barclay, 32 Cal. App. 4th 980, 981-82 (1995); see also Ward v. Superior Court, 35 Cal. App. 3d 67, 69-70 (1973) (revocation of offer by letter to defendant's insurance carrier was ineffective because offer, and revocation of that offer, must be directed to a party).
paid the entire amount of the $998 offer, that defendant would have still been better off. The court held that when an offer is made, the offeree must be able to determine how much is being requested of him or her in particular. When an unapportioned offer is made to multiple defendants, the defendants cannot discern how much they are each being asked to pay individually, and therefore they have nothing to evaluate against their potential liability. But also see Bihun v. AT&T Info. Sys., Inc., 13 Cal. App. 4th 976, 999-1000 (1993), in which the court held that an unapportioned statutory offer to compromise made to employee and employer defendants was sufficient to allow an award of expert costs against the employer defendant, because it was based on a theory of respondent superior and therefore was jointly liable for the full amount of damages. Taing appears to contradict the ruling in Fortman, 211 Cal. App. 3d at 263, in which the court of appeal held that joint demands should not be mechanically held to be invalid if it is absolutely clear that the plaintiff has recovered more at trial than was possible from the joint offer to compromise. The plaintiff in Taing clearly recovered more from the guilty defendant than the plaintiff would have recovered from that defendant even if that defendant paid the entire amount requested in the plaintiff’s $998 offer. The Fortman rule would appear to further settlement more than Taing, but the California Supreme Court has not yet addressed these conflicting opinions. The Taing Court distinguished Fortman on the basis that it involved multiple plaintiffs making a joint offer to a defendant, but Fortman appears better reasoned regardless of which side holds multiple parties.

21 Id. at 1545.
22 Id. at 1548-49. See also Brown v. Nolan, 98 Cal. App. 3d 445, 451 (1979), in which the court awarded both defendants their expert witness fees and postoffer costs after the plaintiff rejected their joint statutory offer to compromise of $12,500 and thereafter received a verdict against only one of the defendants for $3,000.
23 Wear v. Caleron, 121 Cal. App. 3d 818, 821 (1983) (defendant’s offer of $1 held to be invalid).
25 Id. at 700.
35 Pazderka v. Caballeros Dimas Alang, Inc., 62 Cal. App. 4th 658, 667 (1998). But a decision by the trial court granting or denying a request that the judgment be vacated is properly the subject of an appeal.
36 Id. at 671.
It is a dilemma few civil litigators want to encounter. Days before the deposition of a client in a civil litigation, the lawyer for the client learns that the government is investigating the client’s former employer. Calls to the investigating agency yield no concrete answers about whether the client is viewed as a possible subject or target of the government’s investigation. Understandably, the client wants to avoid any possible criminal exposure that might arise from the deposition. The lawyer, although not a criminal law specialist, generally is aware that the client’s deposition testimony could someday be used against the client by the government.

Another lawyer, representing a corporate client in a civil trial, is informed that some current and former corporate employees who are essential to the case have just learned that they are possible subjects or targets of a criminal investigation. They will therefore assert their Fifth Amendment privilege and refuse to answer questions at the civil trial. Consequently, shortly before trial, the inability to call these witnesses to testify leaves the lawyer with virtually no case.

Many seasoned civil litigators, even those who consider themselves experienced general practitioners, stop short of advising clients on criminal matters, believing them to be best handled by specialists in the field. But with increasing frequency, civil practitioners must confront the dilemmas posed when civil proceedings intersect with criminal investigations. Given the current surge of criminal investigations in the corporate sector, civil practitioners need to have at least a basic understanding of criminal law, particularly the effects of simultaneous criminal and civil proceedings, in order to advise their clients properly. Further complicating matters is the fact that often the civil litigant and the potential target or subject of the criminal investigation require separate counsel and have opposing interests.

In order to appreciate the implications of concurrent civil and criminal proceedings, it is important to remember what the Fifth Amendment does and how it works in practice. To do so requires a review of four basic

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principles about the Fifth Amendment privilege against self-incrimination: 1) when it may be asserted, 2) who may assert it, 3) how it may be asserted, and 4) what effect its assertion may have on a civil proceeding.

**Proper Invocation of the Fifth Amendment**

The Fifth Amendment privilege, which is applicable to the states through the Fourteenth Amendment, provides that no person “shall be compelled in any criminal case to be a witness against himself.” Federal decisions have made clear that the Fifth Amendment privilege may actually be asserted more broadly “in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory,” in which the witness reasonably believes that the information sought or discoverable as a result of testimony or a state or federal criminal proceeding.

California statutes and decisional law afford similar protection. California’s Evidence Code allows any witness, whether in a civil trial or criminal proceeding, to “refuse to disclose any matter that may tend to incriminate him or her.” According to case law, any party or nonparty witness in a discovery proceeding may assert the Fifth Amendment privilege against disclosing information that might tend to be incriminating under either federal or state law. The privilege extends to compelled testimony in any form and may properly be invoked in response to deposition questions, interrogatories, or trial testimony.

In short, whenever individuals are asked to give sworn testimony, whether at a deposition or trial, they may assert the Fifth Amendment and refuse to answer a question if there is a good faith belief that the answer “would in [itself] support a conviction…[or] would furnish a link in the chain of evidence needed to prosecute” them. This good faith belief exists when there is a reasonable belief that the individual is the subject or target of a criminal investigation.

Who may assert the privilege? Significantly, the privilege protects only natural persons; it does not apply to corporations. Consequently, for an individual to assert the Fifth Amendment privilege, the witness must fear actual self-incrimination. Individuals who assert the privilege for testimony that would only incriminate another person—or, as happens often, a current or former employer—are doing so improperly.

How is the privilege asserted? The Fifth Amendment can only be invoked on a question-by-question basis because the court must have the opportunity to determine whether specific questions pose a threat of self-incrimination. Therefore, it is improper for a witness to make a blanket assertion of the Fifth Amendment privilege by, for example, refusing to answer any questions on a particular subject. A witness who claims the Fifth Amendment privilege has the burden of showing that the testimony or other evidence could tend to be incriminating. Once the privilege has been asserted, the court must make a “particularized inquiry” as to whether the claimant has met that burden with respect to each claim of privilege. The court may conduct in camera hearings for this inquiry but must make its findings on the record as to whether the claim of privilege is valid for each question.

As a result, for a noticed deposition, opposing counsel may not be content with a letter from the lawyer representing the deponent stating that his or her client will either not appear to testify or will assert the Fifth Amendment privilege in response to all questions. In practice, a court is likely to find such a tactic equally unpersuasive. The bottom line is that a lawyer cannot simply call off a deposition upon learning that the deponent is the potential subject or target of a concurrent criminal investigation. Instead, the deponent and his or her lawyer will most likely have to endure the exercise of sitting through the deposition and asserting the deponent’s Fifth Amendment privilege to each and every question for which it may be properly invoked.

What are the ramifications of asserting the Fifth Amendment in a civil proceeding? The answer to this question is critical to deciding on a course of action. While it is true that no punishment can be imposed against a party or witness for claiming the Fifth Amendment privilege, it is also true that courts will not endorse parties taking advantage of their adversaries by invoking the Fifth Amendment. Thus, a party “may be required to either waive the privilege or accept the civil consequences of silence if he or she does exercise it.”

So when the plaintiff in a civil litigation asserts the Fifth Amendment privilege, several things can happen. At the pleading stage, commencing a lawsuit waives the privilege as to the factual issues raised in the complaint, and a plaintiff who persists in refusing to answer risks dismissal of the lawsuit. At the discovery stage, a plaintiff may suffer less drastic but equally damaging sanctions for refusing to answer questions. For example, a plaintiff may be barred from introducing evidence at trial on issues relating to discovery questions that he or she refused to answer.

Likewise, defendants in both state and federal proceedings who claim the Fifth Amendment privilege during a deposition run the risk that the court will preclude their entire testimony at the time of trial. Indeed, a plaintiff is likely to seek a protective order barring a defendant from testifying at trial about matters on which the defendant refused to be deposed. In addition, federal appellate courts have upheld trial courts that struck affidavits supporting or opposing summary judgment after parties offering the affidavits had asserted the privilege during discovery and refused to answer deposition questions on the subjects in the affidavits.

However, there are limitations on the trial court’s authority to “punish” a defendant for asserting the Fifth Amendment privilege. One decision by a state court held that a default judgment was not warranted against a defendant who asserted the Fifth Amendment during discovery and, while the defendant could not testify, the trial could proceed. And while some federal courts have gone so far as to preclude a civil defendant from introducing any evidence at trial regarding matters covered by a Fifth Amendment assertion, other federal courts have ruled that such stringent restrictions make asserting the Fifth Amendment privilege too “costly.” Certainly, in either forum, the defendant may find the ability to defend a civil suit substantially compromised because of a parallel criminal investigation that precludes participating in discovery.

At least one significant difference exists between state and federal civil practice when a witness asserts the Fifth Amendment privilege at trial. In federal practice, opposing counsel may comment to the jury during closing argument that a witness asserted the Fifth Amendment on the stand and the jury may draw a negative inference from that fact. Under California law, however, neither the court nor counsel may comment on the fact that a witness asserted the Fifth Amendment privilege, and the jury may not draw any inferences—about the credibility of the witness or any other matters at issue in the trial—from that assertion. Interestingly, this ban on commenting on a claim of privilege does not prevent counsel from commenting on gaps in the opposing party’s case resulting from the exercise of the Fifth Amendment privilege by a witness. Clearly, then, even civil litigants who survive discovery sanctions and proceed to trial face a substantial obstacle when their witnesses invoke the Fifth Amendment privilege.

With all these considerations, the lawyer whose client may be the subject of a criminal investigation and is being asked to appear for a deposition in a civil case has a difficult decision to make. First, the lawyer needs to advise the client on whether it is proper for the client to assert the Fifth Amendment privilege. Next, even if such an assertion is proper, the lawyer should advise the client on whether...
asserting the Fifth Amendment is a good move strategically. If the client refuses to testify or asserts the Fifth Amendment in the civil suit, the client may avoid disclosing incriminating information that could be used in a criminal proceeding. But invoking the Fifth Amendment may be tantamount to admitting defeat in the civil case, as the client may be precluded from testifying at the civil trial or, worse, called to testify knowing that the jury will be able to draw negative inferences from arguing the Fifth Amendment privilege. For each witness, another lawyer—one qualified to handle a criminal defense and whose only concern is the interests of the witness rather than the corporation’s civil and criminal exposure—generally should be consulted and will likely advise the witness to assert the Fifth Amendment privilege. Once this happens, corporate counsel is left in the unenviable position of having to proceed to trial while unable to elicit testimony that may be critical to the company’s defense.

In these situations, the lawyers and the parties may face unpleasant choices. However, there may be another, more palatable option for clients whose civil cases require an assertion of the Fifth Amendment privilege. In order to escape the quandary of either testifying to help the civil case and risking criminal exposure, or refusing to testify to avoid criminal exposure and risking defeat in the civil lawsuit, parties can look to California decisional law for an alternative that involves postponing the civil proceedings.

An assertion of the Fifth Amendment privilege. In short, the lawyer must weigh the relative exposure that the client faces in the civil and criminal proceedings and advise the client that he or she may essentially have a Hobson’s choice.

Similarly, the lawyer representing a corporate client in a civil case with essential witnesses who are current or former employees facing a criminal investigation most likely has a conflict of interest in advising the witnesses whether to assert their Fifth Amendment privilege. For each witness, another lawyer—one qualified to handle a criminal defense and whose only concern is the interests of the witness rather than the corporation’s civil and criminal exposure—generally should be consulted and will likely advise the witness to assert the Fifth Amendment privilege. Once this happens, corporate counsel is left in the unenviable position of having to proceed to trial while unable to elicit testimony that may be critical to the company’s defense.

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**Pacers Motion**

In order to escape the quandary of either testifying to help the civil case and risking criminal exposure, or refusing to testify to avoid criminal exposure and risking defeat in the civil lawsuit, parties can look to California decisional law for an alternative that involves postponing the civil proceedings. This alternative also gives parties the benefit of preserving the future testimony of nonparty witnesses who may need to assert the Fifth Amendment privilege.

The seminal case in this area is *Pacers, Inc. v. Superior Court*, in which three individuals were simultaneously defendants in a civil action and under investigation by the U.S. Attorney’s Office for the same conduct. The defendants sought to postpone their deposition until after the statute of limitations had run. The court ruled, in what may seem an extraordinary remedy, that the defendants’ depositions could be taken after the statute of limitations ran or once the deponent or witness is no longer a potential subject or target of a government investigation. The strongest case for deferring civil proceedings until after a criminal prosecution is completed occurs when a party being investigated for a serious offense is also involved in a civil action concerning the same matter. The fact that an indictment has not yet been returned in the criminal proceeding is a factor to be considered by the court but does not make a *Pacers* motion to stay civil proceedings any less appropriate.

Generally, a court will consider five factors when deciding whether to delay civil proceedings—which can constitute a single deposition, all discovery, or the entire trial—in the face of parallel criminal proceedings:

1. The interest of the plaintiff in proceeding expeditiously, and the potential prejudice to the plaintiff of a delay.
2. The burden that any particular aspect of the civil proceedings may impose on defendants.
3. The convenience of the court in the management of its cases.
4. The interests of persons not parties to the civil litigation.
5. The interest of the public in the pending civil and criminal litigation.

It is important to note that a *Pacers* motion is far from a perfect solution. First, a typical *Pacers* motion seeking to stay civil discovery until the criminal proceedings are resolved is
an extraordinary remedy. This is true because the government may investigate and seek an indictment during the entire statute-of-limitations period, which, for example, is generally five years for nonviolent federal crimes and ten years for crimes affecting federally insured financial institutions.\textsuperscript{43} For nonviolent state crimes, the statute of limitations generally varies from three to six years.\textsuperscript{44} Complicating the situation is that, as a practical matter, prosecutors rarely indicate that an investigation is closed or confirm that an individual is no longer an active subject or target. Typically, the only time a potential witness knows for certain that there is no longer a risk of self-incrimination by testifying in a civil proceeding is after the criminal statute of limitations has run. Thus, civil litigants who file \textit{Pacers} motions could theoretically be seeking a stay of the civil proceedings for up to six years or even for ten years if a financial institution is a putative victim. Courts rarely grant stays in civil litigation for six years or more.\textsuperscript{45}

\textbf{Modified \textit{Pacers} Motion}

There is however, another solution—a modified \textit{Pacers} motion. Using this procedure, a party to the civil suit (whether an individual or corporation) would agree to allow the deposition to go forward. At the deposition, a deponent—whether a party or a nonparty witness—would assert the Fifth Amendment privilege as needed. Afterward, the party to the suit who is faced with the prejudice caused by the assertion of the privilege would bring a motion seeking an order mandating that if circumstances should change in the criminal investigation making it possible for the deponent to testify fully, a new deposition would be taken, thereby preserving the deponent’s ability to testify at trial. This motion requests much more limited relief from the court than the \textit{Pacers} motion and does not seek to delay civil proceedings. It also allows potential deponents time to either resolve the criminal matter or clarify whether the government views them as actual subjects or targets of a criminal investigation. The modified \textit{Pacers} motion is not a perfect solution either, but when the traditional \textit{Pacers} motion is unlikely to prevail or has already failed, it may be a suitable alternative.

In California, a civil court has the authority to grant a motion immunizing a potential witness from state criminal prosecutions,\textsuperscript{46} which presents another potential solution to the dilemma—requesting immunity directly from the civil court.\textsuperscript{47} But such a motion also must be served on the prosecutor’s office, and the prosecutor merely needs to submit an opposing declaration stating that there are reasonable grounds to believe that the proposed grant of immunity might unduly hamper a criminal proceeding, including the subse-
quent prosecution of that witness.\textsuperscript{44} The trial court must treat the prosecutor's declaration as conclusively establishing that the potential witness’s request for immunity cannot be granted.\textsuperscript{45} Thus, this solution does not hold out much promise of success unless the individual was never a target or subject in the first place.

Sometimes plaintiffs benefit from civil litigation that overlaps with an existing or subsequently commenced criminal investigation. Indeed, from a less charitable standpoint, when a civil complaint is filed in the wake of a well-publicized criminal investigation, or when the civil and criminal complainants are the same (such as when the government is the victim of a fraud),\textsuperscript{50} the motives of the civil plaintiff can be questioned. If the civil complainant is suing or noticing depositions to get the benefit of the negative inference of a party or third-party witness asserting the Fifth Amendment privilege, other remedies are available if a civil proceeding is affected by a client or third-party witness who cannot participate in discovery or at trial because of concerns about self-incrimination. Pursuing these options might make it possible for clients to avoid facing an uncomfortable choice between vigorously prosecuting or defending a civil claim and protecting themselves against criminal exposure.\textsuperscript{52}

Given the current climate of corporate scandal and resulting investigations, civil practitioners need to stay alert to the ramifications that arise when the Fifth Amendment privilege is asserted in a civil proceeding. And lawyers should understand that there are options available if a civil proceeding is affected by a client or third-party witness who cannot participate in discovery or at trial because of concerns about self-incrimination. Pursuing these options might make it possible for clients to avoid facing an uncomfortable choice between vigorously prosecuting or defending a civil claim and protecting themselves against criminal exposure.

\begin{enumerate}
\item Malloy v. Hogan, 378 U.S. 1, 6 (1964).
\item U.S. Const. art. V. The same privilege is included in the California Constitution. Cal. Const. art I, §15.
\item United States v. Babys, 524 U.S. 666, 672 (1998) (citing Kastigar v. United States, 406 U.S. 441, 444-45 (1972); see also McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) (the privilege “applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it”).
\item Evid. Code §940. In addition, a defendant in a criminal case has a statutory privilege not to be called as a witness to testify. Evm. Code §930.
\item Id.
\end{enumerate}
Benson).


27 Securities & Exch. Comm'n v. Graystone Nash, Inc., 106 F. 3d 187, 192 (3d Cir. 1994); Campbell v. Gerrans, 592 F. 2d 1054, 1058 (9th Cir. 1979) (reversing district court’s dismissal of civil rights action due to defendant’s refusal to answer deposition questions based on the Fifth Amendment privilege).

28 Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) (“The Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.”). United States v. United States Fid. Guar. Co., 302 F. 2d 107 (2d Cir. 1962) (affirmation of the Fifth Amendment privilege prejudiced the other party, the district court “would be free to fashion whatever remedy is required to prevent unfairness”).

29 EVID. CODE §913(a).

30 People v. Redmond, 29 Cal. 3d 904 (1981).

31 Pacers, Inc. v. Superior Court, 162 Cal. App. 3d 686 (1984). This case is so well known that the motion made to seek this type of relief is known as a Pacers motion.

32 Id. at 688.

33 Id. at 689.

34 Id. (quoting Griffin v. California, 380 U.S. 609, 614 (1965)).

35拓宽 the grant of total preclusion orders in Cymaticolor and Benson.

36 Securities & Exch. Comm’n v. Graystone Nash, Inc., 25 F. 3d 187, 192 (3d Cir. 1994); Campbell v. Gerrans, 592 F. 2d 1054, 1058 (9th Cir. 1979) (reversing district court’s dismissal of civil rights action due to defendant’s refusal to answer deposition questions based on the Fifth Amendment privilege).


40 Id.

41 At least one federal court has questioned the propriety of the government using a criminal investigation to further its own civil lawsuit. See, e.g., United States v. Twed, 550 F. 2d 297 (5th Cir. 1977) (examining implications of parallel civil and criminal proceedings in the Fourth Amendment context).

42 The court is empowered to issue a protective order quashing a deposition notice in order to protect a party or deponent against “unwarrented annoyance, embarrassment or oppression.” Code Civ. Proc. §2025(f).

43 The court may also do this if it determines that the “burden…or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence.” Code Civ. Proc. §2017(c).

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There are also significant differences between the two systems at the appellate level. The losing party in a trial has a wide range of appellate rights and can challenge, for example, the sufficiency of evidence or the application of law. On the other hand, the losing party in an arbitration has limited rights to judicial review. The losing party cannot raise challenges based on evidence, including its insufficiency, or legal errors. For the most part, judicial review is limited to issues involving due process, such as not receiving notice of hearings, not having a neutral arbitrator, or the refusal of the arbitrator to hear relevant and material evidence. Basically the procedure itself is reviewed on appeal as opposed to the merits of the dispute.

Thus the willingness to give up appellate rights is a factor when considering arbitration. Nevertheless, because of an evolving trend in matters governed by the Federal Arbitration Act, parties who opt for arbitration governed by the FAA may be able to secure the best of both worlds—the efficiencies of arbitration and the more extensive bases for appeal. This trend is due to the fact that some courts have upheld agreements for expanded judicial review of arbitration awards, but it depends upon the circuit in which the judicial review occurs. The Ninth Circuit is one of the circuits that allows parties to agreements governed by the FAA to agree to expanded judicial review. Although California state courts also are called upon to review arbitration awards that are governed by the FAA, no state court has yet addressed the issue of expanded judicial review of FAA-governed agreements.

The trend of allowing parties to contract for expanded judicial review, however, does not extend to the California Arbitration Act. As a result of the decision earlier this year in Crowell v. Downey Community Hospital Foundation and the recent decision in Oakland-Alameda County Coliseum Authority v. CC Partners, if a matter is governed by the CAA, any provision for expanded judicial review is void. However, because of a conflict between these two decisions, it is unsettled whether the inclusion of a clause providing for expanded judicial review will void the entire arbitration agreement.

What this means is that practitioners...
called upon to draft arbitration agreements for clients who reside in California must now fully understand the present state of the law in both the federal and state judicial systems in California. If expanded judicial review of arbitration awards in California is desired, the practitioner must find a way for the arbitration agreement to be governed by the FAA and have a basis (such as diversity) for federal jurisdiction or, alternatively, hope that California state courts will adopt a position of expanded judicial review for arbitration awards governed by the FAA. If practitioners cannot find a way to place an arbitration agreement under the FAA, they must hope that another California Court of Appeal will render an opinion opposite to Crowell and Oakland-Alameda County Coliseum Authority, thereby establishing a conflict for resolution by the California Supreme Court.

**Appellate Review in Federal Court**

The purpose of the FAA, which was enacted in 1925, was to abolish longstanding antiarbitration laws and to make agreements to arbitrate that fall within its purview specifically enforceable. Section 10(a) of the FAA allows the court to vacate an award on specified grounds regarding the conduct of the arbitrators. In commenting upon this provision, the court in *Barbier v. Shearson Lehman Hutton Inc.*, stated, “It is well-settled that judicial review of an arbitration award is narrowly limited. The award may be vacated only if at least one of the grounds specified in 9 U.S.C. Section 10 is found to exist.” These grounds include:

- The procurement of an award “by corruption, fraud, or undue means.”
- The “evident partiality or corruption” of the arbitrator.
- The arbitrator refused to “postpone the hearing, upon sufficient cause,” or refused “to hear evidence pertinent and material to the controversy,” or engaged in “any other misbehavior by which the rights of any party may have been prejudiced.”
- The arbitrator “exceeded [his or her] powers, or so imperfectly executed them that mutual, final, and definite award upon the subject matter submitted was not made.”

Some federal courts have augmented these grounds by articulating that an award may also be vacated when it is in “manifest disregard of the law.” However, this concept is not uniformly accepted in the federal system. As the court stated in *Baravati v. Josephthal, Lyons & Ross Inc.*, a number of courts, including our own, have said that they can set aside arbitration awards if the arbitrators exhibited a “manifest disregard of the law.” Two courts, however, have declined to adopt this formula, though without rejecting it. Two have criticized it…We can understand neither the need for the formula nor the role that it plays in judicial review of arbitration (we suspect none-that it is just words). If it is meant to smuggle review for clear error in by the back door, it is inconsisent with the entire modern law of arbitration. If it is intended to be synonymous with the statutory formula that it most nearly resembles—whether the arbitrators “exceeded their powers”—it is superfluous and confusing. There is enough confusion in the law. The grounds for setting aside arbitration awards are exhaustively stated in the statute….13

Despite the seemingly well-established precedents for limited judicial review of arbitration awards in the federal judicial system, some federal courts also have recognized that parties may agree to a broader scope of judicial review of an award. Specifically, to avoid the FAA’s limitations on the scope of judicial review, parties to an agreement to arbitrate have provided in their agreements that an award may be vacated if it is not supported by substantial evidence or if it is based upon errors of law. This evolution, however, has not been uniformly accepted.

Best exemplifying the divergence of views on this issue is the case of *Lapine Technology Corporation v. Kyocera Corporation*, in which three judges expressed three different views on this subject. The underlying facts involved parties to an international joint venture who agreed to arbitration in San Francisco pursuant to the Rules of the International Chamber of Commerce. The arbitrators were to “issue a written award which shall state the bases of the award and include detailed find-

The district court, when asked to conduct the expansive review to which the parties had agreed, declined. The court held that the parties could not contract for a more expanded judicial review than what was allowed under Section 10 of the FAA.

In reversing that decision, the Ninth Circuit held that parties to an arbitration agreement could contract for a more expansive judicial review than that allowed by the FAA. According to Judge Ferdinand F.
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Robert Mayer in his dissent wrote:

Kozinski stated:

The Fourth and Fifth Circuits have also courts to apply, “they can contract for parties desire more scrutiny than the sion. Absent this, they may not. Should court must review an arbitration deci-

ment of this agreement. This is not authority explicitly empowering lit-

arbitration agreement necessarily limited to the grounds set forth in the FAA or can the court apply greater scrutiny, if the parties have so agreed?...

We hold that we must honor that agreement. We must not disregard it by limiting our review to the FAA grounds....

In a concurring opinion, Judge Alex Kozinski stated:

While I join Judge Fernandez’s opinion, I find the question presented closer than most. The Supreme Court cases on which the opinion relies are helpful...but they don’t get us all the way there. As Judge Mayer points out, they say that parties may set the time, place and manner of arbitration; none says that private parties may tell the federal courts how to conduct their business....

Nevertheless, I conclude that we must enforce the arbitration agreement according to its terms. The review to which the parties have agreed is no different from that performed by the district courts in appeals from administrative agencies and bank-

ruptcy courts, or on habeas corpus. I would call the case differently if the agreement provided that the district judge would review the award by flipping a coin or studying the entrails of a dead fowl. Given the strong policy of party empowerment embodied in the Arbitration Act, I see no reason why

agreement governed by the FAA. The uncer-

tainity is compounded by the fact that

Arbitration Act, we do not believe it is yet a foregone conclu-

sion their own (including by referencing state law standards).

Lining up with the Tenth Circuit are the Seventh and Eighth Circuits. For example, in Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., the Seventh Circuit held, “An agreement to submit a dispute over the interpretation of a labor or other contract to arbitration is a contractual commitment to abide by the arbitrator’s interpretation. If the parties want, they can contract for an appel-

late arbitration panel to review the arbitrator’s award. But they cannot contract for judi-

cial review of that award; federal jurisdiction cannot be created by contract.23

Likewise, in UIUC Management Company v. Computer Sciences Corporation the Eighth Circuit stated, “Notwithstanding these cases, we do not believe it is yet a foregone conclu-

sion that parties may effectively agree to compel a federal court to cast aside sections 9, 10 and 11 of the FAA.”24

A review of these opinions shows that while the results are all based upon an inter-

pretation of the FAA, the focus, however, dic-

tates the result. For the Third, Fourth, Fifth, and Ninth Circuits, the focus is upon the FAA’s strong policy of enforcing the right of the parties to define their agreements to arbi-

trate. For the Seventh, Eighth, and Tenth Circuits, the focus is upon the congressional intent of the FAA, which is to limit the scope of appellate review.

Given the split among the circuits, unless and until the U.S. Supreme Court takes up the issue, the circuit in which a party attempts to enforce an agreement for expanded judicial review will dictate whether the agreement will be enforced. Thus, practitioners representing clients whose arbitration agreements provide for expanded judicial review of arbitra-

torship awards and who have an option of where to petition to confirm or vacate an arbitration award should not file the petition before considering the available locations for filing. Indeed, if a basis for federal jurisdiction exists, the FAA allows a party to petition to confirm or vacate an award in any location considered a proper venue—even if the arbitration was conducted elsewhere.25

**Appellate Review in State Court**

Until the California Court of Appeal’s decision in Crowell, it was unsettled whether California courts would adopt the concept of the right of the parties to contractually agree to expanded judicial review of arbitration awards governed by the FAA or CAA. State courts are called upon to enforce the FAA because the FAA does not create a basis for federal jurisdic-

tion.26

Under applicable law, decisions of federal courts of appeals on federal questions are not binding on state courts; they are merely persuasive.27 Moreover, if the federal appellate courts are divided, “state courts must make an independent determination of federal law.”28 This is true in California even when a Ninth Circuit opinion exists on the very matter at issue.29

The Second Appellate District in Crowell, and the First Appellate District in Oakland-Alameda County Coliseum Authority, inter-

preted the CAA—and their decisions leave open the question of what California courts will do when asked to enforce an expanded judicial review component of an arbitration agreement governed by the FAA. The uncer-

tainity is compounded by the fact that Crowell was a majority decision.

In rejecting expanded judicial review under the CAA, the court in Crowell stated: “Because the Legislature clearly set forth the trial court’s jurisdiction to review arbitration awards when it specified grounds for vacating or correcting awards in sections 1286.2 and 1286.6, we hold that the parties cannot expand that jurisdiction by contract to include a review on the merits.”30 The Oakland-Alameda County Coliseum Authority court expressly adopted this holding.31

That conclusion mirrors the Tenth Circuit’s decision regarding the FAA. Both rely upon legislative intent to limit the scope of judicial review of arbitration awards. Thus, there is reason to believe that at least the First and Second Appellate Districts would apply that same reasoning for cases governed by the FAA. What other California appellate courts might do is an open question, because the decisions of one district of the court of appeal are not binding on other districts of the court of appeal.32

The dissent in Crowell mirrored the focus
1. Parties to an arbitration agreement governed by the California Arbitration Act (CAA) can agree to expanded judicial review of an arbitration award.
   True.
   False.
2. The Ninth Circuit has held that parties to an arbitration agreement governed by the Federal Arbitration Act (FAA) can agree to expanded judicial review of an arbitration award.
   True.
   False.
3. If federal appellate courts are divided on a federal question, state courts must make an independent determination of federal law.
   True.
   False.
4. A Ninth Circuit Court of Appeals opinion on a federal question that is not in conflict with any other federal court of appeals opinion is binding on California state courts.
   True.
   False.
5. In all federal courts, an arbitration award can be vacated if it is determined to be in “manifest disregard of the law.”
   True.
   False.
6. Parties to an arbitration agreement governed by the FAA can enforce their agreement, or a resulting award, in federal court because the FAA provides a basis for federal jurisdiction.
   True.
   False.
7. Which one of the following federal circuits does not allow parties to agree to expanded judicial review of arbitration awards?
   A. Third Circuit.
   B. Fourth Circuit.
   C. Fifth Circuit.
   D. Tenth Circuit.
8. Which one of the following federal circuits allows parties to agree to expanded judicial review of arbitration awards?
   A. Fifth Circuit.
   B. Seventh Circuit.
   C. Eighth Circuit.
   D. Tenth Circuit.
9. In what year was the FAA enacted?
   A. 1925.
   B. 1935.
   C. 1945.
   D. 1955.
10. In California, it is unsettled whether arbitration agreements governed by the CAA that contain a provision for expanded judicial review of an award are void.
    True.
    False.
11. Decisions of the Ninth Circuit Court of Appeals are binding upon federal district courts in California even if contrary authority exists in other circuit courts of appeals.
    True.
    False.
12. Decisions of the U.S. Supreme Court on federal questions are binding on state courts.
    True.
    False.
13. Decisions of one district of the California Court of Appeal are binding upon other districts of the court of appeal.
    True.
    False.
14. The purpose of the FAA was to abolish longstanding antiarbitration laws and to make arbitration agreements within its purview specifically enforceable.
    True.
    False.
15. Section 10(a) of the FAA authorizes a court to vacate an arbitration award that contains errors of law.
    True.
    False.
16. The CAA authorizes a court to vacate an arbitration award that contains errors of law.
    True.
    False.
17. Under the FAA, an arbitration conducted within one federal circuit can be confirmed or vacated in another federal circuit if venue exists. For example, an arbitration conducted in Los Angeles can be confirmed or vacated in Chicago if venue exists in Chicago.
    True.
    False.
18. Crowell v. Downey Community Hospital Foundation was a majority, as opposed to unanimous, decision.
    True.
    False.
19. Under California law, arbitration can be stayed pending a judicial determination whether the arbitration should proceed on a classwide basis.
    True.
    False.
20. The decision in Crowell construed both the FAA and the CAA.
    True.
    False.

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8. □ A □ B □ C □ D
9. □ A □ B □ C □ D
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11. □ True □ False
12. □ True □ False
13. □ True □ False
14. □ True □ False
15. □ True □ False
16. □ True □ False
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18. □ True □ False
19. □ True □ False
20. □ True □ False

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of the Third, Fourth, Fifth, and Ninth Circuits upon the broad policy of enforcing arbitration agreements. Justice Michael G. Nott wrote, “I conclude that the parties entered into an arms-length arbitration agreement to have the trial court act in excess of its statutory authority by reviewing the award for errors of law and sufficiency of the evidence. I perceive no substantial argument that would make it inappropriate for the trial court to act in accord with the wishes of the parties.”

Were the issue not confusing enough, the recent decision in *Sanders v. Kinko’s Inc.* makes it even more so. The *Sanders* court addressed whether the FAA precludes a state court from determining if class certification issues should be resolved before an arbitration agreement covered by the FAA is enforced. In upholding the right of the state court to stay the arbitration pending determination of the class certification issues, the court held that state procedural law applied even though the right to arbitration was governed by the FAA’s substantive law.

Moreover, in *Mount Diablo Medical Center Authority v. Health Net of California*, the First Appellate District addressed a generic choice-of-law provision that specified California law as governing the validity, construction, interpretation, and enforcement of an agreement containing an arbitration clause that would otherwise be governed by the FAA. The court construed the provision to mean that California procedural law governed the enforcement of the arbitration. Under the CAA the court had the authority to stay the arbitration, whereas no comparable authority exists under the FAA.

If *Sanders and Mount Diablo* apply to the right to contract for expanded judicial review under the FAA, enforcement of that right may turn upon whether the party seeking to enforce it in California is confined to the state court, where enforcement is unlikely, or can find an independent basis for federal court jurisdiction, where enforcement is assured.

*Sanders and Mount Diablo* also create the same type of uncertainty if a federal court is asked to enforce an agreement for expanded judicial review of an arbitration award governed by the CAA. That situation could arise when federal jurisdiction is based upon diversity. Since decisions of the Ninth Circuit are binding upon federal district courts in California, even if contrary authority exists in other circuits, a CAA-governed agreement that provides a right for expanded judicial review deemed to be procedural would be enforceable in federal district court in California—although a California state court would not enforce the agreement.

Apart from the uncertainty as to what...
California courts will do when called upon to enforce an agreement for expanded judicial review of arbitration awards, *Crowell* also raises the issue of whether agreements to arbitrate that contain provisions for expanded judicial review are even enforceable. Recognizing that for some people and entities a willingness to agree to arbitrate is dependent upon being able to contract for expanded judicial review, the court in *Crowell* refused to sever the expanded judicial review portion of the arbitration agreement and, instead, invalidated the entire arbitration agreement.40

The *Oakland-Alameda County Coliseum Authority* court refused to follow the portion of *Crowell*'s holding that voided the entire arbitration agreement. Two primary distinguishing factors referenced by the court were the existence of a severance clause and the fact that the argument to void the arbitration agreement was first made after the arbitration award. In *Crowell*, the agreement at issue contained no severance clause, and the argument to void the arbitration agreement was first raised prior to the arbitration.

As a result of these differences, it may be that arbitration agreements that contain provisions for expanded judicial review of arbitration awards may be valid in the First Appellate District and void in the Second Appellate District. In the remaining appellate districts the issue is still open.

The implications of *Crowell* and *Oakland-Alameda County Coliseum Authority* are significant. For those who now have agreements for arbitration that contain an enhanced judicial review provision, should they still want arbitration even if the enhanced judicial review portion is unenforceable, they should so specify in an amendment to their arbitration agreements before a dispute arises and one side changes its mind about arbitration. It would also be prudent for lawyers aware of a provision for expanded judicial review in an arbitration agreement to advise their clients of the present state of the law on this subject.

In today’s commercial world, a system that allows for expanded judicial review of arbitration awards in some parts of the country, including federal courts in California, and prohibits it in other parts of the country, including state courts in California, cannot remain. Apart from being a trap for the unwary and promoting forum shopping, the dichotomy makes no sense. Only the U.S. Supreme Court can now resolve the conflict over whether the FAA allows for agreed-upon provisions for expanded judicial review of arbitration awards. State courts are obligated to follow U.S. Supreme Court opinions interpreting federal law.41

As for California law, given the conflicts among the federal circuits and the fact that

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two California appellate courts have rejected the Ninth Circuit’s position—though the dissent in one of the decisions adopted the Ninth Circuit’s position—the California Supreme Court should decide whether the CAA allows for expanded judicial review. This decision will be of great importance for California practitioners and persons and entities doing business in the state.

In the final analysis, certainty from both the U.S. Supreme Court and the California Supreme Court is needed so that those with existing arbitration agreements that contain provisions for expanded judicial review can know if their arbitration agreements are even enforceable, let alone if expanded judicial review will be allowed. Also, those who contemplate entering into arbitration agreements should know whether they can contract for expanded judicial review.

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1 Federal Arbitration Act, 9 U.S.C. §§1 et seq.
3 Oakland-Alameda County Coliseum Auth. v. CC Partners, California Court of Appeal No. A094859 (Aug. 27, 2002).
12 Health Servs. Mgmt. Corp. v. Hughes, 975 F. 2d 1253 (7th Cir. 1992). Though the award in this case, which involved an architect prevailing on a claim for services performed, was not vacated, the court did opin that the concept of “manifest disregard of the law” meant “something beyond and different from mere error in law or failure on the part of the arbitrators to understand or apply the law; it must be demonstrated that the majority of arbitrators deliberately disregarded what they knew to be the law in order to reach the result they did.” Id. at 1267.
14 Lapine, 130 F. 3d at 877-88.
15 Id.
16 Lapine, 130 F. 3d at 881.
18 Id.
19 Id.
20 Id. (quoting Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 935 F. 2d 1501, 1505 (7th Cir. 1991)).
21 Syncor Int’l Corp. v. McLeland, 120 F. 3d 282 (4th Cir. 1997), 1997 WL 4532245 (unpublished); Gateway Techs., Inc. v. MCI Telecomm’s, Corp., 64 F. 3d 995 (5th Cir. 1995).
24 Id. at 933.
25 Id.
26 Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 935 F. 2d 1501, 1505 (7th Cir. 1991) (emphasis in original).
30 Rohr Aircraft Corp. v. County of San Diego, 51 Cal. 2d 759, 764 (1959).
31 Id.
32 Forsyth v. Jones, 57 Cal. App. 4th 776, 783 (1997) (“Where the federal circuits are in conflict, the decisions of the Ninth Circuit are entitled to no greater weight then those of other circuits.”).
34 Oakland-Alameda County Coliseum Auth. v. CC Partners, California Court of Appeal No. A094859, at 10-12 (Aug. 27, 2002).
36 Crowell, 95 Cal. App. 4th at 750.
40 Crowell, 95 Cal. App. 4th at 739-40.
Facts and Issues Presented:
Attorney represents Plaintiff in suing Defendant. Attorney learns that Defendant has an insurance policy that might provide coverage for Plaintiff's claim, but Defendant has advised attorney that it will not submit the matter to Insurer. Attorney believes that the involvement of Insurer will facilitate a beneficial resolution of the matter for Plaintiff.

Question Presented:
May Attorney contact Insurer without violating any ethical duties?

Discussion
Rule 2-100(A) of the California Rules of Professional Conduct restricts the ability of lawyers to make contact with other persons with an interest in a matter. This rule provides:

While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.1

Under the rule, the critical inquiry is whether the member knows that the other party is represented by another lawyer in the matter.2 The lawyer often would be the defendant’s counsel, who typically is deemed to be representing the insurer who assigned him or her to defend its insured.3

On the facts presented there is no indication that Insurer is represented by a lawyer in the matter. To the contrary, Defendant has advised Attorney that Defendant has not submitted—and does not intend to submit—the matter to Insurer. Under these facts, Attorney does not know that Insurer is represented by a lawyer in the matter. Accordingly, Rule 2-100 imposes no limitation on the propriety of Attorney contacting Insurer to advise Insurer of the action against Defendant.4 Prudence may, nonetheless, dictate that Attorney begin any communication with Insurer by confirming that Insurer is not represented by counsel in the matter.5

Nothing in this opinion pertains to the more common situation in which an insurer has accepted the defense of a party to an action and is involved in the litigation. In such circumstances, the attorney representing a defendant is generally representing the insurer and the insured.6 Accordingly, Rule 2-100(A) would make it improper for the attorney to contact the insurer directly.7 Of course, in such a situation the concerns presented in this inquiry would not arise—the insurer would already be represented by counsel and plaintiff’s counsel could communicate with the insurer through the insurer’s counsel. (Different issues, not addressed here, may arise where an insurer defends under a reservation of rights, and the insured has separate counsel.8)

The same distinction drawn here was seen by the Utah State Bar Ethics Advisory Committee in a 1998 opinion.9 The Utah Committee...
was asked whether a lawyer for a plaintiff could ethically contact the adjuster for a defendant’s insurer without obtaining permission from the defendant’s lawyer. The committee advised that if the matter is in an informal prelitigation stage, it is reasonable for the lawyer to believe (absent being informed to the contrary) that the insurer is not a represented party and make contact. If, however, the matter is in or likely to proceed to litigation, the committee concluded that the insurer would have a direct interest in the matter and be considered a party to the matter, and that the plaintiff’s counsel could properly contact the adjuster about the matter only upon confirmation that the insurer is not represented by counsel in the matter.

Here, where the facts show that counsel for Defendant does not currently represent Insurer, and Attorney does not know that Insurer is represented in the matter by other counsel, Attorney is not precluded by the Rules of Professional Conduct from making direct contact with Insurer.

This opinion is advisory only. The committee acts on specific questions submitted ex parte, and its opinions are based only on such facts as are set forth in the questions submitted.

1 CAL. RULES OF PROF’L CONDUCT R. 2-100(A) (emphasis added); see also Discussion to Rule 2-100 (“As used in paragraph (A), ‘the subject of the representation,’ ‘matter,’ and ‘party’ are not limited to the litigation context.”).


5 See State Bar Formal Op. No. 1996-145 (recommending that attorney ask party if it is represented in context of contract dispute where attorney knew party had been represented by counsel in entering contract).

6 See State Farm, 72 Cal. App. 4th 1422, 1428-29.

7 See Waller v. Kotzen, 567 F. Supp. 424, 426-27 (M.D. Pa. 1983) (plaintiff’s counsel violates Pennsylvania disciplinary rule by directly contacting insurer after insurer provides defense counsel to defendant); In re Inuz, 616 A. 2d 233 (Vt. 1992) (ethical rule violated by direct contact to insurers providing defense to defendant).


9 Utah State Bar Ethics Advisory Committee, Opinion No. 98-07 (interpreting Rule 4.2 of the UTAH RULES OF PROF’L CONDUCT, which prohibits a lawyer, in representing a client, from communicating “about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so”).
Using Antivirus Strategies to Protect Law Firm Data

A computer virus is a program that propagates itself across computer hard drives and networks and produces undesirable effects on data, systems, and networks. Virus writers release approximately 8,000 new viruses every month, obliging all users, including law firms, to participate in a costly and frustrating race. Constant work is necessary to preserve data in the face of the continuing attempts of virus writers to vandalize data. To make things worse, antivirus software often detects a virus only after it has released its disruptive code.

Because computer viruses are hard to stop with software alone, education is the key to protecting a law firm’s data. Education relies on user cooperation, however, and too many attorneys are willing to evade the small annoyances of network security—considering them intrusive and counterproductive—even when doing so increases the risk of propagating a virus that is much more counterproductive than a safeguard or two. A firm that spends thousands of dollars on antivirus security may still face infection from one employee.

As a result, law offices not only need to take measures against viruses but also should be prepared for infections. A virus that breaches a law firm’s defenses is likely to cause a substantial decline in productivity and a significant loss of important data. Attorneys can take steps, however, to stop viruses before infection and limit the damage afterward.

The first issue to address is network protection. This is not an issue to address casually, because the data that law firms now keep on their computer hard drives is simply too valuable. Moreover, the option that is cheap today may be expensive tomorrow. An antivirus program may offer settings that, if misapplied, render the application all but useless. For example, network administrators may choose an option on the firm’s antivirus software that decreases the level of protection against infection by e-mail. While some employees may express their preference for avoiding the inconvenience of an e-mail gatekeeper, the alternative is leaving the front door to the firm’s data unlocked.

Once the firm’s antivirus software is properly installed, administrators should keep its definitions updated, especially on computers that host public services and are accessible through the firewall (these include HTTP, FTP, mail, and DNS). Newer copies of antivirus programs update themselves automatically, but older versions may not, which means that users will need to keep the definitions current by downloading updates from the Web site of the company that makes the antivirus software that the firm uses. Performing this download every three days is recommended (remember: 8,000 new viruses per month), which makes buying the latest version of the antivirus software an appealing alternative.

Office Computer Settings

Another step is to alter the settings of the firm’s office computers to raise their defenses against viruses. On each local computer, the administrator or user can disable booting from the floppy drive by going into the CMOS (a manual or a knowledgeable user may help those users who do not know how) and changing the boot sequence from “A then C” to “C then A” only. This change will stop viruses that load to boot sectors and partitions. (However, this step will not stop all viruses, including multipartite viruses in their boot sector infection stage.) When a user needs to boot the computer from a floppy drive, it takes 30 seconds to switch the setting back to “A then C” before shutting the computer down to reboot from a floppy. Afterward, the user should return the boot sequence setting to its safer mode. Also, users should write-protect all floppies after scanning them for viruses.

Other settings to change involve scripts, a common avenue of attack for viruses. Windows 98 users can go to Settings, Control Panel, and Add/Remove Programs. From there, the next step is to choose the Windows Setup tab, the Accessories item, and then the Details button. If the Windows Scripting Host is selected, deselect it and click on OK. By default, Windows 2000 and XP block scripts and may prompt users to allow installation of a script. Unless the source is expected and verifiable, installing scripts can be dangerous and should be avoided.

An additional way that Windows users can avoid activating embedded code is to install the Office Viewers for Word, Excel, and Power Point. Each viewer can be downloaded for free from the Microsoft Web site and is contained on the Microsoft Office CD. The viewers allow users to view a file but do not activate macros and other potential hazards.

Users should also disable any option in their Internet browsers that they do not use often. The options may include Java Script and ActiveX. A compromise is to set the software to post an alert every time these potential conduits for viruses are detected on a Web page. While changing browser settings to a higher security level, users should also disable HTML support in their e-mail software so that potentially harmful code that arrives attached to e-mail messages is not allowed to run. In Internet Explorer, these settings can be found under Tools, Options, and the Advanced tab.

After each office computer’s settings are reset to security levels that are higher than standard,
fewer gateways will remain open for viruses to enter. Nevertheless, they still may. Users should set their virus protection software to schedule weekly scans of their complete system. With all these measures in place, the office computers will be far less receptive to viruses and far more likely to detect them when they appear.

Network Protection Measures

If there is a server on the network, the next step is to protect the server. Servers require separate antivirus software that is different from that of the office computers. Additionally, servers require virus protection methods that are different from those of desktop computers. In short, virus protection for servers requires knowledge and techniques beyond those of the average office computer user, so a firm should plan accordingly.

Many virus strains automatically attach and send themselves from an infected system without the owner’s knowledge. Even if users know and trust the sender of a message, it may contain a virus of which the sender is unaware. In short, network administrators should be prepared for the worst. For those who maintain small networks, keeping desktop antivirus software up-to-date is a difficult but essential task. Virus penetration usually occurs when a system’s antivirus software does not recognize a new virus. A good relationship with the antivirus software supplier is an important factor in a firm’s antivirus strategy, but it is no substitute for having procedures in effect to limit the damage of an infection.

To get started on a systematic antivirus program, make backups of all software (including operating systems) and formulate a contingency plan with a specialist. Viruses not only can destroy data, which is bad enough, but also can corrupt it. Data corruption is worse than destruction because corruption is often difficult to detect, and months may pass before it is noticed. Resorting to backups to retrieve the data may not be an option, since documents and spreadsheets change and documents retrieved from a backup may also be infected. Considerations such as this need to be taken into account when discussing and implementing the contingency plan.

Should a virus manage to penetrate all the defenses put in its path, the company must have effective procedures in place to be able to limit the infection to as few computers as possible and to restore the infected computers. This complex operation should err on the side of thoroughness rather than adherence to any set procedure. When a destructive virus infects the firm’s computer system, the first step should be containment. Viruses replicate themselves, so to destroy copies without locating the original will not disinf ect the system. As a means of keeping the virus from spreading, infected items should be separated from the network. If the items reside on an office computer, for example, it should be physically disconnected from the network. Once infected systems are isolated, recovery involves disinfecting or fully removing infected files and recovering or replacing the corrupted data. A forensic analysis can help locate affected files, and trusted media (such as original software disks and data backups that pass inspection) can restore them. This process can become herculean if each office computer has its own particular software, obliging computer personnel to diagnose and solve each infected computer’s problems in a different way. If a company standard for software is not in practice before the contingency plan is created, it should be after. The greatest expense of an infection is likely to be time, since it will probably be necessary to disinfect and restore every infected work station, one at a time. If each work station has the same software, considerable time should be saved.

After disinfection, the contingency plan should include a method for finding out what went wrong in the firm’s virus protection system. A general security analysis that leads to the source of the virus should help avoid a reinfec tion by the same route. This part of the plan will have to address the human factor, including issues of whether policy was being followed.

Many people think that the only way to get a virus is by downloading an e-mail attachment. The truth is that the Web has a multitude of Web pages that carry viruses. An employee at a computer with access to the Web can unwittingly download infected files. Everyone at the firm should be informed that if a bit of Web surfing on the job brings a virus to the company’s network, the infection can be traced back to the person who downloaded it first. The best defense against viruses includes proper education and preparation.

An effective antivirus contingency plan is likely to affect a broad range of policies and procedures. A thorough review of firewalls; backups; storage media security; laptop and handheld security; Internet, e-mail, and intranet policies; browser security and settings; and encryption is likely to require the help of a specialist. In addition, law firms should implement a plan not only to reduce the cost of recovery of infected systems but also to avoid the potential legal problems that could result from lost data.
The Truth about Lying

For attorneys, spotting deception is a professional skill, and this book can help

The Truth about Lying
By Stan B. Walters
Sourcebooks, 2000
$14.95, 256 pages

In The Truth about Lying: How to Spot a Lie and Protect Yourself from Deception, Stan B. Walters attempts nothing less than to teach his readers how to detect lies. Attorneys who do not have the luxury of always giving lie detector tests to their potential clients, witnesses, potential jurors, and teenage children will certainly appreciate having the ability to detect deception. The success that readers may experience in improving their skill at lie detection depends, for the most part, on their ability to divest themselves of preconceptions and observe carefully and accurately.

People lie for the same reason they tell the truth, which is to get what they want and avoid what they do not want. Sometimes, lying meets basic needs of self-esteem and affiliation. Sometimes, the deceiver enjoys the lying game and experiences what Walters refers to as “duping light.” Deception is achieved in numerous ways, including by means of communication that lacks completeness, relevance, or clarity, or that contains equivocation. A deceiver may use verbal and nonverbal behaviors to appear poised, pleasant, and under control. It usually takes more than words to tell a convincing lie.

According to the author, verbal communication is achieved through language (including body language), voice quality, speech content, and micro-expressions (minute facial expressions that typically are not under the control of the person lying and that often escape recognition by the person being lied to). Only about 7 percent of communication is nonverbal. Some experts estimate that 55 percent of a speaker’s impact is due to body language and appearance. Walters summarizes the categories to consider when attempting to detect lies: constancy, clusters, consistency, preconceptions, contamination, and cross-checking. A focus on these categories can help people notice the moments in which deceivers are unable to conceal their feelings.

What to Look For

Constancy, for example, refers to a person’s constant (or normal) behavior, which interviewers should gauge before attempting to identify deviations. Change in a person’s constant behavior may indicate deception. The pitch of the speaker’s voice may change in volume. He or she may gesture more or less or become more rambling or more concise. The interviewer should consider what is normal for the particular speaker rather than rely on general preconceptions; it may be normal, for example, for the speaker to mumble or avoid eye contact, in which case such behavior has negligible value as an indication of deception.

When the speaker is unfamiliar to the interviewer, the task of determining constancy is considerably more demanding. The first issue to address is the amount of time available to learn the speaker’s usual behavior. Walters suggests that the interviewer engage in a conversation about sports, movies, the weather, or other topics unconnected with the primary issue. Even better is to engage interviewees in conversations about things they are familiar with and will be at ease discussing. Once the interviewer has a sense of the speaker’s ordinary behaviors and turns the discussion to more sensitive issues, it is time to watch for a new behavior. Walters uses the example of a child who normally talks with her hands. When she is asked about a broken vase, she hides her hands behind her back and begins a long explanation about how the cat knocked over the vase.

Checking for constancy is an inexact process. The interviewer may not always be able to discern whether the change in behavior is due to deception rather than nervousness. Walters also indicates that interviewers should not attribute changed behavior to the wrong question. The interviewer must limit analysis to the specific question posed just before the observed change.

Lack of constancy offers one clue that an interviewee is too busy calculating what to lie to tell to maintain conscious control over voice and gesture, but it is not entirely reliable. Judging a person’s truthfulness based upon a single behavior is risky. Multiple behaviors, or clusters, may be a stronger indicator of deception. Additionally, the notable absence of a cluster of behaviors may also indicate deception. Consistency occurs when the same cluster of behaviors occurs when a topic is raised. Interviewers may look for lack of consistency as an indication of possible deception.

Finally, Walters indicates that the proven method of cross-checking (confirming information by more than one means) is necessary to evaluate the results of an interview.

What to Avoid

One of the biggest obstacles to the detection of deception is the interviewer’s preconceived notions. Walters uses the example of the preconception that res-
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The Truth about Lying,
the Second Edition
RICHARD WALTERS

ident of a certain state are poor drivers. If a man who holds this preconception travels to that state, he will perceive driving behaviors to confirm the preconception. An interviewer who has preconceptions about the interviewee is vulnerable to deception. Spouses who have discovered infidelity can attest to the erroneous preconception that their loved ones would not lie to them.

Contamination is another problem. It takes two to communicate, whether the communication is a lie or the truth. The interviewer is not only a receiver but a conveyor and can affect the responses of the interviewee in ways that the interviewer may not recognize.

To avoid contamination, Walters suggests conducting an evaluation only when the environment is free from distractions and the interviewer is relaxed.

Folk wisdom identifies certain nonverbal behaviors as indicative of deception, including pupil dilation, blinking, smiling, head movements, shrugs, foot and leg movements, and postural shifts. Only pupil dilation and blinking are legitimately associated with deception. Portions of the body over which the speaker has more control do not provide reliable information. An aware speaker will control facial expressions.

Similarly, using eye contact to gauge deception is unreliable. People do not maintain consistent eye contact during conversations with others. People may break eye contact if they are uncomfortable with the topic, if they feel inferior to the interviewer, or if they hold the other person in contempt. Walters states that nothing could be further from the truth than the assumption that deception may be determined by whether the interviewee breaks eye contact. Timely breaks in eye contact that appear to be a change from the person’s established constant and that appear as part of a cluster of behaviors, however, may be a sign of stress and possible deception. Additionally, a change in a person’s blink rate that is not due to allergies, contact lenses, and other variables may indicate that the person is under stress. Studies have established that the blink rate coincides with how fast the brain is processing information.

Whether or not the techniques Walters describes will result in an increased ability to distinquish honesty from dissembling depends upon the reader’s ability to observe keenly and dispassionately. Lack of detection skills may be a result of the norms of polite interaction, a lack of ability to note and interpret relevant cues, and a reluctance to attribute dishonesty. With the help of books such as The Truth about Lying, however, attorneys may develop their skills at evaluating verbal and nonverbal communication in order to detect deception.
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Secession for Real Estate Attorneys

ON TUESDAY, OCTOBER 9, the Land Use Planning and the Environmental Law Subsections of the Real Property Section will present a program titled "Possible Secession of the Valley and Hollywood from the City of Los Angeles—What Does This Mean for Real Estate Lawyers?" At this program, distinguished speakers will discuss the effect of possible secession on real estate lawyers and address such questions as: Will secession result in increased work? Different types of work? What about issues of conflicts of interest? What about the interim versus the long-term effects? The program will take place at the New Otani Hotel, 120 South Los Angeles Street, Downtown. Valet parking at the hotel costs $8 and self parking $4. On-site registration will begin at 11:45 A.M. and lunch at noon, with the program continuing from 12:30 to 1:30 P.M. The event code number is 803LJ09.

CLE+PLUS members may attend for free (meal not included). Prices below include meal.

$45—Real Property Section members
$55—other LACBA members
$65—all others, including all at-the-door registrants
1 CLE hour

Persuasive Legal Writing

ON WEDNESDAY, NOVEMBER 6, the Association will present a seminar on legal writing. Speaker Daniel U. Smith is a highly experienced certified appellate specialist with an enviable record of favorable results. Participants will be able to learn to write in a style that captures the court’s attention and study the style of America’s greatest lawyers and writers, including Thomas Jefferson, Abraham Lincoln, Henry David Thoreau, Walt Whitman, Ernest Hemingway, and E. B. White. Learn how to lead the court to your result, write shorter briefs more easily and more quickly, and increase your chances of winning.

This course advocates brevity, simplicity, and clarity in word choice, punctuation, and the structure of sentences and paragraphs. The course also shows how to structure a persuasive argument and reviews the key steps for drafting and editing. The seminar will take place at the LACBA/Lexis-Nexis Publishing Conference Center, 281 South Figueroa Street, Downtown, from 6 to 9:15 P.M.; the registration code number is 7094K06.

$90—CLE+PLUS members
$160—other LACBA members
$195—all others
3.25 CLE hours
Educating Clients on ADR Alternatives

The Rules of Professional Conduct should require lawyers to inform clients about ADR

In the early 1990s, alternative dispute resolution emerged as an essential component of a litigator’s practice. ADR has mushroomed in importance ever since, and one of the challenges to the State Bar of California’s Commission for the Revision of the Rules of Professional Conduct is to update the rules in light of the emergence of ADR. ADR is an integral part of law practice, but there are still a substantial number of attorneys who, as a result of ignorance or personal taste, have resisted it. I therefore propose that California adopt a rule stating: “A lawyer shall inform clients of the advantages and disadvantages of reasonably available means of dispute resolution and abide by their decision whether to pursue one of them.”

The decision about whether to pursue ADR is very important for the client. ADR methods are likely to resolve the case more quickly, save the client time and attorney’s fees, reduce hostility between the parties, generate creative resolutions of issues, yield a more stable resolution of the dispute, and protect the client’s privacy. While ADR is not always better than litigation, the client is likely to bear most of the risks of the choice. For example, the lawyer may not realize how important it is for the client to maintain an amicable relationship with the opposing party. Studies have shown that clients are consistently more satisfied with ADR than with litigation and attorney negotiation. ADR increases clients’ feelings of self-worth as they take more control of their lives.

In addition, the lawyer and client are likely to have a conflict of interest over this issue. Pursuing ADR may conflict with the lawyer’s interest in high attorney’s fees or the lawyer’s desire to maintain a “hardball” image.

Clients and Patients

Fifty years ago, courts began to impose liability on doctors for the failure to allow patients to choose alternatives to surgery. Underlying this cause of action was support for patient autonomy against doctor paternalism. The patient is the person who bears the greatest consequences of the choice. Legal clients have similar interests in being able to choose ADR over litigation. What surgery is to the patient, litigation is to the client. Both surgery and litigation carry risks and potential benefits. ADR is not always better than litigation, any more than nonsurgical medical care is always better than surgery. But ultimately who should decide?

In fact, the argument for allowing clients to choose whether to pursue ADR may be even stronger than the argument for allowing patients to choose medical procedures, because medical decisions are likely to be more technical and complicated than the decision to opt for ADR instead of litigation. An attorney disciplinary rule requiring the lawyer to present the client with the option of pursuing ADR should be based on client dignity, which is the basis for the duty of doctors to obtain informed consent from patients. To the fullest extent possible, individuals should control decisions that affect them.

Unfortunately, the new ABA Model Rules are ambiguous on this issue. A Comment to Model Rule 2.1 states, “[W]hen a matter is likely to involve litigation, it may be necessary…to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.” Some states are ahead of the ABA on this issue. Arkansas, Colorado, Georgia, Hawaii, and Ohio have rules requiring lawyers to discuss ADR options with clients. Massachusetts, Michigan, Pennsylvania, and Virginia have rules requiring lawyers to present ADR options to clients. There is precedent in California for requiring lawyers to inform clients about their ADR options. In Blanton v. Womancare, the California Supreme Court held that a lawyer may not opt for arbitration against the client’s wishes. In a concurring opinion, Chief Justice Rose Bird stated, “An attorney should explain to the client the strategic considerations that determine whether a jury trial or some other form of dispute resolution should be exercised.”

Some lawyers have expressed a concern that a rule requiring lawyers to present ADR options to clients would subject lawyers to malpractice claims if they failed to discuss ADR with clients. Ideally, this should not be the concern of the bar. The bar should be concerned with protecting clients and encouraging competent legal representation. I do not believe that my proposed rule would lead to many malpractice claims. If the bar adopts such a rule, lawyers will develop boilerplate language that explains ADR options in clear, simple terms, and they will include this information in their client agreements. Clients will be able to look over their agreements at their leisure. Indeed, many lawyer-client agreements already include this type of provision.

The State Bar should amend the California Rules of Professional Conduct to require lawyers to present ADR options to clients. The decision to pursue ADR is important to clients and is likely to be within their competence, and the lawyer is likely to have a conflict of interest on this issue.

Closing Argument

By Robert F. Cochran Jr.

1 For a fuller discussion of the themes presented in this article, see Robert F. Cochran Jr., Professional Rules and ADR, 4 Fordham Urb. L.J. 895-914 (2001).
3 Id. at 656.
Charitable Gift Annuity
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