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Choice of Law Analysis page 37

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David L. Brandon, senior counsel at Morris, Polich & Purdy, LLP in Los Angeles, practices the litigation of professional liability and appellate matters. He is also adjunct professor of appellate law at Loyola Law School. In “Burning Issues,” he explores the concerns that practitioners must address in litigation involving burning limits insurance policies. His article begins on page 30.

Cover photo: Tom Keller

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<th>Years w/this Firm</th>
<th>Number of Attorneys</th>
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2. Please tell us what percentage of Billable Hours— not income--you spend in the following areas of practice (please express in whole numbers):

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<td>Workers’ Compensation - Defense</td>
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| Current Policy Expiration Date ______/_____/______ |
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In every profession, it is natural that the skill levels and competence of those involved will vary to some degree. We hope, though, that professions such as law and medicine, which have high thresholds and rigorous education requirements for admission and continued practice, have practitioners with nearly universal strengths.

This hope, of course, is routinely dashed. We see it in court, as judges impose monetary sanctions for discovery shortfalls or gamesmanship. We see it in dealings with opposing counsel, who lose documents or other evidence that they hold for their clients. How often do we ask ourselves, “How did that person ever pass the bar?”

As an arbitrator for the Los Angeles Superior Court, I unfortunately see far too many attorneys do their clients a great disservice by simply not preparing their cases. On the date a case is set for arbitration, the attorneys should be as ready as they would be on the first day of a trial. While preparation should be a given, I routinely experience the polar opposite in the arbitrations that I handle, with some attorneys not having a basic understanding of the issues in their cases or even knowing the names of their clients and witnesses.

Though I could present myriad examples of unprepared attorneys, two will suffice given space limitations. In one case, a party did not speak English, to the apparent surprise of her lawyer. The attorney, of course, had not made any arrangements to have an interpreter at the arbitration, and the arbitration would have ended before it could even start had a staff member in my office not been able to provide rough translations. In another case, I agreed to conduct the arbitration at 8 A.M. due to an attorney’s conflict during regular business hours. It was not until after both parties’ attorneys and I arrived that the attorney with the conflict advised that his client had not cleared the earlier time and intended to request de novo review by the trial court.

When one side is unprepared, the arbitration becomes a sideshow, with the attorneys using the arbitration merely to learn about the other party’s case, rather than to obtain an accurate evaluation by the arbitrator of the probable outcome of the case at trial. Thus they use the arbitration merely to learn about the other party’s case, rather than to obtain an accurate evaluation by the arbitrator of the probable outcome of the case at trial. When one side is unprepared, the arbitration process seriously since they have the option to request de novo review by the trial court. Thus they use the arbitration merely to learn about the other party’s case, rather than to obtain an accurate evaluation by the arbitrator of the probable outcome of the case at trial. When one side is unprepared, the arbitration process is often predetermined. When neither side is prepared, the result is a waste of everyone’s time.

There are hundreds of attorneys in Los Angeles whose service as volunteer arbitrators helps ease the enormous burdens on the courts. The task, which is difficult enough given the time commitment, becomes nearly impossible when the participants are not prepared. For those who plan to handle their next arbitration by the seat of their pants, they should instead do their clients and the arbitrator a favor: Pass the case on to someone else who can give the matter the attention it warrants.
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**Practical Implications of HIPAA**

**How the privacy of personal health information concerns lawyers and law firms**

In 1996, the Health Insurance Portability and Accountability Act (HIPAA) was enacted to establish uniform standards to prohibit disclosure of protected health information (PHI), which is information relating to the physical or mental health information of an individual. Privacy regulations established under HIPAA include: limits on the nonconsensual use and release of PHI, rights of patients to access their medical records and to know who has accessed them, restrictions on disclosure of PHI to the minimum need and intended purpose, and criminal and civil sanctions for improper disclosure.

The act mandates that “covered entities,” which are defined as healthcare providers, health plans, employers, and healthcare clearinghouses, comply with its privacy measures. It is important to note that pharmaceutical, biotechnology, and medical device companies are not covered entities under the act. Although law firms are not directly covered entities, they are obliged to implement safeguards for the protection of PHI that pertains to or is received by a client. Law firms should document their privacy protection measures in a Business Associate Agreement with any covered entity. This agreement effectively imputes the duties of a covered entity regarding the protection of PHI to the law firm. Lawyers and law firms that are not compliant with the act may be subject to liability for penalties and fines for improper disclosure of PHI—not to mention potential loss of clients, detrimental consequences to reputation, and potential litigation.

To gain compliance, law firms must create and execute policies and procedures that address: access to, and release of, medical records, a mechanism for privacy complaints, internal sanctions for improper disclosure, access, restrictions, and security pertaining to computers, accounting of disclosures and recording unauthorized disclosures, fax precautions, telephone responses, transportation of charts and data, and disposal of medical records.

Additionally, law firms should train their lawyers and staff about the mandates of HIPAA and the confidentiality of PHI. Administrators, professional staff, nonprofessional staff, and senior management will require different approaches and levels of information.

Reasonable precautions include, for example, encryption of electronic mail containing PHI. When faxing PHI, personnel should call ahead to make sure someone will be at the receiving end, and someone must remain at the fax machine until the transmission is completed. There should be no discussion of healthcare cases by name outside the office without a valid business purpose. At the conclusion of a case, drafts of reports to clients that include PHI should be shredded. Access to files must be controlled to ensure that PHI is kept confidential. For example, access to file room shelves should be restricted, distribution of files must be limited, and there should be restrictions on keeping multiple files in offices.

HIPAA also affects the discovery of medical information. Although most courts in California liberally allow discovery of medical records on the grounds that the plaintiff who places his or her medical condition in issue waives the right to privacy, HIPAA may narrow the scope of medical information to that which is consistent with HIPAA’s policy of “minimum necessary.” Thus, only PHI expressly called for by the subpoena or request may be disclosed or made available to the requesting party. HIPAA regulations specifically provide for the continued use of subpoenas to obtain medical records with a court order. However, a subpoena does not need to be accompanied by a court order if the medical provider receives appropriate documentation concerning assurances of confidentiality from the party seeking the information. That is, the requesting party must ensure that 1) a good faith effort was made to provide written notice to the individual, 2) the notice included sufficient information about the proceeding in which the PHI is requested to permit the individual to raise an objection, and 3) a written statement that either the patient did not object in a timely manner or that any objection was resolved in favor of disclosure.

It should be noted that the HIPAA requirements are consistent with California civil practice. Specifically, in California, the requesting party must serve a “Notice to Consumer” with a subpoena, allowing individuals (or their counsel) 10 days to object to the production of certain information. Therefore, although HIPAA has added a requirement to be met prior to disclosure of medical records, this added requirement does not affect California legal practice, since it is already embodied in the California code.

The HIPAA privacy rule is comprehensive, but it is important to remember that its hundreds of pages of regulations may be distilled into a one-sentence theme: Do not use or disclose personal health information without a valid business purpose.

---

1 The author would like to acknowledge the contributions of David M. Humiston and Kenneth N. Rashbaum, partners in the Los Angeles and New York offices, respectively, of Sedgwick, Detert, Moran & Arnold LLP. See 42 U.S.C.A. §1320d-2(a)(1).
3 45 C.F.R. §164.502 (b)(1); 45 C.F.R. §164.512.
4 45 C.F.R. §164.512(e).
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Clarifying the Confidentiality of Mediation Evidence

Mediation, virtually nonexistent only 25 years ago, has become an accepted part of the legal process. Courts regularly send cases to mandatory mediation, and disputing parties routinely agree to voluntary mediation. Compared to litigation, mediation offers many benefits to parties, the most important of which is the ability to control their own destiny. When a case is submitted to a judge, a jury, or an arbitrator, the parties cannot control the outcome. In a mediation, however, no deal can be reached unless all parties agree. The prospect of determining their own fate and limiting attorney’s fees and costs has attracted litigants to mediation in droves.

Still, mediation is a relatively new aspect of legal practice, and many of the rules of mediation are not yet certain. This is especially true in the important area of mediation confidentiality.

Parties to a mediation usually are asked to sign a confidentiality agreement. Typically, the agreement cites sections of the California Evidence Code that seemingly assure the parties that statements they make during the mediation, or documents that they prepare for the mediation, are strictly confidential and cannot be used in future litigation. However, a thorough review of these code sections reveals that this assurance may be somewhat less than ironclad. Moreover, the case law in this area has been marked by confusion, with the result that the California Supreme Court has decided to grant review in Rojas v. Superior Court. This case, which most likely will be decided this year, hopefully will provide a complete explanation of the Evidence Code provisions on mediation confidentiality, with a specific focus on the interplay between Evidence Code Sections 1119 and 1120, and thus give guidance to lawyers and their clients on what can be said and produced during mediation without risk that the same evidence will reemerge to haunt the clients in future litigation.

Effective January 1998, various laws pertaining to mediation that had been spread across seven different California codes were amended and brought together in one place—Evidence Code Sections 1115 to 1128. These code sections expressly address the issue of mediation confidentiality. In 2001, the California Supreme Court made it clear that there is an important policy behind these Evidence Code provisions. Citing both legislative history and a law review article, the court explained that the purpose of confidentiality is to promote a frank and candid exchange of views, both between the parties and between a party and the mediator. If the parties worry that a statement made or a document introduced at the mediation could be discoverable or admissible in a later proceeding, the goal of candor and frankness will be lost. When a party seeks to invade mediation confidentiality, a court must consider whether its decisions in this area will encourage or thwart the clear policy underlying mediation confidentiality in California.

Section 1119 states, in relevant part:

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. Section 1119(b) extends the same rule to a writing that is “prepared for the purpose of, in the

Guidance is needed on the relationship between Evidence Code Sections 1119 and 1120

Joel M. Grossman is an attorney who is a full-time mediator and arbitrator affiliated with ADR Services, Inc., in Los Angeles.
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course of, or pursuant to, a mediation or a mediation consultation.” Finally, Section 1119(c) broadly states that “[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.” The last word of the section is not defined.

Evidence Code Section 703.5 provides that judges, arbitrators, and mediators are not competent to testify in any subsequent civil proceeding as to “any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding.” Exceptions are provided only for statements or conduct related to crimes, civil or criminal contempt, conduct that could give rise to lawyer disciplinary actions, or disqualification of the neutral. In other words, in most cases, statements made by parties at a mediation are inadmissible, and mediators themselves are not permitted to testify about what transpired during the mediation.

Section 1121 prohibits the mediator, or anyone else, from submitting to a court or adjudicative body any “report, assessment, evaluation, recommendation, or finding of any kind by the mediator.” The sole exception is a court-mandated report that states only whether an agreement was reached at the mediation.

The Evidence Code gives a broad promise of confidentiality in Sections 1119 and 1121 and underscores that promise with Section 703.5, but a good portion of that promise appears to be taken away in Section 1120.

Subsection (a) of that section provides that:

Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

Thus a party cannot invoke Section 1119 as a tactic to protect statements or documents that would otherwise be fully discoverable in the course of litigation. This is fair and reasonable. But is the language of Section 1120 so broad that it exposes to future production all or even most of what is protected by Section 1119? This question apparently will be answered this year by the California Supreme Court in Rojas.

Case Law before Rojas

In two cases decided before Rojas, a state court of appeal and a federal district court held that a mediator could be required to testify. Both cases have been criticized in subsequent decisions and limited to their specific and unusual facts. While the decisions have not been overruled, they should be relied on with great caution, if at all.

In the first, Rinaker v. Superior Court, the state court of appeal created a limited exception to Section 703.5’s ban on mediator testimony. The case involved a civil lawsuit and juvenile delinquency proceedings. At the mediation in the civil case, the complaining witness told the mediator that he did not actually see the accused commit the alleged acts. The mediator was subpoenaed to testify about this key fact at the juvenile delinquency hearing. The Rinaker court held that even though a juvenile delinquency hearing is civil and therefore a “noncriminal proceeding” as that term is used in Section 1119, nevertheless constitutional due process rights required that the accused juvenile be permitted to impeach his accusers. The court noted that mediation confidentiality is an important value, but it must yield to “the constitutional right to effective impeachment.” The California Supreme Court in Fogate Homeowners Association, Inc. v. Bramalea California, Inc. agreed with the court of appeal, noting that Rinaker “is consistent with our past recognition that of the United States Supreme Court that due process entitles juveniles to confrontation and cross-examination.” Thus the mediator in Rinaker was properly ordered to testify.

In the second, Olam v. Congress Mortgage Company, a mediator’s testimony was compelled in a federal case decided by a magistrate judge. The issue in Olam was whether the party who defaulted on a loan had been competent to enter into a settlement that another party later tried to enforce. The plaintiff had waived confidentiality, and the defendant agreed to a limited waiver of confidentiality. The magistrate judge, following Rinaker, sought to balance the parties’ interest in having the mediator testify on the competency issue versus the state’s interest in maintaining confidentiality, as expressed in the Evidence Code. Ultimately the judge allowed the mediator to testify. The judge deemed the mediator’s testimony to be crucial to the case’s being decided correctly.

The trial judge in Fogate faced different circumstances when deciding whether to accept a mediator’s report, contrary to Evidence Code Section 1121. In this complicated case, the trial judge had appointed a retired judge to serve as both special master and mediator. When one of the parties failed to attend hearings and bring appropriate parties to the mediation, the other party moved for sanctions. The mediator then wrote a report recommending sanctions, which was considered by the trial court.

The supreme court in Fogate noted that the case represented the “intersection between court-ordered mediation, the confidentiality of which is mandated by law...and the power of a court to control proceedings before it by imposing sanctions on a party or the party’s attorney for statements or conduct during mediation.” The key issue in the case was whether the language of Evidence Code Section 1121 prohibiting a court from considering any report or finding by the mediator applied to the sanctions report.

The supreme court provided the clearest possible answer to this question: Mediation confidentiality is absolute unless the Evidence Code provides an exception. Thus, the trial judge should not have considered the mediator’s report. The supreme court recognized that with a court-ordered mediation, public policy dictates that all parties participate in good faith and may support sanctions against parties who do not. Nevertheless, the court stated that “the Legislature has weighed and balanced the policy that promotes effective mediation by requiring confidentiality against a policy that might better encourage good faith participation in the process.”

Two years after Fogate, the court of appeal decided Eisendrath v. Superior Court, in which a party sought the testimony of a mediator. In Eisendrath, a couple reached a mediated divorce settlement. The parties’ written settlement agreement specified that spousal support would be paid for seven years, even if the former wife remarried before the seven years elapsed, and that the former wife, in her sole discretion, could agree that spousal support should be lessened or stopped altogether after she remarried. When the former wife remarried within the seven-year period, the former husband contended that the settlement agreement had been drafted incorrectly. According to the former husband, the settlement agreement actually provided that in the event of his former wife’s remarriage, it was in the former husband’s sole discretion to determine whether spousal support should continue at the same level as it began. He contended that this was agreed to in conversations between the parties outside the presence of the mediator and that the written agreement incorrectly reversed the pronoun in the key provision regarding sole discretion from his to her. Based on this contention, he filed a motion to correct the spousal support agreement to clarify that spousal support would continue only if he so chose.

In response, the former wife contended that the document accurately reflected the parties’ agreement, and to support her position she sought to depose the mediator. She contended that mediation confidentiality...
under the Evidence Code is not absolute and instead should be viewed as a privilege, similar to the attorney-client privilege or other privileges set forth in Evidence Code Sections 910 et seq. The former wife stated that she was willing to “waive” this “privilege” and, as a result of seeking to correct the spousal support agreement that had been reached by mediation, the former husband also had impliedly “waived” the mediation “privilege.” Thus the statements made during the mediation, and the testimony of the mediator, were admissible. The former husband responded by requesting a protective order to bar the mediator’s deposition or any other evidence from the mediation, except for the conversations outside the mediator’s presence between himself and his former wife that were the basis of his motion to correct the support order. The trial judge denied the former husband’s motion for a protective order and declared that an in camera hearing would be held on the issue of whether or not the mediator could testify.

The court of appeal granted the former husband’s petition for writ of mandate and reversed the trial judge’s decision. The court soundly rejected the former wife’s theory that the mediation confidentiality provisions are analogous to the lawyer-client privilege and can be impliedly waived. The waiver provisions in Sections 910 et seq. “by their plain language, are limited to the particular privileges enumerated therein.”

The court also rejected the former husband’s view that conversations between him and his former wife, which took place outside the presence of the mediator, were admissible. Reviewing Sections 1119 and 1121 of the Evidence Code, the court held that these provisions “render confidential any communications between mediation participants before the end of the mediation that occur outside the mediator’s presence, provided that these communications are materially related to the mediation.” The court specifically noted the broad language of Section 1119, which refers to statements made not only “in the course of” but also “pursuant to” a mediation. Thus, so long as the mediation has not ended, statements made between the parties that are related to the subject matter of the mediation will be deemed confidential.

The court’s final ruling concerned the former wife’s request to depose the mediator. The trial court had relied on both Rinaker and Olam in determining that the mediator might be compelled to testify notwithstanding the provisions of Section 703.5. The court of appeal held that the mediator would, in fact, be incompetent to testify under Section 703.5. The court had little trouble distinguishing Rinaker and Olam because, unlike Rinaker,
the Eisendrath case did not raise any constitutional due process issues, and unlike Olam, there were no executed waivers of the confidentiality rights. The Eisendrath court further noted that "given the forceful rejection of nonstatutory exceptions to mediation confidentiality requirements in Foxgate, we conclude that Rinaker and Olam should be closely limited to their facts." Thus, absent rare circumstances, a mediator will not be deemed competent to testify regarding any aspect of the mediation.

These cases all seek to interpret the breadth of the confidentiality provisions of Sections 1119 and 1121. But what about the Evidence Code’s counterweight to these sections, Section 1120, which declares that evidence that is otherwise admissible or subject to discovery cannot be made inadmissible simply by being introduced at a mediation? Does Section 1120 take away the protections that the legislature provided in Section 1119? Unlike Section 1119, Section 1120 had not been judicially interpreted prior to Rojas. This left the trial and appellate courts in Rojas with tough decisions to make without precedential guidance.

The Rojas Dilemma

A review of the facts of Rojas, especially the procedural context of the case, is crucial for an understanding of what the supreme court’s decision may mean for other mediated cases. Rojas is the second of two related cases involving a dispute over building defects. In the first action, the owners of an apartment complex sued the builders of the complex regarding construction defects that caused the intrusion of water and led to toxic mold. Eventually, the lawsuit between the owners and builders was settled.

In Rojas, the tenants of the apartment complex brought suit against the owners and the builders. The tenants claimed that the building defects, including the resultant mold, had caused them health problems. The plaintiffs turned over to the defendant builders a full report of their experts’ investigation of the building defects, including test data and hundreds of photographs. Eventually, the lawsuit between the owners and builders was settled.

Invitation for Public Comment on the Reappointment of Federal Public Defender Ms. Maria Stratton

The United States Court of Appeals for the Ninth Circuit is conducting an evaluation of the performance of the Federal Public Defender (FPD) for the Central District of California, Ms. Maria Stratton. The Court conducts this evaluation in order to determine if the incumbent FPD should be appointed to an additional four year term without a competitive recruitment. Any persons having knowledge of the performance of Ms. Stratton and/or her respective staff are invited to submit comments. Anonymous responses will not be accepted. However, the identity of all respondents will be kept confidential except to those with a need to know.

All comments must be received no later than Friday, May 7, 2004 in order to be considered. Comments may be submitted via mail or fax to the following address:

Office of the Circuit Executive
ATTN: FPD Evaluation, Central District of California
U.S. Courts for the Ninth Circuit
PO. Box 193939
San Francisco, CA 94119-3939
Fax: (415) 556-6179
the sought-after materials. The plaintiffs next filed a more limited motion seeking production only of “raw evidence,” such as the photographs, and not the reports or impressions of the experts. The trial court also denied this motion to compel, although the court expressed concern that Section 1119 could be used by a clever litigant to make otherwise discoverable evidence “disappear” by producing the evidence at a mediation. The plaintiffs filed a petition for a writ of mandate, which was granted by the court of appeal.

The court of appeal reversed the trial court decision and issued an opinion ordering production of the “raw evidence,” such as the test data and photographs. The court emphasized that the confidentiality granted by Section 1119 must be read in tandem with Section 1120, which states in no uncertain terms that evidence that is otherwise admissible or subject to discovery outside the context of a mediation “shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation.” Thus, the court of appeal clearly shared the concern of the trial judge that a litigant could bury discoverable evidence merely by producing it at a mediation—a result that, according to the court, is exactly what the legislature meant to prevent when it balanced Section 1119 with Section 1120. The court explained that the mediation confidentiality established by the Evidence Code is meant to protect the negotiations and communications that take place during a mediation—not what the court referred to as “pure evidence.”

In reaching its conclusion, the Rojas court drew an analogy to the attorney work product doctrine. It held that to the extent raw evidence can be separated from the analysis of the attorney or an expert, it is discoverable. Just as parties cannot use the attorney-client privilege to bury potentially damaging documents merely by sending the documents to their attorneys, they also cannot invoke the protection of Section 1119 to shield raw evidence during litigation simply by providing it to the opposing side at a mediation. The court was influenced by the fact that the Rojas plaintiffs had no alternative means of obtaining evidence of construction defects that was obviously relevant to their case.

The California Supreme Court has a unique opportunity to clarify the scope of mediation confidentiality and to let parties to mediations know the extent to which Section 1120 limits Section 1119. Many of those who are regularly involved with alternative dispute resolution are concerned about Rojas. Some are worried that if the supreme court affirms the court of appealed decision, it could have a chilling effect on the use of mediation in California.
the ruling will open a huge hole in the wall of protection provided by mediation confidentiality and discourage parties from engaging in the kind of candid exchange that helps facilitate settlement. Others take the opposite view, warning that unless the decision is affirmed, the process of mediation will become a tool for hiding unfavorable evidence, and no one will voluntarily participate in mediation. Thus, each side in the debate views the outcome as potentially destroying or at least severely limiting the practice of mediation as it is now known.

Both sides in this debate, however, overstate the potential fallout from the supreme court’s decision. First, there can be no question that mediation is here to stay. It has proven itself as an extremely effective process that provides litigants with an excellent alternative to judicial adjudication, and it will not be devastated by an affirmance or reversal of the ruling will open a huge hole in the wall of protection provided by mediation confidentiality and discourage parties from engaging in the kind of candid exchange that helps facilitate settlement. Others take the opposite view, warning that unless the decision is affirmed, the process of mediation will become a tool for hiding unfavorable evidence, and no one will voluntarily participate in mediation. Thus, each side in the debate views the outcome as potentially destroying or at least severely limiting the practice of mediation as it is now known.

Both sides in this debate, however, overstate the potential fallout from the supreme court’s decision. First, there can be no question that mediation is here to stay. It has proven itself as an extremely effective process that provides litigants with an excellent alternative to judicial adjudication, and it will not be devastated by an affirmance or reversal of the decision. Second, the unusual procedural context of the Rojas makes the upcoming supreme court decision probably inapplicable in most cases. The documents at issue were produced at a mediation with the Rojas plaintiffs. In fact, the Rojas court was careful to note that obtaining evidence from the prior mediation was the plaintiffs’ only way to obtain the evidence; in a typical case, such evidence would be produced through the normal discovery process.

How should Rojas be decided? Given the supreme court’s strongly stated view in Foxgate that there should be no exceptions to confidentiality other than those in the Evidence Code, the court should take the opportunity to clarify that Section 1120 applies only to documents or statements that would have existed if no mediation had taken place. Thus, if evidence such as the photographs or test results at issue in Rojas would have been created in the ordinary course of litigation, such evidence should be discoverable under Section 1120, and it cannot be immunized merely by being produced at a mediation. But if the evidence was truly created solely for use in a mediation and would not have come into existence but for the mediation, Section 1119 should control and the evidence should remain confidential. The issue of whether the evidence exists solely because of the mediation is a question of fact to be determined by the trial court.

In sum, while the supreme court’s ruling in the Rojas case is and should be eagerly awaited by all who seek clarity regarding the law of mediation confidentiality, the decision, whichever way it goes, is not likely to stop the mediation juggernaut. The benefits of mediation are so significant that it will continue to thrive as the best alternative to costly and uncertain litigation.

2 Id. at 9.
5 Id. at 167.
6 Foxgate, 26 Cal. 4th at 10.
8 Id. at 11.
9 Id. at 11.
11 Id. at 363.
12 Id. at 364 (emphasis in original).
13 Id. at 361.
15 Id. at 108.
16 Id. at 110

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Drafting Protective Orders for Confidentiality of Documents

By Michael H. Strub Jr.

New Rules of Court

Historically, trial courts have routinely entered protective orders, based on stipulated confidentiality agreements between the parties, that require that documents the parties designate as confidential be filed under seal. The practice of entering these stipulated protective orders has served the interests of disclosing parties (who want to preserve the confidentiality of their information) and the recipients (who want to review and use the information in discovery but generally have no interest in disseminating it to the public). In NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, however, the California Supreme Court held that this practice was not consistent with California’s open court statute or the First Amendment.

Following this decision, the Judicial Council adopted Rules of Court—notably, Rules 12.5, 243.1, and 243.2—that prohibit courts from simply endorsing the parties’ agreement to keep information out of the public record. In proceedings other than discovery disputes—which are not within the ambit of the new rules—before sealing a record, the trial court must make specific findings that there is an overriding interest in sealing the record and that there is a substantial probability that the disclosing party will be prejudiced if the sealing order is not entered.

The newly adopted Rules of Court set out a procedure that parties must follow before submitting records under seal. The procedure requires that the party seeking to file documents under seal also file, simultaneously with its substantive motion, a noticed motion requesting that the record be sealed. This procedure assumes that the party submitting the record is the party that designated it as confidential. In many cases, the party receiving the confidential record may have little incentive to file a sealing motion or argue forcefully that the record be sealed.

The new rules may surprise the unwary litigant who produces confidential information with an expectation that a stipulated protective order will ensure its secrecy. The perspectives of parties and those of courts on whether information is truly secret are often vastly different, and this fact should guide parties in deciding whether to challenge discovery demands for confidential information. Parties may need to be more aggressive in asserting the trade secret privilege to avoid production rather than rely on the existence of a stipulated protective order to ensure that the information is kept out of the public record.

The Code of Civil Procedure authorizes courts to enter a protective order, providing that “a trade secret or other confidential research, development, or commercial information not be disclosed, or be disclosed only to specified persons or only in a specified way.” The statutory guidelines for determining whether a protective order should issue in a criminal or civil action are found in Evidence Code Sections 1060 and 1061.

In most cases, a court’s protective order relating to confidential information is based on an agreement that has been negotiated and executed by the parties. Stipulated protective orders set forth the framework within which the parties—and, depending on the terms of the agreement, nonparties—may disclose confidential and proprietary information during the litigation. The stipulated protective order also determines the process by which confidential and proprietary information can be filed with the court.

In the past, courts encouraged these agreements to the extent that they balanced the competing interests of open discovery and legitimate privacy. These agreements also increase the efficiency of pretrial discovery. Frequently, however, there is a disparity between the discovery burdens of the parties, and, as a result, a disparity between their interests in preserving the secrecy of disclosed information. An individual plaintiff may have few if any documents to produce and little interest in preserving the confidentiality of the documents he or she has, while an institutional defendant may have voluminous documents in its possession and serious privacy concerns about the information in those records. In these situations, the party that is receiving most of the confidential information will seek a less comprehensive, less burdensome agreement, while the party that is designating most of its discovered material as confidential will seek a more comprehensive agreement with more onerous restrictions on disclosure.

The receiving party will, however, recognize that acceding to the designating party’s demand for a more comprehensive protective order can be in the receiving party’s interest. In the absence of a protective order, the designating party can invoke the trade secret privilege and refuse to produce documents, forcing the receiving party to file a motion to compel their production. But if a protective order has been entered, the designating party’s leverage in refusing to disclose relevant information may be diminished. Moreover, while the receiving party will have a strong interest in ensuring that it is able to disclose relevant information to percipient and expert witnesses, the receiving party’s interest in the portions of the protective order governing the filing of documents under seal with the court is generally limited to ensuring that the administrative burdens imposed on it are minimal.

A New Balance of Interests

Several appellate decisions and recently enacted Rules of Court, however, have imposed...
significant restrictions on the ability of parties to agree contractually on whether documents submitted to the court will remain under seal. In *NBC Subsidiary (KNBC-TV)*, the California Supreme Court established guidelines for whether trial court records and proceedings can be closed to the public. Following the decision in *NBC Subsidiary (KNBC-TV)*, the Judicial Council adopted California Rules of Court 243.1 and 243.2 to “provide a standard and procedures for [trial] courts to use when a request is made to seal a record.” And for reviewing courts, the Judicial Council promulgated rule 12.5. “As in the case of rules 243.1 and 243.2, rule 12.5 was adopted in response to the *NBC Subsidiary* decision.” Applying these rules, two recent decisions by the Second District have denied a party’s request to seal documents.

Litigants in cases involving confidential or proprietary information now face two significant questions. First, should the new Rules of Court be reflected in the stipulated protective order, and, if so, how? Second, how can a designating party be certain that information it produces with an expectation of confidentiality will not become part of the public record if a court should decide later that sealing of the information is not appropriate?

*NBC Subsidiary* involved a dispute between Sondra Locke and Clint Eastwood. After the jury was sworn, the trial court, concerned about the effect of press coverage on the jury’s deliberation, on its own motion issued an order closing all proceedings to the press and public that were held outside the jury’s presence. News organizations petitioned for a writ of mandate, which the court granted. Citing Section 124 of the Code of Civil Procedure, which provides that “the sittings of every court shall be public,” and relying on First Amendment jurisprudence from the U.S. Supreme Court, the California Supreme Court held that “two things” must occur before a courtroom proceeding in California is closed: 1) “[A] trial court must provide notice to the public of the contemplated closure,” and 2) the court must make specific factual findings that closure is warranted by applying four criteria:

1. There exists an overriding interest supporting closure and/or sealing;
2. There is a substantial probability that the interest will be prejudiced absent closure and/or sealing;
3. The proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and
4. There is no less restrictive means of achieving the overriding interest.

Those four criteria now appear, with different wording, in Rule 243.1 of the Rules of Court. Trial courts have broad discretion in applying the criteria.

Rule 243.2 sets out the procedures to be followed for filing a record under seal. Specifically, the “party requesting that a record be filed under seal must file a noticed motion for an order sealing the record” at the same time that the record is presented to the court. If necessary to prevent disclosure, the motion, any opposition, and any supporting documents must be filed in a public redacted version and lodged in a complete version conditionally under seal.” Practitioners should note that Rules 243.1 and 243.2 “do not apply to discovery motions and records filed or lodged in connection with discovery motions or proceedings.” This is a very important exception, as it means that most pretrial disputes will not be covered by these new obligations.

If a party is seeking to rely on its own

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An Order to Protect Confidential Material

The California Rules of Court do not clearly address the problem posed when a party relies on confidential information but is not the party that designated it as confidential. The following language in a protective order may resolve this issue. In this example, the information to be covered by the protective order is labeled Confidential Material. The party that produced the information is called the Designating Party, and the party that received the information is the Receiving Party.

1. Permission is hereby granted by the Court to file under seal documents marked “Confidential” in connection with discovery motions or proceedings (as defined in California Rule of Court (“CRC”) 243.1(a)(2)). A Party seeking to file such documents under such circumstances shall file such documents in sealed envelopes or other appropriately sealed containers on which shall appear a legend which provides substantially as follows:

**FILED UNDER SEAL**—The enclosed materials are subject to a Protective Order of the Superior Court of the State of California for the County of __________. This envelope may not be opened without court order by any person other than this Court, Court personnel, or counsel of record of the party filing these materials.

2. A Party seeking to lodge or file any document that contains Confidential Material with the Court in connection with a motion or proceeding governed by CRC 243.1 and 243.2 shall either: (a) file a motion to seal the record in accordance with CRC 243.2; or (b) comply with the provisions of Paragraph 3. Any motion filed pursuant to subparagraph (a) hereof must be made in good faith and must present facts and argument in support of the sealing. Otherwise, no Confidential Material may be used in such a way (including lodging or filing) that would permit it to become part of the public record without the Designating Party having the opportunity to move to seal the Confidential Material as provided in Paragraph 3.

3. Except as otherwise provided in paragraph 2, no Confidential Material shall be lodged or filed with the Court except as provided herein:

a. The Receiving Party shall provide five (5) court days advance written notice to the Designating Party, by hand delivery or facsimile, of its intent to file Confidential Material produced by the Designating Party. If the Confidential Material is contained in a document, the notice shall include the production number of the document. If the Confidential Material is contained in a written discovery response, the notice shall identify the response. If the Confidential Material is contained in deposition testimony, the notice shall identify the testimony by page and line number. In all other cases, the notice must identify and describe the Confidential Material to be filed with sufficient particularity such that the Designating Party will be fully able to present a case to the Court for the express findings enumerated in CRC 243.1(d).

b. The Receiving Party shall provide five (5) court days advance written notice to the Designating Party, by hand delivery or facsimile, of its intent to file Confidential Material produced by the Designating Party. If the Confidential Material is contained in a document, the notice shall include the production number of the document. If the Confidential Material is contained in a written discovery response, the notice shall identify the response. If the Confidential Material is contained in deposition testimony, the notice shall identify the testimony by page and line number. In all other cases, the notice must identify and describe the Confidential Material to be filed with sufficient particularity such that the Designating Party will be fully able to present a case to the Court for the express findings enumerated in CRC 243.1(d).

c. The Designating Party may, within four (4) court days of such written notice, file a noticed motion for an order sealing the Confidential Records.

d. The Receiving Party shall cooperate in good faith with the Designating Party in facilitating the Designating Party’s attempt to obtain a court order sealing the Confidential Records, including lodging the Confidential Material conditionally under seal as described in CRC 243.2. The foregoing notwithstanding, nothing contained herein shall prevent the Receiving Party from objecting to the designation of such material as confidential.

4. In the event that the Court denies a motion for an order sealing the allegedly Confidential Material, the Party seeking to file the Confidential Records may replace the “Conditionally Under Seal” copy of the Confidential Records with a copy not under seal, and such material shall no longer be deemed to be Confidential. —M.H.S. Jr.
confidential information in support of a nondiscovery motion, the obligations of Rule 243.2 and the procedures to be followed are clear. The movant must file the confidential information on which it intends to rely conditionally under seal and file with its papers a noticed motion requesting that the records remain under seal.22 If the court denies the motion to place the documents under seal, the designating party then can elect either to include the documents in the public record or to withdraw them from the public record and not to rely on them in connection with its motion.

This was the factual situation of two recent appellate court cases. In Universal City Studios, Inc. v. Superior Court,23 the defendant in the underlying case, Universal City Studios, filed a mandatae petition seeking to compel the trial court to seal various documents pertinent to an arbitration dispute. In support of its petition, the defendant lodged two documents under seal and filed a motion to seal the appellate records under Rule of Court 12.5(e). The court denied the defendant’s motion to file the documents under seal and returned them to the defendant, giving the defendant leave “to file any supporting documents it wishes; but they must not be lodged under seal.”24

Similarly, in Huffy Corporation v. Superior Court,25 the appellate court barred Huffy, a bicycle maker, from submitting evidence under seal in support of its mandate petition seeking to set aside an order denying its arbitration dispute. In support of its petition, the defendant lodged two documents under seal and filed a motion to seal the appellate records under Rule of Court 12.5(e). The court denied the defendant’s motion to file the documents under seal and returned them to the defendant, giving the defendant leave “to file any supporting documents it wishes; but they must not be lodged under seal.”26

Court, burden of filing the motion? How will a court that produced it and has no interest in keeping it from the public record or to withdraw the documents from being filed under seal, however, should guide counsel in making the decision whether to withhold confidential information that is within the gray area of discovery permitted by the Code of Civil Procedure.27 Once a document is disclosed to another party in the litigation, the stipulated protective order may not be enough to ensure that the document will stay out of public view. Once the receiving party relies on the document in a motion, the court may refuse to seal the record and strike the confidentiality designation. It may be in the client’s best interest, therefore, to assert the trade secret privilege and resist disclosing this information in the first instance—assuming, of course, that the client has a good faith basis for asserting the trade secret privilege.

Often, a client’s views about the sensitivity of information may be different from those of the court, as Huffy and Universal City Studios illustrate. If a client cannot withdraw a document that is about to lose its confidentiality status, counsel may find themselves in the unenviable position of having to tell the client that the information that the client had expected would be seen only by the limited group of persons identified in the stipulated protective order will now be part of the public record. That conversation will be even more uncomfortable if the client believes that he or she did not have to provide the information at all.

Drafting the Protective Order

Proper drafting of a stipulated protective order, therefore, is important to avoid running afoul of client expectations. Rule 243.2 places certain burdens on a party seeking to file confidential information with the court. The “party requesting that a record be filed under seal must file a noticed motion for an order sealing the record,” accompanied by a “memorandum of points and authorities and a declaration containing facts sufficient to justify the sealing.”28 The party must lodge the record to be filed under seal “when the motion is made.”29 If the court denies the motion to seal, the clerk must return the lodged record to the submitting party and must not place it in the case file.30 Additional provisions of Rule 243.2 set forth the procedure for lodging the records and the process followed by the court if it grants the sealing request.

If the designating party is relying on its own confidential information, it files the sealing motion with its moving papers. Implicitly, the rules place the same burden on the receiving party. Thus, if the receiving party is filing a motion not involving discovery and intends to rely on confidential information from the designating party, the receiving party is required to file a noticed motion concurrently with its moving papers that asks that the confidential information be placed under seal. The receiving party, however, may be ambivalent as to whether the record is sealed and therefore may have little incentive to argue persuasively that the record should be sealed.31 It may, in fact, undermine the sealing request by stating simply that it is filing the motion because it is required to do so by the protective order but then arguing that it does not believe that the information is confidential. Thus it is in the interest of the designating party to draft a protective order that clearly states what obligations the parties are to assume in connection with sealing the record—in discovery disputes and non-discovery disputes.

In addressing the burden of sealing the record, the protective order can reflect one of the following three alternatives. One alternative is simply to draft the protective order so that it requires the receiving party to file the motion to seal the record. If the receiving party does not sufficiently address the grounds for the sealing request, the designating party would join the motion and file a supplemental brief explaining why the record should be sealed. There are two disadvantages to this approach. First, it puts the burden on the receiving party to file what, from its point of view, is an unnecessary brief. Second, it puts the designating party in the procedural posture of being an opponent to a motion it ostensibly supports and offers no opportunity for the designating party to respond should the receiving party, in its reply papers, further challenge the confi-
A second alternative is to seek the court’s approval to file the motion, opposition, and reply briefs simultaneously. This gives the designating party the opportunity to make the appropriate sealing motion, which may be filed along with the record that the designating party wants sealed. Because the designating party will have the full set of papers on which to base the sealing motion, it can identify with precision the portion of the record that it wants to be kept confidential. This alternative imposes the fewest administrative burdens on the parties. However, it alters the filing procedures described in the Code of Civil Procedure. It therefore may not be acceptable to the court. It also might not be acceptable to the court’s clerks, who will have less time to review the moving and opposition papers.

A third alternative is to give the receiving party a choice: make a good faith motion to seal the record or give the designating party advance notice of the information on which it intends to rely, sufficient to enable the designating party to prepare the motion. In most cases, this alternative is the one that is likely to be most acceptable to the parties if the court is not willing to accept the motion papers as a package. This alternative is constructive because it balances the interests and burdens of both parties. (See “An Order to Protect Confidential Material” on page 22 for a sample stipulated protective order form that incorporates this third alternative.)

If a receiving party does not believe the information was properly designated, it should challenge that designation at the time of production. This process, of course, also should be described in the stipulated protective order.

At some point, the Judicial Council may clarify the rules governing the procedure for sealing records. In the meantime, however, these issues must be considered and addressed at the time the stipulated protective order is being negotiated and before decisions are made concerning information to be disclosed.

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1. See, e.g., Huffy Corp. v. Superior Court, 112 Cal. App. 4th 97, 105 (2003) (“The respondent court’s order seals the entirety of any law and motion papers which refer to a document deemed confidential by the parties which is disclosed as part of the discovery process.”).
3. CODE CIV. PROC. §124.
6. CAL. R. CT. 243.1(a)(2) (Rules 243.1 and 243.2 “do not apply to discovery motions and records filed or lodged in connection with discovery motions or proceedings.”).
7. Huffy Corp. v. Superior Court, 112 Cal. App. 4th 97, 105 (2003) (The trial court’s sealing order that did not require the court to make factual findings beforehand failed to comply with the requirements of the NBC.
decision and Rules of Court 243.1 and 243.2); Universal City Studios, Inc. v. Superior Court, 110 Cal. App. 4th 1273, 1283 (2003) (setting forth the findings that trial courts must make before sealing records).

8 See Cal. R. Ct. 243.2.


10 The Evidence Code provides statutory guidelines for determining whether a protective order should issue to protect trade secrets during a criminal proceeding. See Evid. Code §§1060, 1061. In Stadish v. Superior Court, 71 Cal. App. 4th 1130, 1144-45 (1999), however, the court held that “the procedures called for in section 1061 have utility in a civil action in protecting the trade secret privilege provided in section 1060 and should be followed.” See also State Farm Fire & Cas. Co. v. Superior Court, 54 Cal. App. 4th 625, 650 (1997).


16 Cal. R. Ct. 243.1 advisory committee cmt. (brackets added).


18 Id.


20 NBC Subsidiary, Inc., 20 Cal. 4th 1178, 1182.

21 See id.

22 Id. at 1217-18 (footnotes omitted).


24 Cal. R. Ct. 243.2(b).


27 Cal. R. Ct. 243.2(b).


29 Id. at 1275. The court noted the axiomatic conclusion that the denial of the defendant’s sealing request would lead, inexorably, to a denial of the mandate petition: “Without the foregoing documents, the denial of defendant’s mandate petition is now foreordained because it will not be supported by the documents it seeks to have sealed.” Id.


31 Id. at 105.

32 Id.

33 Id.


35 Code Civ. Proc. §2017(a) (requiring that the information sought be “not privileged,” “relevant to the subject matter of the action,” and either admissible or “reasonably calculated to lead to the discovery of admissible evidence”).

36 Cal. R. Ct. 243.2(b)(1).

37 Cal. R. Ct. 243.2(b)(2).

38 Cal. R. Ct. 243.2(b)(4).

39 If it is in the recipient’s interest to have the material no longer designated confidential, it should file a motion challenging the confidentiality designation at the time of production.

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Protecting Trademarks under the Madrid Protocol

A new tool exists for U.S. businesses seeking trademark protection in other countries

International trademarks protect companies doing business abroad from foreign infringers who may profit from, and destroy, a company’s goodwill and reputation. While trademark protection in the United States is often achieved through common law rights and through Section 43(a) of the Lanham Act,1 foreign trademark protection is obtained primarily through actual registration of the marks. Thus, foreign trademark registration for U.S. companies may be the only route to significant protection in other countries. Foreign registration is expensive, and the procedures may be cumbersome. With the primary exception of the Community Trade Mark established by the European Union (EU), registration must be obtained in each country in which trademark protection is desired.

Since November 2, 2003, however, the Madrid Protocol has been available to U.S. businesses to simplify the process of registering trademarks abroad. The Madrid Protocol and its implementing legislation and regulations in the United States allow for the filing of a single international application through the U.S. Patent and Trademark Office (USPTO). This application is then transmitted electronically to the World Intellectual Property Organization (WIPO), an organization of the United Nations located in Geneva, Switzerland, that administers various intellectual property treaties. WIPO in turn forwards the application to the countries designated in the application. Each designated country examines the application according to its laws, subject to certain limitations imposed by the Madrid Protocol. The resulting trademark protection is a Madrid registration, known as an international registration, that is effective in those countries that did not raise timely objections.

The Madrid Protocol is part of the Madrid System, which consists of two companion treaties. One of the treaties, the Madrid Arrangement, has been in existence since 1891 but without the participation of the United States. The other treaty, the Madrid Protocol, was entered into in 1989.2 The United States deposited its instrument of accession to the Madrid Protocol on August 2, 2003, making the Madrid Protocol in force for the United States on November 2, 2003.3 The Madrid Protocol Implementation Act,4 which Congress passed in 2002, provides the implementing legislation, and the USPTO has promulgated rules of procedure.5

Most U.S. businesses could not take advantage of the older Madrid Arrangement because companies resident in nonmember countries are required to have a physical presence or a “real and effective industrial or commercial establishment” in a member country. The United States was not a member of the Madrid Arrangement,6 and even if a subsidiary corporation of a U.S. company was located in a Madrid Arrangement country, that was not adequate for the subsidiary’s parent company to file a Madrid Arrangement application. Nevertheless, the Madrid Arrangement has been an important part of the international trademark community in Europe and elsewhere. While the Madrid Arrangement does not extend to every country in the world, it has been effective in numerous countries considered to be major midrange export markets.

The more recent Madrid Protocol in many ways parallels the Madrid Arrangement procedure, though the membership of the two treaties is somewhat different. The Madrid Protocol makes cost-effective registrations available in more countries while taking into account limited business budgets. A U.S. business is now able to obtain a registration that can have validity currently in more than 62 countries, including those in Western, Central, and Eastern Europe, in Asia, and in other regions as well.7 This does not mean, however, that applications will regularly be processed through all the member countries, because the cost of that type of extensive filing, even under the Madrid Protocol, is still prohibitive and usually unnecessary. Clients and their counsel should pick countries of greatest interest. Significant cost savings will most likely be achieved because, instead of multiple national filings, the Madrid Protocol offers a single registration, and payment of agents and attorney’s fees abroad may be reduced if not eliminated. Companies seeking trademark protection abroad can be guided by a rule of thumb: If they are considering registering their marks in three or more countries, it is worthwhile to consider filing under the Madrid Protocol.

The Application Procedure

To understand the procedure for prosecuting an international registration, it is helpful to first understand the procedure for obtaining protection abroad using national filings and not the Madrid Protocol. A national trademark application is filed abroad by initiating a request with a foreign trademark attorney or agent in the nation in which protection is desired. Usually, that request is sent through trademark counsel in the United States, who sends a letter to the foreign trademark counsel. The foreign trademark counsel puts the application in a form satisfactory to the local government office, which registers the intellectual property rights. The trademark owner pays attorney’s fees for U.S. counsel and foreign counsel and government filing fees and registration fees.
usually on a country-by-country basis (the primary exception being the EU’s Community Trade Mark, for which a single fee is paid). Companies face additional fees if the application is rejected. As the number of countries chosen for trademark protection increases, so do the number of filings and attendant costs.

Under the Madrid Protocol, registration in many countries is achieved with one application, referred to as the international application under Article 3 of the protocol. For United States applicants, that international application must be based either on an existing U.S. registration or a pending U.S. application, which may be filed simultaneously. The usual Madrid Protocol application process will begin with the trademark attorney sending the international application to the USPTO. At press time, only paper forms were acceptable, and the forms must be mailed or delivered by hand. Ultimately, these forms will be available online, and the USPTO will require them to be transmitted via the Internet.

The application designates various countries for which “territorial extension of protection” is desired. Protection under the Madrid Protocol cannot be extended to the EU as a whole, because the EU is not currently a “contracting organization” and, therefore, designation of each of the EU countries for which protection is sought must be made on the application. However, it is anticipated that this year, the EU will become a member of the Madrid Protocol, thus permitting the EU to be designated in place of selected and named EU countries.

The cost of filing the international application is based upon the countries designated. The cost for designating each country varies but is not more than the cost of filing individual national applications in the designated countries, and is usually less. The fact that a very specific, standardized format is required in connection with Madrid Protocol applications means there will be fewer rejections of the applications at trademark offices abroad. At least in the initial stages of the process, foreign counsel may not be needed, though early advice of foreign counsel may still at times be desirable to reduce the likelihood of a rejection from a particular country at a later stage.

Within two months of filing with the USPTO, the international application is sent by the USPTO to WIPO in Geneva. WIPO then distributes the international application to the previously designated countries, which may examine the application with the option to object to registration within a fixed time following the WIPO notification. In the event the Madrid application is rejected by any of the designated countries, a response by a trademark attorney abroad will be necessary, and registration expenses will increase. The protection of what the Madrid Protocol refers to as an international registration will apply if the application is not opposed or rejected by any of the designated countries within 18 months of the WIPO notification.

An applicant can still receive an international registration even if one or more of the designated countries object to the registration. Rejection by a particular country will limit the territorial scope of the international registration but does not affect the registration as to other designated countries.

An international registration under the Madrid Protocol lasts 10 years and may be renewed for additional 10-year periods. The applicant may later apply to extend the territorial reach of the international registration to additional member countries.

**Maintaining the Registration**

One of the key features of the Madrid Protocol’s trademark registration process is that renewal of the registration, and title and name changes, are greatly simplified in comparison to what is required for individual national filings. Indeed, renewing the registration at 10-year intervals can be accomplished by a single filing with WIPO.

When a trademark is transferred or assigned, whether in a foreign country or the United States, it is usually beneficial or necessary to record that transfer. The recording may be a prerequisite to maintaining a lawsuit in the name of the transferee or it may establish priority over subsequent bona fide purchasers without notice. There are significant benefits under the Madrid Protocol when transferring or assigning a mark. For instance, when companies are acquired, sold, or merged, only a single document need be filed to transfer the application or registration in all member countries of the Madrid Protocol. Under the method of multiple national filings, trademark counsel must send paperwork and instructions to counsel in each country in which there is an application or registration, with attendant costs of local counsel and government filing fees in each country. Various countries have special requirements regarding the “legalization” of documents or other formalities that affect the costs of recording transfers. For California companies, legalization—even under the simplified Hague Convention Abolishing the Requirement of Legalization of Foreign Public Documents—generally means having a document notarized locally and sending it to the California secretary of state’s office for an “apostille” (certification of authenticity) to be affixed to the document. Clearly the costs for the recordation or transfer of an international registration or application filed under the Madrid Protocol will be less than for multiple national filings. The only real restriction on transfers of a registration to a new entity is that the assignee must have an established place of business or residence in a country that is a member of the Madrid Protocol.

**Disadvantages**

The disadvantages of using the Madrid Protocol for international trademark protection must be considered by companies and their counsel. There is less flexibility in a single international registration than in filing multiple national applications. This is true particularly and most significantly regarding the issue of the scope of the registration. When an application for registration is filed in the United States or abroad, the goods and services must be identified in the application. The identification cannot be indefinite or overly broad, or the USPTO will reject it. Foreign government intellectual property offices tend to permit much broader designations of goods and services than are permitted in the United States. However, the identification of goods and services in the Madrid Protocol international application must be the same as or narrower than the identification of goods and services of the trademark registration in the originating home country.

Broader identifications become more significant abroad because foreign laws often require similarity of goods and marks in order to find trademark infringement. Broad identifications are less important in the United States, which tends to rely more on liberal interpretations of trademark law through the general concepts embodied in Sections 32 and 43(a) of the Lanham Act. For example, Section 32 of the Lanham Act provides for a civil trademark infringement action when there is use in commerce of “any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale…of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive….” Thus, a showing that the goods at issue are similar is not necessary to sustain a claim for infringement in the United States if there is a likelihood of confusion.

Another drawback is that there are a number of important countries that are not currently members of the Madrid Protocol, including Canada, Mexico, Argentina, Brazil, and Chile. However, WIPO has agreed to add Spanish as a third language acceptable for document filings (French and English are the other two), and with this act there is antic-
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A tendency to slightly increase the protec-
tivity is known as a central attack. One of the basic
facts about a U.S.-originated international regis-
tration is that the registration will be based on the
underlying U.S. application or registration. If the
U.S. registration fails at any time during the
first five years of the international registration,
the entire international registration also fails. An attack on the underlying U.S.
application or registration can occur through
an opposition or cancellation proceeding in the
USPTO or a court. If the U.S. trademark registration is not canceled within its first
five years, then the international registration takes on a life of its own, independent of the
U.S. registration. Thus, the Madrid regis-
tration remains vulnerable for only the first
five years following registration, after which
it becomes independent of the home country
registration.

If a successful action challenging the reg-
istration is begun prior to the expiration of the
five-year period, such as an opposition or can-
cellation proceeding, the protection from the
international registration can no longer be
invoked. Under the Madrid System, central
attacks have occurred infrequently; anec-
dotally, the number of international regis-
trations subjected to a central attack is less than
1 percent.

If a mark is canceled in the home country,
and the Madrid application fails, trademark
protection may not necessarily be lost. The
Madrid Protocol borrowed a concept from the
EU’s Community Trade Mark System that
allows the applicant or registrant to “trans-
form” the underlying home country applica-
tion by filing national applications with each
of the desired countries while preserving the
priority resulting from the filing date of the
otherwise invalid Madrid application.

Although renewals are effected simply by
paying a filing fee to WIPO, member countries
may still require affidavits of use to maintain
registrations. For example, the USPTO
requires the filing of affidavits between the
fifth and sixth year following the issuance of an
extension of protection, and within six
months of the 10-year anniversary of the date
of the extension of protection.

While U.S. companies have the opportu-
nity to file trademark applications abroad
under the Madrid Protocol, foreign countries
may designate the United States as a country
in which protection is sought. This may have
a tendency to slightly increase the protec-
tion granted under U.S. laws to foreign com-
panies that are doing business here in the
United States. The protection granted by the
international registration under the Madrid
Protocol is the same as if the mark were reg-
istered in the USPTO.

Domestic Searches

Even for those not contemplating registra-
tion abroad, the Madrid Protocol has con-
sequences for companies that are only inter-
ested in using their trademarks in the United
States. Because of the advantages provided
under the Madrid Protocol, potential users of a
mark may be vulnerable to hidden rights
that may not immediately appear in trade-
mark searches.

For example, a company that files an appli-
cation in a country other than the United
States may file an application to register the
mark in the United States within six months
of the filing date in the other country. A cur-
rent domestic search will not uncover the
use of the mark in the country abroad, yet the
use may establish a priority over a subse-
quent use in the United States. This so-called
blind spot results from the Paris Convention,
which preserves the filing date of an appli-
cant’s home country filing for up to six
months for the purpose of establishing priority
for a filing in a member country. The
Madrid Protocol may extend the time period of
this blind spot because an international applica-
tion may be filed that might not appear in a search
for two or more months beyond the six
months provided by the Paris Convention.

However, Madrid System filings are now
commonly shown on comprehensive trademark
search reports. Follow-up searches for
Madrid filings are possible, though not always
practical on a regular basis.

While a Madrid registration that is applic-
able outside the United States may be
extended to the United States, the priority of
the registration in the United States is not
likely to be effective until after the extension
is sought. Thus, it is not likely to have a sig-
ificant effect on domestic trademark rights.

The Madrid Protocol is a new tool in the
hands of the U.S. trademark lawyer to eval-
uate the best route to obtaining trademark pro-
tection in countries outside the United States.
While not perfect, the Madrid Protocol pro-
vides a system for a lower-cost method of
obtaining trademark protection in many mar-
kets around the world, enhancing the ability
of companies in the United States to do busi-
ness abroad in selective territories on a more
cost-effective basis.

Not every foreign application may war-
rant a Madrid filing. Discussion with trade-
mark counsel may be helpful in determining
an optimal approach to foreign filing that will
balance the issues of cost, registration, and protection.

1 The Lanham Act, 15 U.S.C. §1123(a). This statute is commonly used to stop infringement of unregistered trademarks or common law marks in the United States as “false designations of origin” affecting interstate commerce.


6 See Madrid Protocol, supra note 2, art. 2, §16.

7 For a list of contracting parties, see http://www.wipo.int/treaties/index.html.


9 These filings will take place on the TEAS Web page of the U.S. Patent and Trademark Office. 37 C.F.R. §7.11(a); http://eteas.uspto.gov.

10 A calculator for determining filing fees can be found on the WIPO website at http://www.wipo.int.

11 Madrid Protocol, supra note 2, art. 6(1): “Registration of a mark at the International Bureau is effected for ten years, with the possibility of renewal under the conditions specified in Article 7.”

12 Madrid Protocol, supra note 2, art. 3ter(2).

13 Id., art. 9, art. 9bis.

14 Legalization is the process of authenticating documents and their execution in international transactions. When the country in which the document needs to be filed is not a member country of the Hague Convention Abolishing the Requirement of Legalization of Foreign Public Documents, the process may be complex: The county clerk authenticates the notary certificate, the California secretary of state authenticates the county clerk certificate, the U.S. State Department attests to the secretary of state authentication, and the embassy of the country in which the document is to be used approves the U.S. secretary of state authentication. See http://travel.state.gov/authentication.html.

15 Madrid Protocol, supra note 2, art. 9bis, art. 2(1).

16 37 C.F.R. §7.11. This regulation specifies as one of the requirements for an international application originating from the United States “(7) A list of the goods and/or service that is identical to or narrower than the list of goods and/or service in each claimed basic application or registration and classified according to the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks.”


18 Madrid Protocol, supra note 2, art. 6.

19 WIPO, Protecting Your Trademark Abroad: 20 Questions about the Madrid Protocol: “In 2000, nearly 23,000 international registrations were effected; during the same period, only 140 international registrations were canceled (in whole or in part) as a result of central attack.”

20 Madrid Protocol, supra note 2, art. 9 quinquies; 37 C.F.R. §7.31(a).


22 Madrid Protocol, supra note 2, art. 6.

23 WIPO, Protecting Your Trademark Abroad: 20 Questions about the Madrid Protocol: “In 2000, nearly 23,000 international registrations were effected; during the same period, only 140 international registrations were canceled (in whole or in part) as a result of central attack.”

24 Madrid Protocol, supra note 2, art. 9 quinquies; 37 C.F.R. §7.31(a).


26 Madrid Protocol, supra note 2, art. 4(1)(a).


28 Article 3(4) of the Madrid Protocol requires that the International Bureau accord a date when the international application was received in the office of origin if it is received by the International Bureau within two months of that date.
Under standard liability insurance policies, the insurer has a duty both to defend the claim being asserted against the insured and to indemnify the insured from the risk. Although standard policies limit the amount that the insurer must provide to indemnify the insured (to fund a settlement and/or judgment), they do not limit the amount that the insurer must pay to defend the claim (to pay for the fees of defense counsel, retained experts, and other defense costs).

Increasingly, however, liability policies contain a provision that controls the amount that insurers will pay for the defense of a claim. These types of “self-liquidating” policies are also known as “wasting,” “cannibalizing,” “self-consuming” or “defense within limits” policies because the available indemnity limit may be eaten or wasted by the costs of defense. They are also frequently referred to as “burning limits” policies. The idea is simple: Every dollar spent on defense reduces by one dollar the amount available to settle or otherwise resolve the claim.

Most professional liability policies now include burning limits provisions. These include lawyers’ professional liability policies, director and officer (D&O) professional liability policies, and employment practices liability (EPL) policies. Although the majority of casualty insurance policies, such as automobile, homeowner’s, and general liability policies, do not yet contain burning limits provisions, they are increasing in frequency in those types of policies as well.

A typical burning limits policy does not distinguish between the cost of defense and the cost of settlement or judgment when calculating the amount charged against the policy limit. While some burning limits policies provide that defense costs begin to erode the indemnity limits when the first dollar is spent on defense, others may provide that defense costs are not charged against the indemnity limits until after the exhaustion of the insured’s deductible and/or a preset expense allowance. For example, one lawyer’s professional liability policy provided that the indemnity limits would not erode until defense costs exceeded $55,000—the combined total of the $50,000 expense allowance and the insured’s $5,000 deductible.

Some insurers have disclosed the fact that there are burning limits directly on the declarations page. For example, one professional liability policy issued in 2001 stated conspicuously on the declarations page: “THIS POL...”

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ICY CONTAINS PROVISIONS THAT REDUCE THE LIMITS OF LIABILITY STATED IN THE POLICY BY THE COSTS OF LEGAL DEFENSE AND PERMIT LEGAL DEFENSE COSTS TO BE APPLIED AGAINST THE DEDUCTIBLE." The applicable burning limits language was contained within the body of the policy itself, under a section entitled "Defense, Settlement," and stated, "It is further agreed that...the Company shall not be obligated to pay any Claim, judgment or Claim Expenses or to defend or continue to defend any Claim after the applicable limit of the Company’s liability has been exhausted by payment of judgments, settlements or Claim Expenses."

Other policies provide for burning limits by using language that defines the "loss" for which the insured is covered as including defense expenses. For example, in one case a court of appeal construed as containing a burning limits provision a D&O policy that defined a "loss" as "any amount which the insureds are legally obligated to pay for a claim or claims made against them for Wrongful Acts, and shall include damages, judgments, settlements, costs, charges and expenses (excluding salaries of officers or employees of the Company) incurred in the defense of actions, suits or proceedings and appeals therefrom...."14

For defense attorneys who agree to represent an insured under a burning limits policy, unique ethical issues may emerge in the course of the representation. These issues can arise when the attorney is first retained, during litigation and settlement discussions, and even at the termination of the insurer’s duty to defend.

Ethical Issues at Retention
The attorney’s representation of a client under the provisions of a declining limits policy may challenge commonly understood notions of the attorney’s duties of loyalty and full disclosure. The insurer may want certain activities to be undertaken in order to protect its potential indemnity liability, while the insured may want to refrain from some activities to preserve the policy limits for a potential settlement or payment of an eventual judgment. One commentator believes that the defense attorney, in order to fulfill the duty of loyalty and to perform competently, must advise the insured of the benefits of the suggested litigation activity and its potential effect both on the defense of the case and on the available indemnity limits.15

One means to satisfy this requirement is to create a liability analysis report and a litigation budget. Defense counsel should attempt to prepare a preliminary liability analysis as soon as possible after assignment, accompanied by a budget of potential costs through trial. These initial documents should be provided to both the insurer and the insured and should be updated at regular intervals and after significant events in the litigation. If defense counsel concludes that the potential costs of the defense may severely impair the ability of the insurer to indemnify the insured for the potential exposure, the lawyer should bring this to the attention of both the insurer and the insured at the earliest possible opportunity.16

If the attorney determines that a certain activity is necessary to defend the action, but the insurer directs the attorney to forego that activity, the attorney should advise the insured of the recommended activity and determine if the insured wants the attorney to conduct that activity. While it has been held that the insurer should have absolute control of the defense in the absence of a conflict of interest,17 it has also been suggested that restrictions that the insurer places on discovery or other litigation costs could “violate the insurer’s duty to defend as well as the attorney’s ethical responsibilities to exercise...independent professional judgment in rendering legal services.”18 This conforms to the rule that when “an attorney represents two clients with divergent or conflicting interests in the same subject matter,...the attorney must disclose all facts and circumstances which, in the judgment of a lawyer of ordinary skill and capacity, are necessary to enable his client to make free and intelligent decisions regarding the subject matter of the representation.”19 If the disclosure of this information results in an irreconcilable conflict in which the insured no longer consents to the defense attorney’s continued representation, the defense counsel may be required to withdraw from further representation.20

Litigation and Settlement
If the potential value of the claim meets or exceeds the available indemnity limits, both sides—the plaintiff and the defendant—will be motivated to preserve the indemnity limits for the eventual satisfaction of the claim.21 The plaintiff and defense attorney must be aware of this possibility at the outset of the claim process.

One of the plaintiff attorney’s first objectives therefore should be to determine not just whether the defendant is insured and, if so, the policy limits, but also whether the limits are subject to reduction by defense expenditures.22 Instead of merely serving the Judicial Council-approved Form Interrogatory 4.1,23 the plaintiff attorney may also consider propounding an interrogatory that inquires in more detail the extent to which any other current or existing claims have compromised the policy limits.24

The plaintiff attorney whose normal approach includes aggressive litigation in the early part of a claim—such as by filing suit and conducting discovery before opening a dialogue with the insurer—needs to consider that every dollar spent on defense counsel’s response could be decreasing the plaintiff’s potential recovery.25 The plaintiff attorney should therefore evaluate the potential benefits that could accrue from any proposed litigation activity and weigh them against the potential decrease in available policy limits for the client’s eventual recovery.26 Since an attorney has an ethical duty to keep the client fully informed, the plaintiff attorney must explain to the client the effect of the proposed litigation activity on the client’s eventual recovery.28

In turn, defense counsel should be careful about the accuracy of the representations that are made to the plaintiff regarding the indemnity limits available to satisfy a claim. In a recent case, the court of appeal held that an attorney retained by an insurer to provide a coverage analysis ("coverage counsel") could be sued by a judgment creditor of the insured for misrepresenting the scope of available coverage for the claim.29 After entry of an adverse judgment against the insured, the coverage attorney advised the judgment creditor that the available insurance did not provide indemnity for any willful acts—despite being aware that the insurer had agreed to cover willful acts. Noting that “cases from twenty-eight states hold that an attorney can be liable to a nonclient, even an adversary in litigation, for fraud or deceit,”30 the court reversed an order of dismissal and permitted the plaintiff to proceed against the insurer’s coverage counsel.31

Defense counsel, however, may have defenses to misrepresentation claims by litigation opponents that are not available to coverage counsel. For example, the plaintiff may not be permitted to justifiably rely on representations by defense counsel, whose statements may be protected by the litigation privilege.32 However, the prudent defense attorney should take steps to avoid becoming a test case for the scope of this protection. Therefore, when responding to inquiries regarding available insurance, defense counsel should consider revealing with specificity that the stated policy limits may be subject to reduction by defense costs.

Termination of the Insurer’s Duty to Defend
If the declining limits are exhausted, the insurer will in all probability advise the insured and defense counsel that it will cease funding the defense. The insurer’s decision, however, does not relieve defense counsel...
of the fiduciary duty to the insured. An attorney may not simply stop representing the client in such cases; instead, the attorney must obtain permission to withdraw from the case, either by a voluntary substitution signed by the client or by an order from the court.34 In both cases, the attorney should consider the relevant procedural and ethical requirements for withdrawal, because the mere fact that the insurer has stopped paying attorney’s fees may not be enough to relieve the attorney of the obligation to continue to represent the insured in litigation.

Nor may the defense attorney simply start billing the insured. The fact that the insured is the attorney’s client does not necessarily mean that the insured must pay the attorney’s bills when the insurance company stops paying them.35 An attorney cannot make a unilateral alteration to a fee arrangement; instead, the attorney must obtain the consent of the client to the change.36

Defense counsel may therefore want to attempt to negotiate a fee agreement directly with the insured. Although there is a general presumption of undue influence when an attorney negotiates a contract with an existing client, this presumption does not exist when the contract involves fees for legal services.37 So long as the fee agreement is “fair, reasonable and fully explained to the client,” it will be enforceable.38

If the client declines to enter into a separate fee agreement at the time that the policy limits are exhausted, any attempt by the attorney to collect fees directly from the insured may subject the attorney to disciplinary action. The California Supreme Court has held that “under a fixed fee contract, an attorney may not take compensation over the fixed fee without the client’s consent to a renegotiated fee agreement. This is true even if the work becomes more onerous than originally anticipated.”39

For this reason, the defense attorney might discuss with the insured the possibility of entering into a fee agreement at the inception of the representation. It should be noted, however, that this approach is not universally practiced by defense attorneys and can raise as many problems as it seeks to solve. For example, the insured may refuse to sign a retainer agreement with the defense attorney at the outset, or the insurer may be reluctant to assign cases to a firm that routinely seeks separate retainer agreements with an insured. The defense attorney, when seeking a separate retainer agreement with the insured, should also bear in mind that many parties purchase insurance precisely because they cannot afford the costs of defending a litigation claim and may be unable to pay defense costs after erosion of the policy limits, even after agreeing to sign a separate retainer with defense counsel.

In either event—whether the defense attorney proceeds with or without a separate retainer—the attorney should consider sending copies of all the statements for services to the insured, including a running total of defense expenditures. This will enable the insured to remain fully informed of the effect of defense costs on the erosion of the indemnity limits.40

### Terminating Representation

If the attorney seeks to terminate the representation of a litigation client, he or she may do so only after taking “reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client....”41 An attorney representing a client in litigation cannot simply cease working42 and has a duty to continue to

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**What Are Burning Limits Policies?**

Although attorneys with experience in litigating professional liability claims are usually familiar with the mechanics of burning limits policies, those who practice in other areas may be unfamiliar with the policy provisions. This may change if burning limits provisions are incorporated into more types of coverage. In order to identify the ethical issues that can arise in cases involving such policies, the practitioner should be familiar with the mechanics of these policies.

The following examples demonstrate how the potential ramifications of a burning limits policy can depend on several factors, including the limits of the policy, whether the single and aggregate limits differ, whether there is an expense allowance, and the amount of any deductible. For purposes of these examples, assume that each claim asserted is a separate claim under the provisions of the policy.

Some policies may provide for combined single and aggregate limits in the same amount. For example, a policy with combined limits of $1 million per claim and $3 million aggregate. This means that the insurer will pay a total of $3 million for all claims made under the policy, but the maximum amount to be paid for any one claim will be $1 million.

Under this policy, if there are three separate claims for $500,000 each, the insurer would pay $500,000 on each claim, for a total of $1.5 million, leaving $1.5 million to satisfy any remaining claims. But if one claim is seeking $2 million and the other two are seeking $500,000 each, the insurer will only pay out a total of $2 million: $1 million for the claim seeking $2 million and $500,000 for each remaining claim, leaving $1 million for the satisfaction of any future claims.

The existence of a burning limits provision can change this result. Assume that there is a policy with $1 million combined single and aggregate burning limits. If there is an indemnity payment of $500,000 under a nonburning limits policy, there would be $500,000 left to satisfy future claims. But under a burning limits policy, defense costs also reduce the indemnity limits. If the insurer pays a $500,000 claim and also pays defense costs of $100,000, this would leave a total of only $400,000 to satisfy future claims. If the policy provided for indemnity limits of $1 million per claim and $3 million in the aggregate, there would be $2,460,000 left for future claims.—D.L.B.
represent the client until there is a formal withdrawal, even in the absence of compensation for services. In addition, the attorney may only withdraw from representation after complying with the applicable rules of the particular tribunal before which the case is pending. These ethical obligations apply regardless of who terminates the attorney-client relationship. The failure to comply with these requirements may subject the attorney to disciplinary proceedings before the State Bar.

An attorney may withdraw from representation in litigation only if the client signs a voluntary substitution of attorney or if the attorney obtains an order from the court permitting the withdrawal. If the client is cooperative, the attorney may be able to obtain and file a substitution of attorney at any time before trial. If the client is uncooperative, the attorney must seek an order permitting the withdrawal, which the trial court could deny if it finds that the withdrawal will cause prejudice to the client—for example, if the motion is made close to trial or while a dispositive motion is pending.

It is unclear whether the exhaustion of policy limits is a justification for defense counsel to seek an order of withdrawal. When a defense attorney agrees to represent a client pursuant to a burning limits policy, the attorney should consider that a court may construe this as accepting representation knowing that there is a maximum amount available for payment of defense costs. Since it has been held in another context that the "refusal of the client to consent to an increase of the attorney's fee does not constitute a sufficient excuse for the attorney to refuse to proceed further in the case," and since the granting of a motion to withdraw is within the discretion of the trial court, the court may require the defense counsel to perform services after the exhaustion of the policy limits.

In certain circumstances, attorneys who were being paid by third parties have been held to have a duty to continue to represent the client when the third party failed to pay the attorney’s fees. This rule was the basis for a 1981 opinion from the California State Bar Committee on Professional Responsibility and Conduct (COPRAC) that the failure of a third party to pay an attorney’s fees does not release the attorney from an obligation to continue to represent a client in litigation. It was also the basis for a federal court’s refusal to permit an attorney to withdraw from representing an insured even though the insurer claimed that its payment of the full policy limits ended the insurer’s duty to defend and a New York court’s holding that the mere fact that the insurer was unable to fund the defense did not relieve defense counsel from an obligation to continue to represent the insured.

The 1981 COPRAC opinion addressed the ethical obligations of attorneys who were employed by legal services programs to represent indigent parties when Congress cut funding for the Legal Services Corporation. The committee had to address whether attorneys whose funding was cut off could withdraw from representation of their clients. COPRAC concluded that the attorneys could not cease representing their clients without obtaining a substitution or a court order, opining that "legal services attorneys and their programs may not discontinue representation of existing clients merely because funding is impaired or cut off entirely." Once an attorney agrees to undertake the representation of a client, even with an agreement to be paid by a third party, the attorney can only withdraw from representation after following the Rules of Professional Conduct and applicable statutes. The opinion argued, "Regardless of whether the attorneys in the legal services organizations are being paid, once having undertaken to represent a given client, they must continue to serve the client unless withdrawal is permitted by the provisions of rule 2-111 of the Rules of Professional Conduct."

While COPRAC concluded that the loss of funding was a legitimate basis for the attorneys to seek to withdraw from representation, it noted that the attorneys might not be able to obtain voluntary substitutions or orders permitting withdrawal from the courts. Under these circumstances, the attorneys would be ethically required to continue to represent their clients despite not getting paid.

One paragraph of the opinion is particularly germane to attorneys defending insureds under burning limits policies:

While the Committee is sympathetic to the extraordinary dilemma faced by the nearly 500 legal services lawyers in California who may be forced to continue representation of clients if they are not permitted by the rules to withdraw from representation, we are not at liberty to interpret the rules in a manner contrary to the plain meaning of the words.

To avoid this problem, some defense lawyers may be tempted to request that the insured provide at the commencement of litigation a signed substitution of attorney form, which would be filed only if policy limits are exhausted. This practice should be discouraged because it runs the risk of subjecting the attorney to disciplinary proceedings. A 1977 opinion from the Los Angeles County Bar Association Ethics Committee addresses this issue in a related context. The committee was asked to determine whether it was improper for an attorney to include language in a retainer agreement that provided for the client to sign an undated substitution form and to grant the attorney authority to file it upon 30 days’ written notification to the client. The
proposed provision would have stated that the substitution could only be filed in the event that the client failed to pay for services rendered and costs advanced.

The committee concluded that the use of a preexecuted substitution form was inconsistent with the Rule of Professional Conduct precluding withdrawal by an attorney without first taking reasonable steps to avoid prejudice to the client. While the committee recognized that an attorney armed with a preexecuted substitution might refrain from filing it if there was a risk of prejudicing the client, the mere “existence of the [form] creates a substantial risk that it will be utilized without the balancing of the client’s and attorney’s interests which would occur if the client were requested to sign the [substitution] at the time the attorney’s desire to withdraw arose.” The committee ruled that when the attorney decides to withdraw, the attorney should first discuss the reasons and consequences with the client before seeking the substitution.

These guiding principles may motivate defense attorneys to discuss and resolve issues regarding the representation of the insured at the outset of the attorney-client relationship. Although defense counsel may be reluctant to deal with these issues, practitioners should be aware of the potential of being forced to continue representation of a defendant in litigation without a guarantee of being paid by the insurer and without an agreement as to who is responsible for the further fees and costs.

Attorneys must recognize that the complexities of the tripartite relationship can create unique ethical issues. The insurance defense attorney must be aware of the ethical rules that govern attorney-client relationships and their application to their own area of practice. Defense counsel should analyze the ethical aspects of each potential representation on a case-by-case basis. It is entirely possible that the issues present in one particular situation, such as in a case of high potential exposure but low policy limits, will be absent in another case, such as one with low potential exposure and high policy limits. The consideration of the application of established ethical rules to each attorney-client situation is a necessary aspect of modern practice.

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2 Id. at 132-33.
5 Karen J. Dilibert, Taking the Hell out of LPL, 90 IRL. B. J. 431, 433 (2002); see also Jack Smart, An Attorney’s Fees Provision May Not Be a Good Idea, 42 OCT ORANGE COUNTY LAW 54 (2000).
6 In 2001, the American Bar Association reported that “36 of the 48 insurers providing legal malpractice coverage include defense costs within the limits of liability in their policies.” Munro, supra note 1, at 135.
9 Munro, supra note 1, at 131.
11 Baliga, supra note 4, at 477.
12 Lipton v. Superior Court, 48 Cal. App. 4th 1599, 1606 (1996). Under this type of policy, while the insured is charged with a deductible for each claim made within the policy period, the preset expense allowance is affected by the defense expenses on all claims within that policy period. See also “What Are Burning Limits Policies?” pg. 33.
14 Id. at 880 n.3.

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Shaun McParland Baldwin, Legal and Ethical Considerations for “Defense within Limits” Policies, 61 Def. Couns. J. 89, 99 (1994). However, defense counsel should be aware that the insurance as rendering coverage advice, which may cause the insured to expect that the defense attorney has a duty to render legal services regarding insurance coverage. The defense counsel may consider sending the insured a letter at the inception of the relationship that specifically states that the defense attorney will not be rendering any coverage advice. Although counsel may perceive a duty limited to defense, unless the insured is so informed or circumstances suggest otherwise, the insured may legitimately believe that appointed counsel will advise on all issues, including coverage. Ronald E. Malen, supra note 15, at 97. Form Interrogatory 4.1(e) asks the defendant to disclose “the limits of coverage for each type of coverage contained in the policy” for any policy that may insure the defendant from the claim asserted. For example, an interrogatory might ask, “State the total dollar amount by which the aggregate policy limits have been eroded during the policy year applicable to this claim.” The extent to which the defendant may be obligated to respond to such an interrogatory has not been specified by case authority in California. Munro, supra note 1, at 157.

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Lawyers conducting a choice of law analysis address a basic but extremely important question: “What law applies to my case?” In a world in which it is not uncommon for matters in litigation to have their tentacles in multiple jurisdictions, understanding the laws of the various forums is just the beginning. Mastering the elements required for an effective choice of law analysis (also referred to as a conflict of law analysis) is a true test for litigators. Unlike most other areas of pretrial litigation, a choice of law analysis can be more dependent on art than science. Every case contains a unique set of circumstances that make it difficult to find binding precedent regarding choice of law. California’s conflict of law rules require that attorneys and courts examine these circumstances through a complicated analytical framework known as the governmental interest and comparative impairment tests. The creativity of attorneys in constructing arguments about why one jurisdiction’s law should apply over another is crucial and can carry the day, as courts want attorneys to provide reasons that courts can state for the record when they rule on which jurisdiction’s law should apply.

When a case arrives at a lawyer’s office, one of the first questions that should be explored is the applicable statute of limitations. In California, as in most states, statutes of limitations are considered to be procedural (as opposed to substantive) law, and the general rule is that the forum state’s procedural law applies. Accordingly, for a case filed in California state court, the applicable California statute of limitations will apply, and choice of law analysis is unnecessary. But attorneys must be cognizant of California’s “borrowing statute,” which was designed as a vehicle for courts to apply the statute of limitations of the jurisdiction in which the cause of action arose. Specifically, the borrowing statute provides:

When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this

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state, and who has held the cause of action from the time it accrued.4

In other words, the statute “borrows” the statute of limitations of another jurisdiction that is pertinent to the case, and if the borrowed statute of limitations would prevent a suit in that jurisdiction, the suit cannot be brought in California—even if California’s statute of limitations would allow the suit.

The borrowing statute generally applies only in cases brought by non-California plaintiffs.5 Also, the borrowing statute specifically addresses cases barred by a “lapse of time” but does not use the words “statute of limitations.” It is unclear whether the borrowing statute borrows all statutes concerning the lapse of time, such as statutes of repose, in addition to statutes of limitation.6

Unlike statutes of limitation, statutes of repose are generally considered to be substantive in nature, most likely because the lapse of time at issue in a statute of repose has nothing to do with a potential plaintiff’s failure to timely file a suit after a cause of action arose. Statutes of repose are concerned with what happened before, not after, the emergence of the cause of action. Accordingly, the determination of whether a foreign jurisdiction’s statute of repose is applicable to a case should be determined through a choice of law analysis just like that of any other substantive law.

However, a survey of California law reveals one published case, Geist v. Sequoia Ventures, Inc., in which the borrowing statute was used to borrow a statute of repose.7 This case was most likely decided incorrectly. First, every other published California case that mentions the borrowing statute does so in the context of a statute of limitations. Second, the issue of whether a borrowing statute can borrow substantive law was not specifically addressed in Geist.8 Finally, case law and commentators generally take the position that the intent of the borrowing statute was to borrow procedural statutes of limitations, not substantive law, because a determination of which substantive law should be applied in a case is governed by a choice of law analysis. Indeed, the commentators in the Restatement (Second) of Conflict of Laws contend that borrowing statutes should be repealed in their entirety and that choice of law analysis should be used to determine the applicable statute of limitations.9 But for now, the Geist opinion remains on the books, and plaintiffs and defense counsel must be aware that a California court potentially could borrow another state’s statute of repose and bar an action.

California’s borrowing statute also must be considered when parties are in federal court on diversity grounds. A federal court that has jurisdiction as a result of diversity will apply 1) the statute of limitations of the forum in which the court sits,10 and 2) the choice of law rules of the state in which the court sits.11 Federal courts in California hearing diversity cases based on causes of action that arose outside of California may apply California’s borrowing statute and, following Geist, apply another jurisdiction’s statute of repose.

In California, a choice of law analysis will determine the substantive law applicable to a case (with the exception of substantive “lapse of time” law that may be covered by California’s borrowing statute). This is true whether parties are in state court or in federal court as a result of diversity—and the federal court will apply California’s choice of law rules.12

A California state court will apply California law unless a party invokes the law of a foreign jurisdiction.13 Thus, attorneys convinced that the law of another jurisdiction should apply in their case in a California court must bring the choice of law issue to the court’s attention. Under the choice of law approach in California, California law will be applied unless the foreign law conflicts with California law and both California and the foreign jurisdiction have significant interests in having their respective law applied.14 If there are significant interests and those interests conflict, the court must assess the comparative impairment of each state’s policies. The law ultimately applied will be that of the state whose policies would suffer most were a different state’s law applied.15

It cannot be stressed enough that a separate choice of law inquiry must be made with respect to each issue in a case.16 The term of art for this process is “depecage.”17 Attorneys should be careful to compare all the applicable laws of competing jurisdictions to determine if one of the jurisdictions has law that may be advantageous to any part of the client’s case. Moreover, if a court applies the law of a jurisdiction to one aspect of the case, that does not mean that the court will apply that jurisdiction’s law to all aspects of the case. For example, a court may conclude that the law of the plaintiff’s domicile applies to damages but that the law of the defendant’s domicile applies to liability.

True Conflict and Governmental Interest

In conducting a California choice of law analysis, the first question for counsel to consider—a seemingly obvious one—is whether the law of the foreign jurisdiction actually is in conflict with California law.18 Very little case law explores how different the laws must be from one another to result in what courts term a true conflict.19 A results-oriented analysis seems to be the basis for determining whether laws are in conflict; that is, a court will find that laws conflict if their applications could lead to differing results. In most cases in which a party seeks the application of a law of a particular jurisdiction, the existence of the conflict is seemingly obvious, because attorneys would not seek the application of a law that would not help their case. For example, if one jurisdiction has a damages cap and another does not, the laws of the two jurisdictions probably are in conflict, and a defendant would likely urge the court to apply the law of the jurisdiction supporting caps.

In examining whether laws conflict, foreign law may be pleaded and proved, but it need not be. The California Evidence Code provides that trial courts may take judicial notice of the decisional, statutory, and constitutional law of any state or foreign nation.20 The code also provides for compulsory judicial notice on the request of a party, provided that the requesting party gives each adverse party sufficient time to oppose the request and furnishes the court with sufficient information to enable it to understand the foreign law.21 As a practical matter, attorneys seeking the application of foreign law should brief that law thoroughly when requesting its application and should request judicial notice of that law. Attorneys opposing the application of foreign law should make sure that they are given sufficient time to brief their opposition to the application of the foreign law by using a conflict of law analysis and to contradict the other side’s characterization of the foreign law, if necessary. To accomplish these tasks, attorneys generally seek expert assistance in the foreign law at issue.

If there is a true conflict, the second question that must be answered is whether both jurisdictions have any significant interests in having their respective law applied. The case law refers to this inquiry as the governmental interest test.22 Some California courts have merged the first and second questions; in analyzing whether there is a true conflict, the courts look to whether both jurisdictions have a legitimate governmental interest in the application of their law.23 Accordingly, if the interests of the foreign jurisdiction will not be significantly furthered by the court’s application of that jurisdiction’s law, the court may conclude that there is a false conflict and apply California law.24

Either approach leads to the same result. The basic question is whether the jurisdictions have a significant governmental interest in having their law applied. If a foreign jurisdiction does not have an interest in having its law apply, then the law of the forum will apply.25

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When a true conflict is found to exist, the comparative impairment test comes into play. This test requires the court to determine which jurisdiction’s policies would suffer most if the other jurisdiction’s laws were applied. The test is not supposed to involve a determination of which law embodies the better social policy with regard to a particular issue.

how the competing laws would affect each aspect of a case. Although articulating governmental interests is usually possible on both sides of an issue, it is not an easy process—but it is generally worthwhile. Indeed, a court could rule for a party’s choice of law on the grounds that the other side did not present a reason why their desired jurisdiction had an interest in its law being the applicable law. Attorneys need to do all they can to make the court’s job in this area an effortless one by fully setting forth the analysis for the court to use in reaching its decision.

The case of Hurtado v. Superior Court is an excellent example of applying the true conflict and governmental interest analyses in concert. Hurtado involved a wrongful death action brought in California by the Mexican heirs of a Mexican national who died in California as the result of the negligence of a California driver. Defendant Hurtado argued that Mexico’s strict damages limitation should apply to the case because the decedent and the plaintiffs were Mexican residents. The court disagreed and ruled that California damages law applied to the case. The court reasoned that Mexico’s interest in limiting damages is to protect its residents from excessive financial burdens. Since the defendants were not Mexican residents, Mexico had no interest in denying full recovery to its plaintiff residents injured by non-Mexican defendants. California has a decided interest in furthering its deterrent policy of full compensation by applying its own laws to California defendants. Accordingly, there was a false conflict, and the court applied California law.

Comparative Impairment

When a true conflict is found to exist, the third question, in the form of the comparative impairment test, comes into play. This test requires the court to determine which jurisdiction’s policies would suffer most if the other jurisdiction’s laws were applied. The test is not supposed to involve a determination of which law embodies the better social policy with regard to a particular issue; instead, it addresses the relative commitment of the respective states to the laws involved.

An instructive example of a case involving a true conflict and the comparative impairment test is Bernhard v. Harrah’s Club, a case involving California’s dram shop rule that was eventually superceded by statute. Defendant Harrah’s was a Nevada corporation that advertised its Nevada casino in California. Mr. and Mrs. M were California citizens who drove to the casino and were served copious amounts of alcohol, beyond the point of their obvious intoxication. On their drive home from Nevada, Mr. and Mrs. M were involved in a car accident that seriously injured Bernhard, another California resident. Bernhard sued Harrah’s Club in California under the dram shop rule. Harrah’s Club demurred, relying on Nevada case law rejecting the dram shop rule. The California Supreme Court held that both states clearly had a governmental interest in having their own law apply: California had an interest in seeing its resident compensated, and Nevada had an interest in protecting its resident tavern keeper from liability.

Because there was a true conflict, the court proceeded to apply the comparative impairment test to the case. The court found that California’s interest in protecting its residents would be significantly impaired if state policy regarding the excessive selling of alcoholic beverages were not extended to out-of-state taverns that sell alcoholic beverages to California residents who can be reasonably expected to return to California after consuming those beverages. The court also found that Nevada’s interest in protecting tavern owners from civil liability would not be significantly impaired, because Nevada already had a policy of establishing criminal liability for tavern owners who continued to serve alcohol to intoxicated guests, and the extension of the California policy to out-of-state taverns only applied to those taverns that actively sought the business of California residents. Accordingly, the court ruled that California’s dram shop rule applied.

The California Supreme Court further expounded on the comparative impairment test in Offshore Rental Company v. Continental Oil Company. In that case, a California corporation brought a negligence action in California against a Louisiana corporation for damages resulting from an injury sustained by the California corporation’s vice president while he was on business at the Louisiana premises of the Louisiana corporation. Louisiana law did not allow a corporate plaintiff to state a cause of action for the injury of its employees. An old California master-servant statute, however, appeared to grant a cause of action against a third party for loss caused by an injury to a key employee.

After determining that both states had an interest in applying their laws and that, accordingly, a true conflict existed, the court turned to the comparative impairment analysis. The court stated the comparative interest test succinctly: “In sum, the comparative impairment approach to the resolution of true conflicts attempts to determine the relative commitment of the respective states to the laws involved.” The court articulated other, more specific factors to consider, such as 1) the history and current status of the laws at issue, and 2) the function and purpose of the laws.

Regarding the first factor, the court noted that if one of the com-
MCLE Test
No. 125

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

1. California’s borrowing statute generally is applicable only in cases brought by non-California plaintiffs.
   True. False.
2. California’s borrowing statute only has been applied to borrow statutes of limitations from other jurisdictions and has never been applied to borrow a statute of repose.
   True. False.
3. A federal court that has diversity jurisdiction will apply the statute of limitations of the forum in which it sits.
   True. False.
4. A federal court with diversity jurisdiction will apply the choice of law rules of the state in which it sits.
   True. False.
5. A federal court in California with federal question jurisdiction will apply California choice of law rules.
   True. False.
6. A California state court will apply California law unless a party invokes the law of a foreign jurisdiction.
   True. False.
7. California’s Evidence Code provides that trial courts may take judicial notice of the decisional, statutory, and constitutional law of any state or foreign nation.
   True. False.
8. If the interests of a foreign jurisdiction will not be significantly furthered by applying that jurisdiction’s law, the court in California may conclude that there is a false conflict and apply California law.
   True. False.
9. The question of whether two jurisdictions have any significant interests in having their respective law applied has been referred to as the governmental interest test.
   True. False.
10. The comparative impairment test is concerned with determining which law embodies the better social policy, not with the relative commitment of the respective states to the laws involved.
    True. False.
11. Whether one of the competing laws is “archaic and isolated” in comparison to the laws of the rest of the states may not be considered when conducting the comparative impairment test.
    True. False.
12. In contracts cases involving contractual choice of law provisions, California courts look to the Restatement (Second) of Conflict of Laws.
    True. False.
13. The Restatement (Second) of Conflict of Laws strongly favors enforcement of contractual choice of law provisions.
    True. False.
14. In determining the enforceability of a contractual choice of law provision, the court looks to (1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties’ choice of law.
    True. False.
15. If either the substantial relationship or reasonable basis analyses are applicable to the contractual choice of law provision, the court must determine whether the law of the chosen state is contrary to a fundamental policy of California.
    True. False.
16. If a California court ultimately determines that a foreign jurisdiction’s law will apply, it becomes the province of the California court to determine and apply that law.
    True. False.
17. When a California court applies the law of a foreign jurisdiction, the general rule is that the foreign court’s statutory construction will not be followed.
    True. False.
18. A California court applying a foreign jurisdiction’s law must respect the decision of a foreign intermediary appellate court if it is the highest court in that jurisdiction to have ruled on the issue.
    True. False.
19. A California court can never construe the meaning of a statute of a foreign jurisdiction before the courts in the foreign jurisdiction have done so.
    True. False.
20. It is improper for a California court to determine the law of another state based on hearing expert testimony.
    True. False.
pending laws was “archaic and isolated” in comparison to the laws of the rest of the states, it may need to yield to a more “prevalent and progressive” law.36 Similarly, the law may be considered archaic and isolated when compared to the other laws of the state in which it was enacted. Indeed, the decisional law of the state may indicate that the law is out of favor, even though it is still in force. The court noted that the majority of common law states that had addressed the issue in the case do not sanction actions by corporations for harm to business employees, noting the radical changes in the master-servant relationship since medieval times. Also, the court noted that despite the existence of the California master-servant statute, no California court had squarely held that the cause of action stemming from the statute still exists, and in recent years no California court had even considered the issue.

As for the second factor, the court noted that the purpose of Louisiana’s law was to promote freedom of enterprise within Louisiana’s borders, and not applying the more modern Louisiana law for an accident that occurred in Louisiana would undercut that purpose. The court also observed that a law may be less comparatively pertinent if the purpose and policy of the law is no longer of “grave concern” to the state, or if the policy underlying the law may easily be served by more modern means other than enforcement of the law itself.

In the end, the court essentially determined that Louisiana had a stronger commitment to its more modern law than California had demonstrated to its more archaic law. Accordingly, the court held that Louisiana law should apply.

Choice of Law in Contracts Cases

California’s choice of law rules apply whether an action lies in contract or in tort. But an important exception applies in cases involving contracts with choice of law provisions. In Nedlloyd Lines B.V. v. Superior Court,37 the California Supreme Court officially adopted the principles set forth in the Restatement (Second) of Conflict of Laws, which strongly favors enforcement of choice of law provisions. Specifically, when a contract contains a choice of law provision, California courts will apply the substantive law of the state designated by the contract unless the state has no substantial relationship to the parties or the transaction at issue, or the application of the chosen state’s law would be contrary to a fundamental policy of a state 1) that has a materially greater interest than the chosen state in the determination of the particular issue and 2) whose law would be applicable in the absence of the choice of law provision.38

The Nedlloyd Lines court further distilled these principles: A court must determine either (1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties’ choice of law.39 If neither of these two tests is met, that is the end of the inquiry. But if either test is met, the court must determine whether the chosen state’s law is contrary to a fundamental policy of California (or the state whose law would have applied absent the provision).40 If no fundamental policy is threatened, the choice of law provision will be enforced. If, on the other hand, enforcing the provision would be inconsistent with a fundamental policy of, say, California, the court must determine whether California’s interest in its fundamental policy is “materially greater” than the chosen state’s interest in having its law applied.41

If a California court ultimately decides that a foreign jurisdiction’s law will apply, the California court will determine and apply that law. The general rule is that the forum court will follow the foreign court’s statutory construction.42 Also, courts and parties must respect the decision of a foreign intermedial appellate court if it is the highest court in that jurisdiction to have ruled on the issue.43 If the courts of a foreign jurisdiction have not construed a statute, the California court will need to determine how the highest court in the foreign jurisdiction would have interpreted the law that the court had ruled on the law under the same facts.44 It is improper for a California court to determine the law of another state based on hearing expert testimony.45

Choice of law issues are complex and very important to the outcome of a case. The key is to recognize potential choice of law issues early in the litigation process and to develop a strategy for determining the best time in the process to raise the issues and marshalling convincing arguments to win judicial support for the most favorable law to apply.46

1 Zellmer v. Acme Breweing Co., 184 F. 2d 940, 942 (9th Cir. 1950).
5 Grant v. McAuliffe, 41 Cal. 2d 859, 865 (1953).
6 An example of a statute of repose is a bar on a product’s liability suit when the product at issue was purchased a specified number of years before the suit was filed. See, e.g., Ga. Code Ann. §§51-11-11.
8 See People v. Banks, 6 Cal. 4th 926, 945 (1993) (“[A]n opinion is not authority for a proposition not there considered.”).
9 Restatement (Second) of Conflict of Laws §142, cmt. b (2002).
10 Forsyth v. Cessna Aircraft, 520 F. 2d 608, 613 (9th Cir. 1975); Restatement (Second) of Conflict of Laws §142.
12 Id. If a case is in federal court in California as a result of federal question jurisdiction, federal common law choice of law rules apply. Chan v. Society Expeditions, 123 F. 3d 1287, 1297 (9th Cir. 1997). Federal common law applies the conflict of laws principles that are set forth in the Restatement (Second) of Conflict of Laws. Chan, 123 F. 3d 1287.
15Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157 (1978) (en banc).
17 Commentators have used the French word depecage for the idea that a separate choice of law analysis needs to be applied to each legal issue arising in a case. See, e.g., R.A. Leflar, American Conflicts of Law (3d ed. 1977); Reese, Depecage: A Common Phenomenon in Choice of Law, 73 COLUM. L. REV. 58 (1973). Depecage can lead to different law being applied to the same aspects of nearly identical cases arising out of the same incident. See In re Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994, 948 F. Supp. 747 (N.D. Ill. 1996).
20 Id. (Fed. Supp.)
21 Id. (Fed. Supp.)
22 Sommer, 40 Cal. App. 4th 1455.
24 Id.
26 Hurtado v. Superior Court, 11 Cal. 3d 574 (1974).
27 Id. at 581.
28 Id. at 584.
30 Bernhard v. Harrah’s Club, 16 Cal. 3d 313 (1976) (superceded by statute). The legislature significantly altered California’s dram shop rule so that tavern owners are no longer strictly liable for injuries caused by their intoxicated customers. Thus the liability aspect of the Bernhard case is no longer good law, but Bernhard remains instructive on the application of California choice of law analysis.
31 Bernhard, 16 Cal. 3d at 318-19.
32 Id. at 323.
33 Id. at 323-24.
34 Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 165-67 (1978) (en banc).
35 Id.
36 Id. at 166.
38 Restatement (Second) of Conflict of Laws §387(2).
39 Nedlloyd Lines, 3 Cal. 4th at 466.
40 Id.
41 Id.
44 Id.
45 Restatement §32, comment b
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FAIRNESS DEMANDS that those who accuse others of theft describe the allegedly stolen property, especially before being allowed to rummage through the belongings of the accused. This principle applies well to trade secret disputes. While the description of a commercial trade secret is usually more complicated than that, say, of a stolen bicycle, written specifications of allegedly misappropriated trade secrets are now required at the outset of most actions involving trade secret claims.

Obtaining a full and complete trade secret specification sometimes entails a great deal of effort at the beginning of a dispute. Quick study of the technology at issue is ordinarily necessary. Experts may be needed immediately. And a motion requesting a specification, or a more detailed specification, may be the only way to force disclosure of key details of the information claimed as the trade secret. Nevertheless, these efforts are worth their cost. The trade secret defendant who requests a specification at the right moment, presses the request until true particularity is provided, and uses the specification properly will gain some control over the subject of the dispute. The defendant who does not will have little or no control.

When should a defendant request a trade secret specification? In California state court, the Code of Civil Procedure largely answers this question with the requirement that every plaintiff identify its allegedly misappropriated trade secret “before commencing discovery relating to the trade secret.” Consequently, at the beginning of most cases, when the diligent plaintiff follows a complaint with discovery requests, the defendant should immediately request disclosure of the alleged trade secret’s specifics. If the plaintiff refuses to provide the identification required by Code of Civil Procedure Section 2019(d), the defendant can either move for a protective order preventing discovery by the plaintiff until the disclosure is prepared, or simply object and

By Brent Caslin

Understanding what constitutes “reasonable particularity” can be the decisive element in trade secret litigation.

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Two circumstances merit special attention as defendants consider when they should request a trade secret definition: prefiling settlement discussions and provisional remedy situations. As to the first, settlement discussions clearly do not always precede the filing of formal misappropriation claims. But when a plaintiff asks to discuss its claim before filing a complaint, the effort should not be ignored. Not only might settlement discussions be a good alternative for the defendant not totally free from guilt, or the perception of guilt, but they also may give the defendant an opportunity to figure out exactly what it has been accused of misappropriating.

In fact, much can be gained by requesting a specific identification of the purported trade secret at the beginning or in advance of a prefiling settlement talk. It is difficult, and perhaps impossible, for a defendant to evaluate a trade secret claim and determine whether settlement discussions are worthwhile without knowing exactly what the plaintiff thinks was misappropriated.

This is perhaps truer today than at any time in the past because the difficulty of analyzing trade secret claims has increased with the advance of technology. Thirty years ago, for example, it may have meant something for a plaintiff to state that its allegedly misappropriated trade secret was the process, unknown in every way to all others, by which a hand-held camera could take pictures without film and store the pictures on an internal data chip. Today, however, such a broad statement means almost nothing to those in the electronics industry. Indeed, every manufacturer has or could have the technology to create and market digital cameras, and most of the specifics of the technology have been revealed in patent applications across the globe. If a trade secret exists in 2004 with respect to digital camera technology, it probably relates to a specific manufacturing process or a previously unknown and unpatented improvement on existing technology. The details of that process or improvement would be at the heart of any trade secret.

When considering whether to request a trade secret definition in response to motions for provisional remedies, counsel should know that in California, when expedited discovery is requested in connection with an application for a temporary restraining order or preliminary injunction, Section 2019(d) must be raised immediately. Better prepared defendants will ask the plaintiff for a reasonably particular trade secret specification before the first court appearance, even if the pressing schedule permits the request just hours before an expedited hearing. If the request is made but no specification provided, the failure can be placed with the plaintiff. The plaintiff chose the fast pace of the litigation when it requested a provisional remedy. It must know the details of the alleged trade secret, and it must know that the law requires a reasonably particular specification. Indeed, the absence of a proper specification may be enough for the court to deny the application for a temporary restraining order or preliminary injunction. On the other hand, if the plaintiff provides a specification before a hearing on a provisional remedy, any inadequacies can be brought to the court’s attention at the hearing.

A reasonably particular trade secret specification should also be requested if a plaintiff requests a provisional remedy but no immediate discovery. Although the language of Section 2019(d) does not require a trade secret specification outside the discovery context, courts rule almost uniformly that plaintiffs must show the existence of a specific trade secret at the outset of litigation. In FSI International v. Skurnow, for example, the plaintiff, FSI, a supplier of equipment used to manufacture microelectronics, sought a temporary restraining order to prevent one of its account managers from working for a competitor. FSI alleged the account manager had “numerous trade secrets and other confidential and proprietary information as a necessary component of his sales position,” including “valuable customer, pricing, marketing, and product formula and manufacturing information that is not generally known to FSI’s competitors.” The district court did not rely on any statute when it concluded that the order should be denied because FSI’s listing of broad information categories was not an appropriate trade secret disclosure: “Given FSI’s lack of specificity in identifying what is a trade secret, it is impossible for the Court to fashion a meaningful injunction that would not overly restrict legitimate competition.”

Other courts in California, including state and federal courts, also have required reasonably particular trade secret specifications outside the realm of discovery, including in situations involving provisional remedies. Some courts in California and elsewhere have gone so far as to find that a specifically identified trade secret is a necessary piece of a trade secret cause of action, effectively making the specification compulsory to every claim. In 1999, a Massachusetts court wrote, “A plaintiff has no cognizable trade secret claim until it has adequately identified the specific trade secrets that are at issue.”

Requesting a trade secret specification at the beginning of every case, including those involving provisional remedies, is a trend that is gathering steam around the country. In the past year, several courts in an assortment of states have denied preliminary injunctions, or reversed their entry, when plaintiffs failed to adequately define the allegedly misappropriated trade secret. Defendants should thus demand a specification immediately and request that all provisional relief and discovery be denied until the plaintiff adequately specifies its alleged trade secret.

**The Appropriate Trade Secret Definition**

Detailing the particulars of an allegedly misappropriated trade secret is sometimes simple. If, for example, a company that sells cookies alleges that another corporation stole its secret recipe for chocolate chip cookies, the company might simply provide the recipe as its trade secret disclosure—1/2 cup unsalted butter, 1 cup brown sugar, 1 egg, 2 teaspoons vanilla, and so forth. Of course, cases as straightforward as this are few and far between. In the many cases in which the alleged trade secret is not as easy to define as a cookie recipe, defendants should seek to calibrate the disclosure to the level of specificity that will prevent the plaintiff from later changing the alleged trade secret in order to navigate through discovery disputes and other problems that might harm the plaintiff’s case.

To determine what level of specificity is required in more complex cases, the natural starting point is the language of California’s statute. Section 2019(d) requires plaintiffs to “identify the trade secret with reasonable particularity.” The “reasonable particularity” standard means different things to different people, and there is not much information regarding its precise meaning for those who drafted Section 2019(d). Dictionary definitions can help to illuminate the meaning of the words chosen by the drafters of the statute. Merriam-Webster defines “particularity” as “1: a: a minute detail...b: an individual characteristic...2: the quality or state of being particular as distinguished from universal...3 a: attentiveness to detail...” Similarly, Oxford defines “particular” as “relating to or considered as one thing or person as distinct from others.” Both definitions are in line with the primary purpose behind Section 2019(d) and the goal of defendants who rely on the statute—to obtain enough detail about the plaintiff’s alleged secret information that
the trade secret definition can be distinguished from other similar information and not later transformed to match something the plaintiff finds in the defendant’s files.

Drafting the necessary level of specificity is easier said than done. Plaintiffs may not simply allege that a defendant has misappropriated trade secrets but provide no information other than the most basic allegation. Disclosures that identify the class or type of information that makes up the trade secret, including but not the information itself, are also improper. It is not enough, for example, to disclose that the allegedly secret information is a method of producing a particular product. The method itself must be described with reasonable particularity.

Frequently, it will be necessary to contact an expert early in the case to determine what degree of specificity might be needed in the trade secret specification to later defend the case effectively. When preparing their reports, for example, testifying experts will likely require sufficient detail regarding the alleged trade secret to compare it with the defendant’s own confidential information, as well as prior art and the library of information generally known to the relevant industry. Generally, it is best to determine exactly how much detail will be needed by the expert before the court rules on how much detail the plaintiff must provide in its trade secret specification. Not doing so may tie the hands of the testifying expert while giving the plaintiff and its experts room to maneuver.

A leading case, Imax Corporation v. Cinema Technologies, Inc., offers further instruction regarding the level of detail necessary for an appropriate trade secret definition. In the case, Imax claimed the precise dimensions and tolerances of its rolling loop projector were misappropriated by Cinema Technologies. But Imax failed, after four attempts, to provide a trade secret definition identifying those precise dimensions and tolerances. The district court eventually granted summary judgment because of Imax’s failures, and the Ninth Circuit affirmed. The Imax case confirms that plaintiffs cannot simply claim their trade secret comprises certain types of information, such as dimensions, measurements, tolerances, and ingredients. They must identify those dimensions, measurements, tolerances, or ingredients. As another court wrote, plaintiffs must provide “specific, concrete secrets.”

In their quest for detail, trade secret defendants should be vigilant of plaintiffs who provide too much information but no real specifics. The plaintiff in Imax attempted this approach, stating “every dimension and tolerance” in its projector was a trade secret. The Ninth Circuit disapproved, concluding it was unlikely a district court or jury would have the expertise to evaluate the projector and determine which dimensions and tolerances were secret. In a recent case, IDX Systems Corporation v. Epic Systems Corporation, the plaintiff’s explanation of an entire software package as a trade secret was also rejected as overinclusive. As in Imax, the IDX court communicated that it is not the court’s responsibility to dig through a product specification and determine exactly what is and what is not part of the alleged trade secret. When preparing a trade secret specification, the simple rule to remember is that indicating an entire process or a product itself is ordinarily not enough for the specification to pass muster with a court.

Using the Specification

The obvious and immediate best use of a trade secret disclosure is investigation of the claim. The defendant should examine the files and memories in every relevant business unit with the specification in hand to determine if a mistake actually was made—or if circumstances exist so that a conclusion can be drawn that a mistake may have been made—in the defendant’s handling of the identified trade secret information. If so, it may be more economical to settle before costly discovery. If not, the disclosure should be used to begin framing a complete story about the alleged trade secret. How was the alleged secret information received from the plaintiff? Was it received at all? What duties of confidentiality were attached to the information? A crucial aspect of some cases is determining what uses and disclosures the plaintiff authorized regarding the secret.

The defendant must proceed to a determination of what conduct the plaintiff claims was wrong. Did the alleged use or disclosure actually occur, or is the plaintiff mistaken? The defendant should investigate how the plaintiff’s belief about the alleged use or disclosure of the secret may be addressed at trial. The defendant, and an expert witness if appropriate, must also begin investigating its files and patent applications, as well as industry journals and all other public sources of information, to discern if the alleged secret really was a secret at the time it was given to the defendant. Finally, the defendant should begin planning how to discover the plaintiff’s efforts to protect the alleged trade secret and any unprotected disclosures of the allegedly secret information.

None of these key considerations in the defense of a trade secret case can be properly analyzed without first determining exactly what information is at issue in the case. Consider the difficulty of defending a patent case or a trademark case without reference to the patent or the ability to review the details.
of the trademark.

The specification required by Section 2019(d) not only relates to discovery but also usually governs its scope. As the U.S. District Court for the Southern District of California wrote, the trade secret specification requirement "assists the court in framing the appropriate scope of discovery and in determining whether plaintiff’s discovery requests fall within that scope." Many courts outside California agree, and they regularly halt discovery until an appropriate trade secret definition is available and appropriate bounds can be placed on discovery.

Because the information requested in almost every trade secret dispute is itself valuable, defendants should not be reticent about attempting to place tight restrictions on discovery. Limits on discovery are often approved, even those that are novel in their approach. In Microwave Research Corporation v. Sanders Association, for example, a court required a plaintiff to demonstrate a "substantial factual basis" for the trade secret claim before it would allow any discovery into the defendant’s confidential information. Finding no such basis, it denied the plaintiff’s request to take discovery of the defendant’s confidential files. Other courts have limited discovery by requiring plaintiffs to show relevance, based on the trade secret definition, as well as a necessity for the requested confidential information.

Perhaps the most important use of the trade secret definition arrives near the close of discovery, as the parties progress through summary judgment proceedings and into trial. Plaintiffs frequently face enormous incentives at these junctures to modify, if only slightly, the identity of the allegedly misappropriated trade secret. Some want the alleged trade secret to more closely match the misappropriation theory developed during the course of the case. Others need to avoid summary judgment because the defendant discovered a patent or some other form of public information identical to the plaintiff’s alleged secret, making the alleged secret no secret at all. Plaintiffs may have good intentions—they believe their secret was stolen and they do not want their claim to fail because the specification varies slightly from the evidence—but defendants should nevertheless attempt to prevent last-minute changes to the plaintiff’s trade secret specifications. Several have had success in stopping plaintiffs from asserting trade secret information that is a variation from their original claims.

Most of these changes occur during summary judgment proceedings, and courts are increasingly concerned about allowing the plaintiff to deviate from its original trade secret specifications at this stage of litigation. In Combined Metals of Chicago Limited Partnership v. Airtel, for example, a district court wary of the potential for a late amendment to a trade secret disclosure warned early in the case that no change would be allowed. Remarkably, it found that the identity of a trade secret had caused "confusion" during summary judgment proceedings in a previous case, the court wrote that it "would not entertain such a dispute at such a late stage in the proceeding again." With candid language the court ordered the plaintiff to state its trade secret and not modify it:

[The plaintiff] will be held to those trade secrets, i.e., it will not be permitted to change or narrow them as the case progresses....[The plaintiff] better put [the defendant] on notice of such technology now...or forfeit the right to claim such technology as a trade secret at a later time in this case.

In 1995 the Central District of California expressed similar concerns. The court stopped a plaintiff from switching trade secrets in the midst of litigation, writing that the "plaintiff must be judicially estopped from arguing, in a desperate attempt to avert summary judgment, that these 'different' trade secrets are really the subject of its claims." Summary judgment is not the only procedure that can be used against plaintiffs who refuse to properly identify their alleged trade secrets or try to change their trade secret specifications late in a case. A motion to dismiss might be successful if the plaintiff fails to plead facts identifying the trade secret or if the plaintiff continually fails to define the alleged trade secret. Sanctions under Rule 37 of the Federal Rules of Civil Procedure were granted in at least one case following a plaintiff’s repeated failure to abide by a court’s order to prepare a proper specification. Motions in limine are also an obvious tool with which to exclude new theories going into trial, and these motions might be useful in excluding undefined aspects of purported trade secrets. The Ninth Circuit effectively did just that in Twin Vision Corporation v. BellSouth Communication Systems, Inc., when it refused to examine a district court’s summary adjudication of several trade secret claims. The appellate court simply ignored the trade secrets that were not properly defined and only analyzed the merits of a single properly defined secret. The logic used by the appeals court seems equally applicable to motions in limine before trial.

The recent success of defense tactics—chiefly motions for summary judgment—in cases involving allegations of trade secret misappropriation, and courts’ increasing focus on trade secret definitions at provisional remedy hearings, may reflect a renewed recognition of the primary reason for the rule requiring trade secret specifications: basic fairness. These developments almost certainly reflect the practical concerns of courts. Without a trade secret specification, it is difficult to control discovery—and it is nearly impossible to compare similar collections of sophisticated information at summary judgment or trial without first knowing the specifics of the alleged secret at issue. Trade secret disclosures provide the specifics and thus a baseline against which to judge information allegedly used or disclosed by the defendant. They also give defendants something against which they can compare information in the public domain, information developed on their own, and the public disclosures of plaintiffs. Without a properly detailed trade secret specification, the defendant will have a difficult time making these comparisons. The trade secret, and thus the case, could be subject to a plaintiff’s changing directions, leaving the defendant little opportunity to effectively defend its position.
actual use of a trade secret, plaintiff has failed to ade-
quately identify what portions of its overall software
architecture are trade secrets.
21 Cantor v. West Publ Co., Inc., 31 F. Supp. 2d 1193
(N.D. Cal. 1999) (opinion withdrawn) (granting summary
judgment only partially on ground that the plaintiff's
"failure to adequately designate their trade secret con-
stitutes a failure to carry their burden on this necessary
element of their claim"); Cambridge Internet Solutions,
(citing Microwave Research Corp. v. Sanders Assoc.,
LEXIS 387, at *4.
23 Analog Devices, Inc. v. Michalski, 579 S.E. 2d 449, 452-
54 (N.C. App. 2003); Southwest Research Inst. v.
Keraplast Techs., 103 S.W. 3d 478, 482-83 (Tex. App.
2003); Motorola, Inc. v. DBTEL, No. 02C3326, 2002 WL
1610982, at *16-*17 (N.D. Ill. July 22, 2002); AMP, Inc.,
Inc. v. Flexan, Inc., 823 F. 2d 1191, 1203 (7th Cir. 1987).
24 Merriam-Webster OnLine Dictionary (2003), avail-
able at http://www.m-w.com/home.htm.
25 The OXFORD DICTIONARY AND THESAURUS 1087
(Am. ed. 1996).
26 Universal Analytics, Inc. v. The MacNeil-Schwendler
Corp., 707 F. Supp. 1170, 1177-78 (C.D. Cal. 1989); see
generally supra note 32.
27 PSI Int'l Inc. v. Shumway, No CV02-4028RKHSRN,
Corp. v. Peak Computer, Inc., 991 F. 2d 511, 522-23
(9th Cir. 1993) (vacating injunction because the plain-
tiff stated only that the trade secret was in computer soft-
ware); J M v. Phibyl, 259 F. 3d 587, 590 n.2 (7th Cir. 2001);
Combined Metals of Chicago Ltd. Phibyl v. Airetk, Inc.,
985 F. Supp. 827, 832 (N.D. Ill. 1997) ("[T]he court has
amended its amended counterclaim from Airetk identi-
fying specific, concrete secrets underlying the process
of producing the catalytic converters."); Thermodyne
Food Serv. Prods., Inc. v. McDonald's Corp., 940 F. Supp.
1300, 1305 n.4 (N.D. Ill. 1996) ("The court is mindful
that it is not enough for a plaintiff to point to broad
areas of technology and assert that something
there must have been secret and misappropriated.")
citing Composite Mariner Propellers, Inc. v. Van Der
Woude, 962 F. 2d 1263, 1266 (7th Cir. 1992).
28 Inmax Corp. v. Cinema Techs., Inc., 152 F. 3d 1161 (9th
Cir. 1998).
29 Id.
31 Inmax, 152 F. 3d at 1166 (paragraph bb of the trade
secret definition).
32 Id. at 1167.
33 IDX Systems Corp. v. Epic Sys. Corp., 285 F. 3d 581,
583 (7th Cir. 2002).
34 Id. Similarly, courts also do not allow parties to insert
catchall provisions in specifications. See generally
Scientific & Ind Inf Corp. v. General Foods Corp., 51 F.R.D. 149, 153
(Del. 1970).
35 A magistrate recently rejected an attempt to define
an entire software program as a trade secret. Computwpe Corp. v. Health Care Serv. Corp., No.
Because of repeated failures by the plaintiff to identify
its trade secret, the magistrate recommended dismissal
of claims relating to 9 of 12 products. Id. at *7-*8.
2d 980, 985-86 (S.D. Cal. 1999).
F. Supp. 635, 637 (Del. 1991) ("[D]isclosure of plain-
tiff's trade secrets prior to discovery of defendant may
be necessary to enable the defendant and ultimately the
Court to ascertain the relevance of plaintiff's discovery."); Xerox Corp. v. IBM Corp., 64 F.R.D. 367, 371-72
(5d. N.Y. 1974); Engelhard Corp. v. Savin Corp., 505
A. 2d 130 (Del. Ch. 1985) (specification necessary to set
ground rules for relevance); Struthers Scientific, 51
F.R.D. at 154 ("Struthers' discovery will be limited to
those specific trade secrets which it claims were disclo-
sed to General Foods."). Of course, federal courts
have discretion to order the sequence for the taking of
38 A court decision resulting in the disclosure of valuable
confidential information may trigger the taking clause
of the U.S. Constitution. See generally James R. McKown,
Taking Property: Constitutional Ramifications of Litigation
39 Microwave Research Corp. v. Sanders Assoc., 110 F.R.D.
40 Id.; see also Puritan-Bennett Corp. v. Pruitt, 142 F.R.D.
306 (S.D. Ga. 1989); A-Mark Auction, Inc. v. American
Numismatic Assoc., No. 3-99-MC-0014-F, 1999 U.S.
Dist. LEXIS 15192, at *7-*9 (N.D. Tex. Sept. 24, 1999)
(Discovery of trade secrets "should be allowed only if
the competitor can demonstrate a true need for the con-
fidential information and can establish the potential
harm is outweighed by the need for discovery.").
41 American Airlines, Inc. v. KLM Royal Dutch Airlines,
Inc., 114 F. 3d 108, 109-10 (8th Cir. 1997).
42 Stutz Motor Car of Am., Inc. v. Reebok Int'l, Ltd., 909
F. Supp. 1353, 1360 (C.D. Cal. 1995), aff'd, 116 F. 3d 1258
9th Cir. 1997).
43 American Airlines, 114 F. 3d at 109-10. American
Airlines initially claimed as its trade secret a combina-
tion of five elements in an algorithm used to predict cus-
tomer demand. After it was revealed that the defendant
received only four of the five elements, and a motion for
summarv judgment was filed on this basis, American
claimed the fourth elements as its secret. The court did
not allow the change, however, and granted summary
judgment. Id. at 111-12. See also Thermodyne Food
Serv. Prods., Inc. v. McDonald's Corp., 940 F. Supp.
1300, 1305 n.4 (N.D. Ill. 1996); Stutz Motor Car, 909 F.
Supp. at 1360. But see Vacco Indus., Inc. v. Van Den
was permitted to amend its trade secret disclosure
during discovery).
44 American Airlines, 114 F. 3d at 109-10; Thermodyne,
940 F. Supp. at 1305 n.4; Stutz Motor Car, 909 F.
Supp. at 1360.
45 Combined Metals of Chicago Ltd. Phibyl v. Airetk,
46 Id.
47 Stutz Motor Car, 909 F. Supp. at 1360.
48 Diodes, Inc. v. Franzen, 260 Cal. App. 2d 244, 250-53
(1968). See also Victoria A. Cundiff, How to Identify
Your Trade Secrets in Litigation, 574 PLI/Pat 557, 572
(1999) ("[T]o hold off a motion to dismiss, plaintiffs can
recite in the complaint that a more detailed specifi-
cation of the secrets will be provided once the protective
order is issued."). Cundiff's PLI lesson is an excellent
resource on trade secret specification requirements.
49 Computwpe Corp. v. Health Care Serv. Corp., No.
01C0873, 2002 WL 485710, at *7-*8 (N.D. Ill. Apr. 1,
2002).
50 See generally JAGER, supra note 2, at §5:32.
51 Twin Vision Corp. v. BellSouth Communications Sys-
sms., Inc., No. 97-5221, 1998 WL 385135, at *2 (6th Cir.
June 22, 1998).

Ten Rules

By David Nolte

If you want to improve your chances of success in litigation, commit these rules to stone. Then follow them religiously.

Keep it simple. This is the greatest commandment and the one most frequently violated. Too much information in a visual aid will confuse rather than clarify. To achieve your goal, invoke the following guidelines: 1) Each chart should have only one major point, so use multiple charts that build on one another for more complex ideas; 2) details that are too small to be easily seen should be eliminated from the chart; and 3) eliminate extra words, numbers, and details.

Use graphics with every important witness. Studies consistently show that memory increases several hundred percent when the information is both explained and shown. Armed with this knowledge, you should improve every important witness's presentation with graphics. Graphics enhance the jury's attention span, increase witness credibility, and forcefully communicate your case's theme between witnesses. Place the emphasis on the evidence, not the witness. If allowed in the jury room, your graphics will also serve as a tool that can be used by sympathetic jurors to convince others.

Improve interest through variety. Blowups of written documents by themselves will cause a jury to lose interest almost as fast as if no graphics were used. Use a combination of illustrations, photographs, pie charts, line charts, bar charts, document blowups, and video. Display these through a variety of presentation media, such as foam boards, models, and on-screen projection. Variety also means not using graphics for everything. Although every witness should have some graphic support, the litigator needs to select those issues that are truly important and direct graphic attention there.

Test your charts with those unfamiliar with your case. You need to be able to explain the key facts and rationale of each graphic in a few minutes. If your graphic is not immediately understood by those unfamiliar with your case, your explanation and/or your graphic needs to be reworked. Your jury will not have studied your case in any way comparable to the agonizing detail that you have mastered. The risk is that what is obvious to you will be lost on the judge or jury. This does not require expensive jury research; a small budget case can be reviewed with colleagues who promise to be candid.

Use only properly scaled and labeled color graphs. All presentations must be accurately scaled to show amounts, measures, times, etc. For example, the y-axis (the vertical line in any numerical chart) should begin with zero, and not skip amounts through the data that is being shown. Doing otherwise presents a biased picture of the graphed data. Your charts should also include the source of the information that it conveys.

Use word charts rarely, if at all. Not all graphics are created equal. Graphics need to show pictures, concepts, and objects—not words and numbers. A typical PowerPoint slide presentation consisting of words and bullet points lacks creativity and interest.

Remember the seriousness of the setting. Modern computerized graphics packages have a wide range of fancy do-das. That does not mean you need to use them in a courtroom. Jurors have a job to do, and most of them take it seriously. Keep to the basics. Numbers should be presented with simple pie, bar, and line charts. Overly flashy elements may even backfire by raising the suspicion that you are attempting to hide something by being slick.

Charts improve the entire process. Graphics can be useful during settlement, witness preparation, and strategy planning, so develop graphics early in the process. They can then be used during depositions as a means of having witnesses agree with your presentation of the facts. Each time you present your graphics, you will need to consider logistics, so acquaint yourself with the actual physical layout where your presentation will occur before finalizing your plans.

Keep up with technology. Recent computer advances have revolutionized the preparation and presentation of information. Costs are a small fraction of what they used to be, but a budget is necessary. Even a low-budget case can afford some graphics. For example, document video cameras (sometimes called ELMOs after a particular brand) are now cost effective for every trial practice. Storage of electronic images and graphics is also easier than ever. Hard disk and CD/DVD storage have advanced to the point where you can carry the equivalent of whole rooms of paper documents in your briefcase.

Get help. In the end, each of these commandments is easier said than done. There are a wide range of consultants who are skilled in the technology and methods of producing effective presentations. Have them listen to your case and present ideas based on what they have seen be effective in similar circumstances. Judge them according to how they honor the first nine commandments. Vendors who frequently violate these commandments do not have an appreciation of what it takes to make a convincing courtroom presentation. Keep looking until you find someone with the right skill and approach in the courtroom.
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4955 Wittenau Avenue, Woodland Hills, CA 91364, (818) 883-5886, fax (818) 883-5887, e-mail: djcoates@earthlink.net. Web site: www.karslab.com. Contact Dr. Ramesh J. Kar or Naresh J. Kar. Southern California’s premier materials/mechanical/structural/forensics laboratory. Registered professional engineers with 20-plus years in metallurgical/forensicsstructural failure analysis. Experienced with automotive, bicycles, tires, fire, paint, plumbing, corrosion, and structural failures. We work on both plaintiff and defendant cases. Complete in-house capabilities for tests. Extensive deposition and courtroom experience (criminal and civil investigations). Principals are fellows of American Society for Metals and board-certified diplomats, American Board of Forensic Engineers. See display ad on page 60.

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(800) 475-4565, e-mail: benjamin@legalfriendly.com. Web site: www.legalfriendly.com. Preeminent law office technology firm. Legal Friendly integrates 20 law office technologies into supporting the management and practice of law. Legal Friendly is a contributing author for the L.A. Bar Association’s Computer Counselor section, The Los Angeles Lawyer magazine’s ABA Legal Association Reporter Technology Corner. ABA compliant Web pages, networks, data discovery and data recovery, remote communication, employee training programs, courtroom multimedia animation and presentation, document desktop programming and support, expert witness, and inter alia. The importance of law firm technology cannot be overstated. Proper legal technology can win litigation, attract clients, reduce costs, and improve reputations. “Engineers that think LAW.”
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MEDICAL LEGAL CONSULTING NETWORK, LLC
1624 North Wardman Drive, Brea, CA 92821, (714) 345-6645, e-mail: bbm@msn.com. Contact Bobbi Baguhn, CEO, MA, BSN, RN, CLNC. Medical record review, organization and analysis. Interpret deviations from the standards of care. Product liability and motor vehicle accident case review. Preparation of time lines. Location of expert witnesses. Demonstrative evidence development. See display ad on page 62.

OBSTETRICS AND GYNECOLOGY

GIL N. MILEIKOWSKY, MD
Offices in Encino and Beverly Hills, 29341⁄2 Beverly Glen Circle, Suite 373, Bel Air, CA 90077, (310) 658-1500 or (818) 981-9101, fax (310) 658-1303 or fax (818) 981-9194. Web site: www.baby4you.net. Contact Gil N. Mileikowsky, MD, OB/GYN, IVF, laser surgery, laparoscopy, and reproductive endocrinology, Diplomate, board certified by the American Board of OB/GYN. Board eligible, American Board of Reproductive Endocrinology Division. Fellow, American College of OB/GYN. Member of the American Society for Reproductive Medicine, Society of Assisted Reproductive Technologies, former Medical Director IVF (In Vitro Fertilization) at Northridge Hospital, former Chairman, Laser and Safety Committee at Northridge Hospital and member of the Los Angeles County Medical Association. Author, numerous scientific papers and articles published in peer review journals. Clinical assistant pro- fessor, OB/GYN at UCLA. See display ad on page 73.

PAUL SINKHORN, MD, FACOG
2942 Marley Drive, Riverside, CA 92506, (909) 241-2745, fax (909) 779-9189, e-mail: cpaul@pe.net. Web site: www.expertdoc.net. Contact C. Paul Sinkhorn MD, FACOG. Board-certified OB/GYN, clinical associate professor, University of California Riverside, teaching faculty, Arrowhead Regional Medical Center, pro- fessional liability committee for San Bernardino Medical Society, peer reviewer for California Medical Association, deposition/trial experience, expert laparoscopist, and high risk OB and GYN surgery. AAGL, AOA. Degrees/license: MD, FACOG.

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RICHARD C. ROSENBERG, MD

JERROLD M. SHERMAN, MD
1260 15th Street, Suite 614, Santa Monica, CA 90404, (310) 933-9809, fax (310) 786-8438. Contact Jan Lindsey. Orthopedic surgeon who is board certified as an independent medical examiner and chief executive officer of Outpatient Surgery Center. Licensed in Cali- fornia and Nevada.

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1300 North Vermont Avenue, Suite 710, Los Angeles, CA 90027, (323) 953-2631, fax (323) 953-3520, e-mail: jorgenius@live.com. Web site: www.jorgenius.com. Contact Michelle Trumpler, PA-C. Board certified in physical medicine and rehabilitation. Board cer- tified in pain management. IME, QME, courtroom and deposition experience.

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9454 Wilshire Boulevard, 6th Floor, Beverly Hills, CA 90212, (310) 247-2837, fax (805) 383-9973, e-mail: trimarco@aol.com, Web site: www.jacktrimarco.com. Contact Jack Trimarco, Former manager of the Federal Bureau of Investigation’s Polygraph program in Los Angeles. Former Inspector General Polygraph Program—Department of Energy, Nationally known and repected Polygraph Expert. I have the credentials you would want when you have a client polygraphed, a case reviewed, a motion made regarding polygraph, or an in-depth professional investigation. My unique background allows me to bring the highest levels of service and expertise to any polygraph situation. Degrees/certificates: BS Psychology. Certified APA, AAPP, CAPE, AAIE. See display ad on page 49.

PRISON MEDICINE

COREY WEINSTEIN, MD, CCP
1100 Sanchez Street, San Francisco, CA 94114, (415) 333-8228, e-mail: coreman@gc.org. Services available: jail and prison medicine, correctional medical care delivery, correctional medical standards, correctional medical policies and procedures, medical neglect in jail and prison, health effects of control unit prisons, in-custody suicide and death, restraint procedures, and pepper spray. Thirty years of experience in general and family medicine. Member of task force that wrote the American Public Health Association Standards for Health Services in Correctional Institutions (2003). Primary consultant for: Improving Access to Health Care for California’s Women Prisoners (UCSC 2001). Expert in federal court on jail medical programs, suicide, and delivery of medical services in prison. Medical consultant to Legal Services for Prisoners with Children and Justice Now. Certified correctional health-care provider.

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ARNOLD L. GILBERG, MD, PhD
Associate Clinical Professor of Psychiatry, UCLA School of Medicine, a professional corporation, 9915 Santa Monica Boulevard, Suite 101, Beverly Hills, CA 90212, (310) 274-2304, fax (310) 253-0783. Contact Arnold L. Gilberg, Board certified and appointed by three governors to Medical Board of California 11th District MRCQ 1982-1991. Certified in psychiatry and psychoanalysis. All civil matters, experienced as expert witness. Degrees/certificates: M.D., Ph.D. Licensed in California and Hawaii. See display ad on page 71.

BRIAN P. JACKS, MD

CAROLE LIEBERMAN, MD, MPH
247 South Beverly Drive, Suite 202, Beverly Hills, CA 90212, (310) 278-5433, fax (310) 456-2458, e-mail: dr.carole@earthlink.net. Contact Carole Lieberman, MD, MPH. Board-certified Forensic Psychiatrist, UCLA faculty, with winning record of testimony, depositions, and evaluations in hundreds of civil and criminal cases, including: high-profile, sexual harassment, entertainment law, terrorism, priest misconduct, malpractice, divorce, custody, abuse, personal injury, discrimination, wrongful termination, media copycats, sports, and violence. Consultant to Congress and the media. More than 10 years of experience. Excellent reference available upon request.

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18881 Von Karman, Suite 1175, Irvine, CA 92612, (949) 263-8700, fax (949) 263-0770, e-mail: info@mcsassociates.com. Web site: www.mcsassociates.com. Contact Norman Katz, managing partner. Nationally recognized banking, finance, and real estate consulting group (established 1973). Experienced litigation consultants/experts include senior bankers, lenders, consultants, economists, accountants, insurance underwriters/brokers. Specialties: lending customs, practices, policies, in all types of lending (real estate, business/commercial, construction); consumer/credit card; banking operations/administration, trusts and investments, economic analysis and valuations/damages assessment, insurance claims, coverages and bad faith, real estate brokerage, appraisal, escrow, and construction defects/disputes, and title insurance.

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11601 Wilshire Boulevard, Suite 1900, Los Angeles, CA 90025, (310) 575-0800, fax (310) 575-0170, e-mail: hgould@frlawcorp.com. Contact Howard N. Gould. Attorney malpractice in residential real estate, residential brokerage issues, and broker and finder issues.

SAMUEL K. FRESHMAN, BA, JD
6151 West Century Boulevard, Suite 300, Los Angeles, CA 90045, (310) 410-2300, fax (310) 410-2919. Contact Samuel K. Freshman. Attorney and real estate broker since 1956, banker, professor legal malpractice, arbitration, brokerage malpractice, leases, syndication, construction, property management, finance, due diligence, conflict of interest, title insurance, banking, escrow, and development. Expert witness 20-plus years in state and federal courts. Twenty-one published arti-


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6033 West Century Boulevard, Suite 890, Los Angeles, CA 90045, voice (310) 645-9000, fax (310) 645-8999. E-mail: frabinovitz@aol.com. Contact Francine Rabinovitz, PhD, executive vice president. Public policy, finance, and management consultants providing litigation support, simulation, and modeling to courts and corporate/public litigants in land use, real estate development, environmental protection, mass tort (including toxic tort), insurance, finance, housing, minority rights, education, and employment cases. Degrees/license: MBAs, PhDs, cert. planners, MPAs, MCPs.

**Arthur Mazirov**

Freeman, Freeman & Smiley, LLP, 3415 Sepulveda Boulevard, Suite 1200, Los Angeles, CA 90034, (310) 255-6114, fax (310) 591-4042, e-mail: am@ffslaw.com. Web site: www.ffslaw.com. Contact Arthur Mazirov. Thirty-years of real estate law practice handling purchases, sales, leases, ground leases, loan transactions, brokerage, and title matters. One of the principal authors, publisher, and purchase forms published by the American Industrial Real Estate Association. Author. 100+ articles on legal aspects of real estate. Lecturer 300+ on leases and contracts for UCLA Extension, CEIB, and realty groups. Arbitrator with AAA. See display ad on page 18.

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**Security**

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BRIAN H. KLEINER, PhD
Professor of Human Resource Management, California State University, 800 North State College Boulevard, LH-640, Fullerton, CA 92834, (714) 879-9705, fax (714) 879-5601. Contact Brian H. Kleiner, PhD. Specializations include wrongful termination, discrimination, sexual harassment, ADA, evaluation of policies and practices, reasonable care, progressive discipline, conducting third-party workplace investigations, retaliation, RFIs, statistics, negligent hiring, promotion selections, CFRA/FMLA, compensation, wage and hours, ERISA, workplace violence, and OSHA. Consultant to over 100 organizations. Over 500 publications. Five-time winner of CSUF Meritorious Performance Award. Extensive experience giving testimony effectively.

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5200 Bothwell Road, Tarzana, CA 91356, (818) 594-1587, fax (818) 245-9961, e-mail: morewitz@earthlink.net. Web site: http://home.earthlink.net/~morewitz/ Contact Dr. Steve Morewitz. Disability and sexual harassment: Evaluates disability and sexual harassment. Provides other experts. Eighteen years of experience giving testimony effectively. Professor and dean, author of three books and over 60 abstracts and articles.

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TRAFFIC ENGINEER
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1111 Town and Country #34, Orange, CA 92868, (714) 973-8883, fax (714) 973-8821, e-mail: w@traffic-engineer.com. Web site: www.traffic-engineer.com. Contact William Kunzman, PE. Traffic expert witness since 1979, both defense and plaintiff. Auto, pedestrian, bicycle, and motorcycle accidents. Largest settlement: $2,000,000 solo vehicle accident case against Caltrans. Before becoming expert witnesses, employed by Los Angeles County Road Department, Riverside County Road Department, City of Irvine, and Federal Highway Administration. Knowledge of governmental agency procedures, design, geometrics, signs, traffic controls, maintenance, and pedestrian protection.

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FACTS AND ISSUES PRESENTED: The Attorney, an estate planning attorney (the “Attorney”), often does business with a financial planning company (the “Company”). The Company has invited the Attorney to become an employee. The Attorney would be expected to render legal services to the Company’s customers,1 who would also receive financial planning advice directly from the Company’s nonlawyer employees.

The Company would not charge the customers separately for the legal services. Instead, the Company would charge customers based on a percentage of the total value of the customer’s estate, whether the Attorney provides legal services or not. The customers would pay the fees directly to the Company. The Attorney would be paid a set salary as an employee, whether or not the Attorney provides legal services to particular customers of the Company.

The Attorney seeks this committee’s opinion on whether this proposed arrangement is prohibited by the California Rules of Professional Conduct and, as specifically noted by Attorney, Rule 1-310 (Forming a Partnership with a Non-Lawyer)2 or Rule 1-320 (Financial Arrangements with Non-Lawyers).3

DISCUSSION

In General, California Rules Prohibit Members from Sharing Legal Fees with Nonlawyers.

Lawyers can ethically be employed by nonlawyers in a wide variety of situations, even if the lawyers perform legal services. The application of Rule 1-320 will depend on the particular circumstances of each specific situation. We limit this opinion only to the facts presented in this inquiry.

With limited exceptions that do not apply here, Rule 1-320(A) provides that “[n]either a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer.” The rationale behind this rule and its intended application are, primarily, to protect the integrity of the attorney-client relationship, to prevent control over the services rendered by attorneys from being shifted to lay persons, and to ensure that the best interests of the client remain paramount. See, e.g., Gassman v. State Bar, 18 Cal. 3d 125, 132 (1976); Gafcon, Inc. v. Ponsor & Associates, 98 Cal. App. 4th 1388, 1418 (2002); California State Bar Formal Opinion No. 1997-148.
Based on the facts presented by the Attorney, we conclude that the Attorney’s financial arrangement with the Company is prohibited by Rule 1-320(A). See California State Bar Formal Opinion No. 1999-154 ("To the extent that [a lawyer’s] company performs legal services or offers legal advice, rule 1-320(A) prohibits [the lawyer] from sharing with a non-lawyer any fee received as compensation for those services or advice.").

The threshold question is whether the inquiry presents a situation in which there are “legal fees” paid by the customers of the Company. We believe that there would be under the arrangement presented. The Attorney would be providing legal services to the Company’s customers. Because the legal services provided by the Attorney to those customers would be part of the “package” of services rendered by the Company, the fees paid by those customers would consist in part of legal fees. That the payments made by the Company’s customers would be dictated by a percentage of the value of the estate, rather than broken down into nonlegal versus legal fees, is not determinative. Whatever the payment by the customer, if the customer has received legal services through an attorney-client relationship with the Attorney, the customer’s payment would be directed at least in part toward legal services. Whether the Company promotes only the financial planning services it provides or also the legal services provided by Attorney as justifications for the fee it collects from its customers, or as an inducement to attract customers, the fees collected would necessarily represent both.

Having concluded that the payments to the Company by the customers include legal fees, it is clear under the facts presented that legal fees are being shared with nonattorneys. The fact that the Attorney is not directly compensated by the Company’s customers does not change this conclusion. There is improper fee splitting under Rule 1-320 where income derived in part from the Attorney’s legal services for the Company’s customers—i.e., the Attorney’s legal fee—is shared with the Company itself.

Because the Company would derive income (and the Company’s nonlawyer principals would thus be compensated) from a fund generated at least in part by the fees received from the Company’s customers, at least some of whom will have received legal services from the Attorney, we conclude that the Attorney would be violating Rule 1-320’s prohibition against sharing legal fees with nonlawyers “directly or indirectly.” The words “or indirectly” are significant. It is consistent with the rule’s breadth that “a mere change in payment arrangements cannot provide a subterfuge to avoid ethical rules that otherwise apply.” See California State Bar Formal Opinion No. 1997-148 (even if marketer establishes relationship with client by giving seminar on living trusts, and collects fees directly from client for purpose of having attorney prepare such a trust, if marketer thereafter shares fees with attorney for attorney’s work in preparing the trust, this is impermissible sharing of legal fees); see also Cain v. Burns, 131 Cal. App. 2d 439, 442 (1955) (attorney paid investigator for services rendered to clients, contingent upon legal recovery obtained on behalf of client; the fact that investigator was paid from attorney’s “general fund” instead of directly from the attorney’s fees upon which it was based) does not remove this from the prohibition of splitting legal fees.

It could be argued that if the portion of the fees generated by the Company’s customers that is attributable directly to the Attorney’s legal services does not exceed the Attorney’s salary, the Attorney could not be deemed to “share” these legal fees. In other words, if all of the legal fees generated by the Attorney’s legal services would cover only the Attorney’s salary, there would be none to be shared with the Company (and thus none to be shared with the Company’s nonlawyer principals). This question was considered by the ABA Standing Committee on Ethics and Professional Responsibility, in relation to Model Rule of Professional Conduct 5.4, which provides—in language materially similar to Rule 1-320—that a “lawyer or law firm shall not share legal fees with a non-lawyer.”

The ABA’s Standing Committee determined that, in providing legal services to others, “a corporation may not reap profits from the work of its in-house attorneys.” ABA Formal Opinion No. 95-392 (emphasis added). If the facts presented in this inquiry showed this to be the case—namely, if the legal fees generated by the Attorney’s legal services were paid solely to the Attorney, and the Company did not profit from these legal fees—then there would be no violation of Rule 1-320. Whether other rules would be violated by such an arrangement would still need to be considered, but those are not the facts presented in this inquiry.

On the facts of this inquiry, the Company would not charge its customers separate fees for legal services. Because of this, it cannot readily be determined what is being charged to the customer for legal services. Therefore, the danger remains that the Company “is in a position to view its legal department as a profit center.” Id. Rule 1-320 was intended to prohibit this and the concomitant danger that the Company would exercise control over the matters handled and services rendered by the Attorney for the Company’s customers.

This committee has previously considered a similar issue and reached the same conclusion. See Los Angeles County Bar Association, Formal Opinion No. 431 (1984). In Opinion 431, the committee considered a company that provided business management services for entertainment industry clients, and that proposed to enter into an agreement with a law firm to provide services directly to the company’s clients. The company would be primarily responsible for collecting the client’s payments for the legal fees and, in turn, compensating the law firm for its fees and expenses. However, the company also proposed to charge to each client a 20 percent fee override, as pure profit for the company, based upon the legal service hours provided by the law firm to the client. This committee determined that the 20 percent fee override is “a clear case of fee splitting” under the rule that preceded Rule 1-320. Id.

In the situation presented in Opinion 431, the fee override determined to be improper as it related to the law firm was “based solely on the number of service hours rendered by Law Firm to the clients,” whereas in this inquiry, the fee collected from customers by the company is not based on the number of legal service hours provided by the Attorney. Nonetheless, the material aspect of the prohibited fee-splitting arrangement in Opinion 431 was that the company received compensation that was directly tied to legal services provided by the law firm. To an extent that has not been quantified by the Attorney in this inquiry, the Company would receive compensation from its customers that may be in part based on legal services provided by the Attorney. It is irrelevant to our conclusion that the Company’s compensation is also derived, to some similarly unquantified extent, from financial planning services provided by nonlawyers.

The Prohibition of Legal Fee-Splitting Arrangements with Nonlawyers Is Consistent with Various Other California Legal and Ethical Requirements.

There are various ethical guidelines for members engaging in business relationships with nonattorneys found in other California rules that are consistent with the general fee-splitting prohibition found in Rule 1-320. For example, Rule 1-600 expressly addresses the concern arising from a nongovernmental entity that furnishes or pays for legal services, prohibiting any licensed attorney from belonging to any organization that interferes with his or her independent professional judgment. Also, it is impossible to tell, at least on the facts presented, what fee would actually be charged to the Company’s customers specifically for the legal services rendered to them by the Attorney. As raised in this com-
mittee’s Formal Opinion No. 431, it is thus difficult, if not impossible, to determine if the legal fee charged “disproportionately exceeds the quality or amount of legal services rendered so as to shock the conscience of ordinarily prudent attorneys practicing in the community”—in other words, if the fee is unconscionable under Rule 4-200. This is yet another danger with fee-splitting arrangements between lawyers and nonlawyers, when there is no breakdown of the fees by services rendered.

An additional consideration is the application of Rule 3-310(F), which requires that an attorney not accept compensation from someone other than the client, unless there is no interference with the attorney’s independent judgment and certain other requirements are met. The general purpose of this restriction is to ensure that no one other than the client has influence or control that would in any way impair the attorney’s loyalty to the client. In the situation at issue, circumstances could arise that would place the welfare or interest of the Company, which pays the Attorney’s salary, at odds with the best interests of the client, to whom the Attorney owes undivided loyalty.

An additional complication could occur if the Attorney receives confidential information from the client that might have some impact on the Company. This could potentially threaten the Attorney’s obligation to “maintain and preserve the confidence and secrets” of the client, pursuant to California Business and Professions Code section 6068(e).

In all, these issues also relate to the policy underlying the fee-splitting prohibition found in Rule 1-320, and its application to the situation presented in this inquiry. 11

CONCLUSION

Here, the financial arrangement proposed between the Attorney and the Company would involve the sharing of legal fees, collected from the Company’s customers in part based on legal services rendered to them by the Attorney, with the Company’s nonlawyers. This is prohibited by Rule 1-320.

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

The facts presented by Attorney in his inquiry indicate that his job at Company would require him to “provide legal services” to Company’s customers. The choice of this language indicates, and we assume for purposes of this opinion, that Attorney would be in an attorney-client relationship with Company’s customers directly. This opinion also assumes that Company is owned, at least in part, by nonlawyers or, if owned entirely by lawyers, is not authorized to practice law in California. The committee’s opinion thus does not address any question regarding the impact of a similar financial arrangement when an attorney has an attorney-client relationship with a financial planning company only. This opinion also does not address the possibility that, even if there were no multidisciplinary arrangement between Attorney and any customer of Company, the activities of Company itself would amount to the practice of law. See, e.g., People v. Volk, 805 P. 2d 1116, 1118 (Colo. 1990) (attorney’s separate entity that assisted in aiding the unauthorized practice of law under a disciplinary rule substantially the same as Rule 1-320 where the attorney admitted that the counseling and sale of trusts by a company that was the attorney’s client, where the company acted through nonlawyers, constituted the unauthorized practice of law by the company).

Unless otherwise stated, all rule references in this opinion are to the California Rules of Professional Conduct.

The committee notes that the topics of multidisciplinary practice, and associations between lawyers and nonlawyers in combined practices of providing legal and nonlegal services to clients, are in a state of flux. Nationally and internationally, jurisdictions and bar organizations are reconsidering the practical realities of modern legal practice. The District of Columbia, for example, recently revised its rules to allow lawyers to practice law within entities owned or controlled by nonlawyers, under certain circumstances. See D.C. Rules of Prof. Conduct 17, 5, 74; 70 U.S.L.W. 2805, 2806. California does not authorize lawyers to practice in multidisciplinary associations.

Rule 1-320(A) provides:

Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer, except that:

1. An agreement between a member and a law firm, partner, or associate may provide for the payment of money after the member’s death to the member’s estate or to one or more specified persons over a reasonable period of time; or

2. A member or law firm undertaking to complete unfinished legal business of a deceased member may pay to the estate of the deceased member or other person legally entitled thereto that proportion of the total compensation which fairly represents the services rendered by the deceased member;

3. A member or law firm may include nonmember employees in a compensation, profit-sharing, or retirement plan even though the plan is based in whole or in part on a profit-sharing arrangement, if such plan does not circumvent these rules or Business and Professions Code section 6000 et seq.; or

4. A member may pay a prescribed registration, referral, or participation fee to a lawyer referral service established, sponsored, and operated in accordance with the State Bar of California’s Minimum Standards for a Lawyer Referral Service in California.

Compensation paid by an attorney to nonattorney employees, even if that compensation is derived from legal fees, is generally not prohibited by Rule 1-320, so long as the amount of compensation is set in advance and not subject to or contingent upon the legal fees collected by the attorney. See Cal. Rules of Prof. Conduct R. 1-320(A)(1); Los Angeles County Bar Association, Formal Op. No. 457 (1990) (bonuses paid to paralegal by attorney does not constitute sharing of legal fees because not based on percentage of attorney’s fees or on fee the attorney was to receive on particular case, and not expected by paralegal).

The facts of the inquiry are unlike those of Gafcon, Gafcon involved the representation of an insured party by the attorney employee of an insurance company. No legal fee was paid by the insured, and the primary issue raised with respect to the insurance company’s employment of counsel for the insured was whether the insurance company was engaged in the unauthorized practice of law. In ruling that this arrangement did not constitute the practice of law by the insured, the court in Gafcon noted 1) an insurance company has a direct pecuniary interest in the underlying third party action against its insured, and 2) having such an interest, it is not entitled to have counsel represent its own interests as well as those of the insured, as long as their interests are aligned. Gafcon, Inc. v. Fonser & Assoc., 98 Cal. App. 4th 1338, 1414 (2002). The court in Gafcon rejected the argument that counsel’s status as a salaried employee in this circumstance inherently creates a temptation for counsel to violate or disregard ethical rules. Id.

The inquiry also raised the issue of whether the proposed arrangement violates Rule 1-310. Rule 1-310 prohibits an attorney from forming a partnership with a nonlawyer. Considering the application of both of these rules in the context of “[a] lawyer providing non-legal services through non-lawyer employees or business entities in which non-lawyers also have an interest,” the State Bar has determined that “[t]ogether, these rules require that both the structure of the business relationship and the division of income from non-legal services be separate and distinct from the lawyer’s practice.” California State Bar Formal Op. No. 1995-141.

Rule 1-600 states: “A member shall not participate in a nongovernmental program, activity, or organization furnishing, recommending, or paying for legal services, which allows any third person or organization to interfere with the member’s independence of professional judgment, or with the client-lawyer relationship, or allows unlicensed persons to practice law, or allows any third person or organization to receive directly or indirectly any part of the consideration paid to the member except as permitted by these rules, or otherwise violates the State Bar Act or these rules.” 2

Rule 3-310 (F) states:

(F) A member shall not accept compensation for representing a client from one other than the client unless:

1. There is no interference with the member’s independence of professional judgment or with the client-lawyer relationship; and

2. Information relating to representation of the client is protected as required by Business and Professions Code section 6088, subdivision (e); and

3. The member obtains the client’s informed written consent, provided that no disclosure or consent is required if:

a. such nondisclosure is otherwise authorized by law; or

b. the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

California Business and Professions Code Section 6088(e) reads, in part:

It is the duty of an attorney to do all of the following:...

e. To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

Another rule that may be implicated in the described facts is Rule 1-400. Assuming the Company solicits business in a way that includes legal services among its offerings to clients, the Attorney would need to be aware that such solicitations comply with the rules relating to advertising and solicitations.

8 Rule 3-310 (F) states:

(F) A member shall not accept compensation for representing a client from one other than the client unless:

1. There is no interference with the member’s independence of professional judgment or with the client-lawyer relationship; and

2. Information relating to representation of the client is protected as required by Business and Professions Code section 6088, subdivision (e); and

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9 California Business and Professions Code Section 6088(e) reads, in part:

It is the duty of an attorney to do all of the following:....

e. To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.
Is There a Bluetooth in Your Future?

A new wireless technology offers hope of eliminating the cords that bind electronic gadgets.

Bluetooth is a short-range wireless communication protocol that can be used for data and voice transmission. The protocol uses the 2.4 GHz band, and the technical specifications for Bluetooth security are comparable to other wireless networking protocols. The range is about 30 feet, and power consumption is relatively low, which makes Bluetooth ideal for cell phones and PDAs.

Infrared data transfer for short distances without wires was implemented several years ago in PDAs, laptops, and printers. This technology is still available, but one of its limitations is that the infrared transmitter has to be aligned in line of sight with the receiver. With infrared, if you want to print from your laptop you have to position it so that its infrared port is pointing at the receiver on the printer. In an improvement over infrared, Bluetooth does not require line-of-sight alignment.

The technology is suited to cell phone headsets because the wired connections between them and cell phones frequently become tangled. If you must use your cell phone while driving, getting rid of the wire that connects the headset to the cell phone eliminates one distraction. A growing number of companies are making Bluetooth headsets, and among the more recent models are the Plantronics M3000 and M1000 (http://plantronics.com), the SonyEricsson HBH-65 (www.sonyericsson.com), the Nokia HDW-2 (www.nokia.com), the Jabra Freespeak BT200 (www.jabra.com), the Cardo Allways Bluetooth headset (www.allways1.com), and the Motorola HS 810 (www.motorola.com).

Do not despair if your phone does not support Bluetooth. Some manufacturers, including Jabra, make adapters that plug into the external microphone port and allow communication with a Bluetooth headset. Unfortunately, an adapter adds another item to dangle from your cell phone. Since most cell phones are not ready for Bluetooth, it is surprising that more companies are not making adapters. When buying an adapter, it is important to make sure it is compatible with your phone’s port. Many Nokia phones, for example, have a proprietary port configuration.

One factor to consider when selecting a Bluetooth headset is that headsets run on battery power. The average battery life is around 3 hours of talk time, although the Plantronics M3000 purports to have 5.6 hours of talk time, and the Jabra Freespeak 250 purports to have 8 hours of talk time. Another factor is that with a wireless headset, security is not likely to match that of a wired connection. The short range of the signal provides an inherent level of protection, and Bluetooth is capable of supporting 128-bit encryption. I tested a Bluetooth headset in a room where several others had Bluetooth headsets, and no one could receive other conversations with their headsets. Nevertheless, Bluetooth is based on radio waves that move through the air. Cell phones themselves offer imperfect protection, and thus users of cell phones and Bluetooth cannot be completely assured that their communications will be secure from a persistent and well-informed hacker.

Much more simply, security based on technology is academic for those who use cell phones in public.

Aesthetics and fit are a matter of personal taste. Most of the devices hang over or around the ear, and they are lightweight. All the units I tested feel relatively comfortable, but after a half-hour most of the units began to cause some discomfort. Those who wear a headset frequently may sufficiently toughen their ear. The Jabra unit appears to be the least noticeable of those I tried because most of the unit goes behind the ear; the others generally cover the ear. The Cardo unit can be clipped to eyeglasses, which I found to be a comfortable alternative. Consider trying each alternative for fit, especially if you intend to use the headset for prolonged periods of time.

Plantronics offers a number of accessory options that can customize the fit of the headset, such as a smaller ear loop and an over-the-head band for holding the headset in place. Jabra offers different size ear buds (the part of the headset that rests in your ear). The microphone on the models listed above is attached to a short boom that does not have to reach to the front of the mouth, presumably the result of a desire to make the headset look less ungainly. Amazingly, these microphones do pick up the user’s speech. While the microphones generally perform reasonably well in an environment with some background noise, wind still creates significant problems.

As with a cell phone signal, the connection between your headset and cell phone can be dropped if there is too much interference. The connection quality will be much better if the cell phone is on your dashboard or desk instead of inside your briefcase. It is also helpful if you keep the headset on the same side of your body as your cell phone. Many headsets advertise advanced features, such as auto redial and voice-activated calling. The fine print on these claims is that your phone has to have these features. Headsets support these functions rather than perform them independently.

Retail prices for Bluetooth wireless headsets range from roughly $100 to $150. On the other hand, a wired headset may cost between $20 to $30, with only deluxe models costing more. One notable newcomer to the wired headset market is The Boom (www.theboom.com), which retails for $150 and has a microphone on a boom that extends to the mouth. The Bluetooth head-
sets cost roughly the same, but The Boom headset offers hands-free use even in a noisy environment. I found the sound capture quality of The Boom unit to be exceptional compared to wired and wireless offerings. The Boom may look more geek than chic, but the reward in sound quality for the longer boom is ample.

**Other Bluetooth Applications**

Bluetooth technology can also be used in what are called private networks, in which a user or users can connect to peripheral devices wirelessly. For example, in a small office, users can employ wireless keyboards individually and share a wireless printer. Hewlett Packard (www.hp.com) recently introduced a Bluetooth mobile printer, the Deskjet 450wbt. Additionally, a number of companies are making Bluetooth adapters for their printers. For complicated or lengthy documents there may be a slight reduction in speed compared to a cable connection, but in general the bottleneck with printing is not the transmission speed but the printer speed. Bluetooth can be a good solution for an office that has one printer and multiple users in a single room who are not already connected to a network.

An adapter is necessary to enable computers to communicate with Bluetooth devices. About the size of your thumb, adapters range in price from $25 to $50, and they are designed to plug into a USB port. To use Bluetooth for multiple devices, users must make sure that the central Bluetooth adapters or hubs in a network support multiple profiles, which are the settings for different Bluetooth devices. To prevent signals from overlapping, a separate profile is needed for each headset, printer, keyboard, and mouse in a network. There does not seem to be a way to upgrade the number of profiles that a given adapter will accept, so it is necessary to plan ahead and to check the capabilities of an adapter before buying.

To remove wires on a desktop, the Logitech DeNovo (www.logitech.com) offers a stylish solution. The device includes a wireless keyboard, a separate wireless numeric keypad that doubles as a remote control for a media center, a wireless mouse, and a recharging base for the mouse that doubles as the hub and Bluetooth adapter. Microsoft (www.microsoft.com) also offers a variety of Bluetooth keyboard and mouse combinations with an offering known as the wireless optical desktop for Bluetooth.

Logitech offers another interesting tool that takes advantage of Bluetooth: a digital pen. The traditional digital pen requires a pressure-sensitive writing surface, is wired to the computer, and does not write with ink. The new Logitech pen, however, is wireless and operates as a normal ink pen. Moreover, the pen can be used on special paper (sold with the pen) that is covered with a grid of tiny dots barely visible to the human eye. A minuscule camera in the pen tracks the dots as the pen moves, thus allowing users to store up to 40 pages of handwriting and drawings in the pen’s memory for subsequent transmittal to a computer.

Software that comes with the pen has a handwriting recognition feature to convert writing into text. As may be expected, the handwriting-to-text feature may not work for everyone. The pen is a bit heavier than an ordinary ball-point, but for those accustomed to using larger pens, little adjustment will be necessary. The special paper costs $10 for a refill, and no doubt the users of this special pen will pay top dollar for ink refills as well.

In a short time Bluetooth technology is likely to be so widely used that there will be no need to pay much attention to the fact that a product uses Bluetooth. Given its relative novelty in the consumer market, and the relatively small number of products that are using Bluetooth, the price of Bluetooth products is currently relatively high. Prices should decrease, however, as more purchasers accept this new wireless technology.
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The Nuts and Bolts of Workout Agreements

ON WEDNESDAY, APRIL 7, the Commercial Law Committee of the Commercial Law and Bankruptcy Section, as well as the Business and Corporations Law Section, will present a program on the basics of workout agreements. Speakers John A. Lapinski, Dan S. Schechter, and Scott O. Smith will discuss such topics as how to structure an effective workout agreement, how to effectively use outside consultants to assist management, and what remedies are available if the workout fails. This event will be held at the LACBA/LEXIS Publishing Conference Center, 281 South Figueroa Street, Downtown. Parking at the Figueroa Courtyard Garage will be available for $7 with LACBA validation. 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 registration code number is 810LD07. Preregistered CLE+Plus members may attend for free ($15 meal not included). The prices below include the meal.

$55—members of the Commercial Law and Bankruptcy, Business and Corporations Law, and Barristers Sections
$65—other LACBA members
$75—all others
1 CLE hour

Effective Case Settlement Techniques

ON WEDNESDAY, APRIL 7, the Family Law Section will present a seminar featuring Judge Aviva K. Bobb and retired commissioner Jill Robbins, who will speak on effective case settlement. There will also be a reception to honor mediators who have generously donated their time to superior court programs. This event will take place at the Music Center, Dorothy Chandler Pavilion, 135 North Grand Avenue, fifth floor, Downtown. The registration code number is 008537. On-site registration and the reception buffet will begin at 6:30 P.M., with the program continuing from 7:30 to 8:30 P.M. Preregistered CLE+Plus members may attend for free ($40 meal not included). The prices below include the meal.

$40—Family Law Section members and LACBA members
$45—all at-the-door registrants
1 CLE hour

Using Environmental Insurance to Close a Deal

ON WEDNESDAY, APRIL 14, the Land Use Planning-Environmental Law Subsection of the Real Property Section, together with the Environmental Law Section, will present a program on how to use environmental insurance to close a deal. This event will be held at the LACBA/LEXIS Publishing Conference Center, 281 South Figueroa Street, Downtown. 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. Preregistered CLE+Plus members may attend for free ($15 meal not included). The prices below include the meal.

$45—Real Property and Environmental Law Section members
$55—LACBA members
$65—all at-the-door registrants
1 CLE hour

How to Be an SB 800 Survivor

ON TUESDAY, APRIL 27, the Construction Law Subsection of the Real Property Law Section will offer a program on the new construction defect statutes. Speakers Bryan C. Jackson, Teresa Tate, and Timothy M. Truax will acquaint participants with the substantial recent revisions to California’s construction defect laws. This event will be held at the LACBA/LEXIS Publishing Conference Center, 281 South Figueroa Street, Downtown. Parking at the Figueroa Courtyard Garage will be available for $7 with LACBA validation. 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 registration code number is 803LD27. Preregistered CLE+Plus members may attend for free ($15 meal not included). The prices below include the meal.

$55—Real Property Section members
$55—LACBA members
$65—all at-the-door registrants
1 CLE hour

The Los Angeles County Bar Association is a State Bar of California MCLE approved provider. To register for the programs listed on this page, please call the Member Service Department at (213) 896-6560 or visit the Association Web site at http://forums.lacba.org/calendar.cfm. For a full listing of this month’s Association programs, please consult the April County Bar Update.
Speed Has Been Deliberate

We celebrate the 50th anniversary of Brown despite our disappointment in its results

As we speedily approach the 50th anniversary of Brown v. Board of Education, it is time for us to again take a deliberate look at our society, educated or not, and our Supreme Court, unanimous or not. Has Brown been the catalyst for change in society? Has it been the seed for positive educational reforms for all our children? Was Brown a defining moment for the High Court, and did it signal a significant change of course in Supreme Court decision making, particularly in matters of civil rights? I believe the answer to all these questions is yes—qualified, but yes.

At the time of the Brown decision on May 17, 1954, I was a college senior. Today, I am contemplating senior status on the federal bench after almost 25 years of service. In 1954, our country was deeply divided on matters of race in very visible ways: legal segregation, usually referred to as separate but equal, in Southern and border states, and de facto separate but equal customs and policies in other large sections of our nation. Clearly, segregated education did not exist in the South alone.

My own early schooling was segregated in Chicago, the urban heart of the Midwest. I attended Forestville, the largest elementary school in the country, with more than 4,000 students, all Black, with a few white teachers and a white principal. Using a family friend’s address, I was able to attend Hyde Park High School, which was overwhelmingly Jewish. Both schools were the products of the de facto neighborhood segregation policies of the Chicago Board of Education.

My childhood experiences find parallels in our “Golden State,” with its own history of “separate but equal.” For example, retired California Supreme Court Justice Cruz Reynoso relates his experience as a student in a segregated school system in La Habra. And right here in Los Angeles, the attempt to rid the system of segregated schooling remains a work in progress, following Crawford v. Board of Education.

I note how my adopted hometown of Pasadena reacted to Brown. When, almost 16 years after Brown, my colleague, U.S. District Judge Manuel L. Real, ordered an end to segregated school policies in Spangler v. Pasadena Unified School District, the result mirrored the resistance to judicial decisions in many parts of the deep South—white flight from the public schools and the overnight establishment of private schools and academies. Today, many years after the decision by Judge Real, the majority of white families with school-age children still avoid the now-“integrated” public schools of Pasadena.

If these rather meager gains were the major result of Brown, why do we celebrate its 50th anniversary? One well established reason is the agreement that Brown was the national incubator for the Civil Rights Movement. Brown (and Brown II) placed the U.S. Supreme Court in the leadership position in dealing with race relations, a position the Court had not held since its tortured 1896 decision in Plessy v. Ferguson, which established the separate but equal doctrine.

We also recognize the extraordinary leadership of the Third Branch with its then new head, Chief Justice Earl Warren. Can you visualize any case dealing with issues of race and public policy that could result in an unanimous opinion from our present nine justices, even for the good of the nation? I rather believe there would be, at a bare minimum, eight concurring opinions defining “good.” Chief Justice Warren, supported strongly by veteran Justice Felix Frankfurter, understood that if this country was ever going to confront and start the difficult task of attempting to resolve longstanding issues of inequality, be true to the ideals of the Constitution, and heal itself, the Court would have to speak with a single voice.

And what an extraordinarily creative feat that was—to craft a unanimous opinion that was so far-reaching. Those magic words—“with all deliberate speed”—inspired millions of minorities who hungered for equal rights and educational opportunities under the law, but, at the same time, they also provided cover for those who opposed the decision and time to develop alternatives to “race mixing” through the closure of public schools, establishment of private white academies, and endless appeals of specific integration plans.

Before he became the first African American solicitor general and Supreme Court justice, Thurgood Marshall was (and still is) associated with Brown. Yet, he did not represent the plaintiffs in that case; rather, he was counsel for the South Carolina plaintiffs in a case joined with Brown. As momentous as the Court’s decision was in striking down the separate but equal doctrine, Marshall was put off by “all deliberate speed.” He was heard to mutter, “Free by ’63.” As we now know 50 years later, Marshall’s sarcasm was not prophetic—merely optimistic!

Contemporary critics of Brown point to the sociological and psychological evidence of the plaintiffs’ experts that the Court considered as just the kind of sophistry that would not get by a gatekeeping federal trial judge under the Daubert standards. Supporters sharply disagree and suggest that the Court would have reached the same decision even without the sociologists’ use of dolls. They believe, as I do, that the Warren court was determined to set the nation on a new course away from Plessy v. Ferguson, and, of course, it did just that—“with all deliberate speed.”
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