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urnout is a state of professional depletion in which internal motivation is insufficient to meet external demand over a prolonged period of time. Showing up to work is accompanied by a churning stomach. Walking down the office hallway is like navigating the gangway on a ship in tumultuous seas. The ringing phone tortures the ear. E-mails pile up like grand jury indictments. Colleagues become stalking monsters.

Last month I addressed the issue of attorney satisfaction, but professional satisfaction cannot prevent the consequences of working too much, living too little, and resting too rarely. Jews and Christians believe that God, after creating the heavens and the Earth, did something lawyers on the burnout track don’t do: God rested. Notwithstanding the exaggerated ego that often accompanies success in the practice of law, very few lawyers place themselves superior to God.

Some advocate changing the traditional billable hours paradigm in law firms, allowing flex time and part-time work. The Simple Living Coalition advocates that well-paid but long-hour salaried workers should be given comp time for work beyond the 40-hour standard. This is not likely. Instead, attorneys who want immediate relief should take responsibility for managing their own professional health.

Each lawyer possesses a unique capacity for output, and each lawyer possesses a correlative rate of burnout. Identifying your own personal burnout threshold is essential. Knowing your limits can be very satisfying; discovering your limits can be an ego-jarring body slam. The problem is, the only way to identify your burnout threshold is to burn out.

But burnout is a blessing in disguise. It affords us the opportunity to confront our limitations and live within them. Many of us who have flamed out of control have regained control and leveled off. Thereafter we avoid burnout because we possess a thorough understanding of our unique limits and employ strategies that may be instructive.

Identify the maximum number of months you can go without a vacation—a real vacation without a cell phone, blackberry, or laptop. Take vacations within that interval.

Identify your breaking point for billable hours. If your attitude and work quality suffer after five consecutive months above 200 billable hours, manage your workload by refusing additional work. What? You can’t refuse work at your firm? Poppycock. Talented attorneys who have earned their seat can demand a light month. By contrast, if you break down after 160 hours per month, burnout is the least of your worries.

Establish consistent and realistic work boundaries. Refusing to work past 6 P.M. on Friday nights and before noon on Saturdays is realistic. Always do something fun or relaxing in that time period.

Lastly, burnout is not always related to the amount of work. Criminal attorneys and family law attorneys often grow weary of witnessing human wreckage. If something inherent in your practice is burning you out, try some pro bono or community work that provides a sense of fulfillment. Don’t rule out a practice area change. You can’t find a better path if you’re afraid of the woods.

Avoiding repeated burnout is each lawyer’s responsibility. There is no malpractice exemption for burnout. There is precious little forgiveness for frayed nerves and explosive tempers. Our loved ones deserve the best of us, not the shattered remains of a lawyer who struggles in grumpy and defeated after prime time.

Consider that God, after creating the heavens and the Earth, did not really need to rest. Maybe God was just setting a good example for the rest of us.
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Taking Depositions Abroad

**AS BUSINESS TRANSACTIONS HAVE BECOME** increasingly globalized, so has litigation. In handling a case in which some witnesses and physical evidence are located abroad, counsel must consider carefully all the available options for obtaining the evidence necessary for the disposition of a case. If a party to the action is domiciled abroad (and the party is unwilling to travel to the United States) or if the transactions at issue occurred in a foreign country, seeking evidence abroad may be unavoidable. Section 2027.010 of the Code of Civil Procedure specifically permits California litigants to take oral depositions in foreign countries.

It can be extremely difficult for U.S. attorneys to depose witnesses in foreign countries because there are no uniform rules. However, some general approaches and requirements can guide attorneys as they consider taking a foreign deposition. For example, once it is determined that taking depositions abroad is essential, counsel should first determine if the foreign nation in which the witness is located is a member of the Hague Convention on Taking Evidence Abroad on Civil or Commercial Matters,¹ which codifies the taking of depositions on notice and commission before consuls and court-appointed commissioners and streamlines procedures for compulsion of evidence when the witness refuses to appear. If the foreign nation is a signatory, counsel has the option of using one of the methods provided by the Hague Evidence Convention or other permissible methods.

Under the Hague Evidence Convention, testimony of a foreign witness may be obtained in two ways. The first involves obtaining a letter of request from the court in which the California action is pending. The letter requests that a judge in the foreign court of jurisdiction conduct the questioning of the witness. The second involves arranging for a deposition at a local U.S. embassy or consulate administered by a consular officer or by a court-appointed commissioner. Obtaining a letter of request is the customary method of compelling evidence from an unwilling witness. If the witness is a party or an officer, director, managing agent, or employee of a party, however, his or her deposition may be compelled by notice, and sanctions may be available under Code of Civil Procedure Section 2027.010(b). Counsel also may apply to obtain assistance from an appropriate foreign authority in compelling the witness to testify. Attorneys should note that it generally takes six months to a year for a foreign court to execute a letter of request.

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American counsel may be able to conduct depositions of willing witnesses by stipulation of the parties, without involvement of a U.S. consular officer, if the foreign country permits depositions under such circumstances. (Canada and the United Kingdom do.) Otherwise, counsel need to arrange for taking a deposition before a U.S. consular officer or a court-appointed commissioner at a conference room or similar facility available at a local embassy or consulate. Before counsel may make reservations for specific days, many foreign nations require a commission before consuls and court-appointed commissioners and streamlines procedures for compulsion of evidence when the witness refuses to appear. If the foreign nation is a signatory, counsel has the option of using one of the methods provided by the Hague Evidence Convention or other permissible methods.

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**The Risk of Taking a Deposition in China**

Although China is a member of the Hague Evidence Convention, the nation does not recognize the right of persons to take depositions, and any effort to do so could result in the arrest or detention of American participants. Although requests for compulsion of evidence...
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may be made to the Chinese Central Authority with a letter rogatory or letter of request, such requests have not been very successful.

If the witness is located in a foreign country that is not a member of the Hague Evidence Convention, his or her appearance may be compelled through the execution of a letter rogatory issued by the court in which the action is pending to an appropriate foreign authority. Under Code of Civil Procedure Section 2027.010(e), letters rogatory may be issued on motion in California upon the court’s determination that it is “necessary or convenient.” Like letters of request under the Hague Evidence Convention, letters rogatory generally take from six months to a year to execute. However, because enforcement of letters rogatory depends on the foreign jurisdiction’s willingness to exercise comity, they may not be as effective as letters of request under the Hague Evidence Convention.

Deposition of a willing witness may be taken before a consular officer or a court-appointed commissioner or by American counsel upon stipulation of the parties if permitted under local laws.

If an interpreter is required, counsel should consider retaining a competent interpreter from the United States and flying him or her to the foreign jurisdiction. Although many U.S. embassies and consulates have lists of interpreters, they are often unqualified. Because the quality of interpretation could potentially affect the outcome of litigation, any interpreter should be interviewed by someone who speaks the foreign language. Counsel should never rely solely on the interpreter’s resume or educational background.

If the opposing side is arranging for an official interpreter, retention of a check interpreter is advisable, particularly in cases, such as patent infringement actions, involving highly technical terms.

Finally, counsel must make their own arrangements for the services of a court reporter. Counsel may wish to bring their own court reporter with them to the United States to countries (such as Japan) where court reporters are not readily available or where English is not the official language. Additional information regarding taking depositions abroad is available on the U.S. Department of State Web site, which has useful circulars regarding obtaining evidence abroad, preparation of letters rogatory, the Hague Evidence Convention, and country-specific information.

Member nations include Australia, France, Germany, Israel, Mexico, the United Kingdom, and the United States.

2 See CODE CIV. PROC. §2027.010(e) (issued by a court in the U.S. to any consular officer).
The Future of Streaming Technology after Grokster

GLOBAL SALES OF RECORDED MUSIC FELL by 20 percent from 2001 to 2004,1 and in the first half of 2005 sales fell by a further 1.9 percent, while the share of digital music sales tripled to 6 percent of total record industry sales.2 Many in the recording industry attribute these massive losses to rampant Internet piracy. A recent U.S. Supreme Court decision, Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., may now help the industry begin to recover. (On November 7, 2005, the Associated Press reported that Grokster had “shut down operations” to settle the suit brought by the recording industry.)

Though music has been recorded in a digital format for many decades, until relatively recently the file sizes have been so large, and the transmission technology (modems) so slow, that online distribution was impractical, if not impossible. However, several technological changes have converged to cause a sea change in the way musical recordings can be delivered to consumers. First, the rapid growth of high-speed Internet access has created a new channel for consumers to access music. Coupled with that development are advances in compression technologies—primarily the popular mp3 format—which have made it possible for consumers to create and transmit perfect digital copies of entire songs in a matter of minutes, or even less. Although mp3 technology was available as early as 1995, it was not until 2004 that the first commercially successful, legitimate online distribution model arrived on the market in the form of Apple’s iTunes Music Store.

During the Internet boom of the late 1990s, a number of unauthorized online services arose to fill the rising demand for digital music downloads. Unlike traditional retail stores, these online services did not sell music to their consumers. Instead, they allowed users to share the music on each other’s computers through various means. Generally, consumers would “rip” (copy) music from a CD and save the songs onto their computer hard drive. These sharing services would then allow users to download music that other users had ripped and stored, typically in the mp3 format. These services are generally referred to as peer-to-peer networks, because they operate by allowing users to share files with one another, rather than the traditional retailer distributing to individual consumers.

Napster, the original peer-to-peer network, was created in 1999 by Shawn Fanning, a college dropout.3 It was the first popular service that enabled easy searching and downloading of a vast library of music supplied by its users. Digital music files had been circulating on the Internet for a few years, but it was not until Napster came into being that a service existed by which consumers could log on and find nearly any song they wanted and download it onto their hard drives within minutes for free. Within its first year of operation, Napster had tens of millions of infringing individual users trading files on its service every single day.4

Just as Napster was a magnet for a growing wave of users looking for fast, free, and easy downloads, it was a lightning rod of the recording industry. As traditional CD sales plummeted, the record companies were unable to prevent file sharing, and piracy started to become the accepted norm to a new generation of music fans. Not surprisingly, the recording industry saw little option but to take Napster and its successor peer-to-peer services to court to try to stem the ever-growing torrent of piracy at its source. After a five-year legal battle involving a number of lawsuits, the music industry finally received the relief it sought from the courts through the U.S. Supreme Court’s ruling in Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.5 To understand the significance of this decision, it is important to understand its historical context.

Antecedents of Grokster

The legal principles governing online file sharing originated with a different technology: the videocassette recorder. In the early 1980s, Sony developed and began marketing the Betamax VCR to consumers as a means of “time shifting” television shows so that consumers could watch their favorite programs even if they were not home when they aired. The movie studios protested that the same technology could easily be used to illegally copy and distribute commercial videotapes. The studios ultimately sued Sony on this basis, claiming...
that it was vicariously and contributorily liable for copyright infringement because it knowingly distributed and profited from technology that was being used to engage in copyright infringement.

The case reached its way to the U.S. Supreme Court, which, in a landmark decision, held that Sony was not liable.5 The Court concluded that the basic distribution and sale of Betamax VCRs was insufficient to support a claim for contributory copyright infringement because the VCR had significant noninfringing uses. It held that “the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is...merely...capable of substantial noninfringing uses.” In other words, though consumers were using the VCR for infringing purposes, Sony was not responsible for their conduct. Because the VCR was “capable of commercially significant non-infringing uses,” the Supreme Court held that its manufacturer could not be held liable for possible infringing uses of which it had no knowledge.7

Sony thus became Napster’s obvious defense when the recording industry brought suit in A&M Records Inc. v. Napster Inc.8 The recording industry invoked legal theories of secondary liability, since the defendant did not directly infringe on copyrightable material. In order to establish a theory of secondary liability, the record companies argued that Napster was a contributory and vicarious copyright infringer based on the direct infringement of its users. Although it was undeniable that its service was being used by consumers for the illegal swapping of copyrighted files, Napster claimed that it could not be liable because its service had a substantial noninfringing purpose in that it could be used to swap legal files, such as songs by independent artists.

The trial court agreed with the plaintiff, granting the industry’s request for a preliminary injunction, which Napster immediately appealed.

The Ninth Circuit upheld the trial court’s preliminary injunction. It distinguished Napster from the Sony case on the grounds that, unlike Sony and the VCR users, Napster had actual knowledge of its users’ infringing conduct. Napster utilized a centralized network for file indexing and user registration by which it could oversee its users’ illegal conduct. Each connection between file sharers was established through Napster’s servers. As such, the court could not ignore the fact that Napster knew of each and every specific act of infringement, yet failed to act. Additionally, the court found that the Recording Industry Association of America provided Napster with notice of the infringing content being shared over its servers, but Napster took no steps to prevent it. Accordingly, the court held that Sony did not apply and Napster was both contributorily and vicariously liable.5

Shortly after the Ninth Circuit decided the Napster case, the Seventh Circuit addressed a similar case of peer-to-peer file sharing in In re Aimster Copyright Litigation.10 Like Napster, Aimster allowed its users to search for specific music files and then link directly to one another to swap them. It made use of AOL’s instant messenger technology but also maintained centralized servers that stored user and file information. Though Aimster did have a legitimate purpose—the sharing of public domain or otherwise authorized files—there is no doubt that some of its members used the system to illegally swap copyrighted files. Like the Napster service, however, Aimster did not copy any music files itself.11

The recording industry filed suit against Aimster alleging contributory and vicarious liability for its users’ copyright infringement. Aimster, too, attempted to use the Sony doctrine to shield it from secondary liability, since its network could be used for legitimate purposes.12 Just as in the Napster case, the trial court disagreed, granting the plaintiffs a preliminary injunction. Aimster appealed to the Seventh Circuit, which affirmed the trial court’s ruling.

Like the Ninth Circuit, the Seventh Circuit rejected Aimster’s argument that the Sony doctrine insulated it from liability. The Court held that the Sony shield is not automatically applicable simply because a product is capable of a noninfringing use. Rather, the court concluded that the burden was on Aimster to show the probability that its technology was actually used for substantial noninfringing purposes. Aimster not only failed to submit evidence of substantial noninfringing uses, the record suggested that it encouraged infringement. Aimster provided a tutorial for its users to show them how to share music, illustrating the tutorial solely with copyrighted works. The Court held that “[t]he tutorial is the invitation to infringement that the Supreme Court found was missing in Sony.”13 As a result, the court of appeals reaffirmed the suitability of secondary liability for peer-to-peer networks by upholding the trial court’s preliminary injunction against Aimster.14

The most notable feature of both the Napster and Aimster cases is that both services exercised some degree of control over the infringement being committed through use of their software and respective networks. Though neither service was actually aware of infringement at the moment it happened, both stored information on their servers that included lists of copyrighted songs and user information. They had means to attempt to block infringement by restricting files and users, but they made no effort to do so. Whereas Sony had no knowledge or control over consumers’ use of the VCR after it entered the market, Napster and Aimster did maintain some dominion over their technology. In the end, their control and ability to restrict consumers’ use of their software was their undoing. Because Napster and Aimster had the ability to control their systems, they also had the responsibility to do so. By choosing to turn a blind eye, they exposed themselves to secondary copyright liability.

The Second Generation P2P

The legal landscape created by the Napster and Aimster decisions led to the rise of an innovative new form of peer-to-peer network. The next generation networks became decentralized, permitting each user to share files with another user without ever transmitting information back to its software distributor. Unlike Napster and Aimster, new services, led by companies like Grokster and Kazaa, did not require centralized servers to store user or file data. Instead, more like the VCR, once the technology was distributed, the consumer alone governed its use. This new design shielded the distributors from actually knowing which files were being swapped and cut them out of the users’ file-sharing loop. As the recording industry began to stamp out the old centralized peer-to-peer network, the new decentralized networks quickly grew in prominence to take their place. In the face of continually plummeting sales, the industry once again turned to the courts.

This time the recording industry filed suit against two companies, Grokster and StreamCast, which created and freely distributed software that allowed users to swap files over a peer-to-peer network.15 Each company created its own technology which functioned quite similarly. Unlike the original version of Napster, the defendants’ software utilized no centralized server, thus preventing them from knowing which files their users were actually infringing. And even though their networks could be used to share any type of digital file, the defendants’ software was mostly used to share copyrighted music and video files without permission. In fact, the industry plaintiffs commissioned a study that found that 90 percent of the files available on the peer-to-peer network offered by Grokster were unauthorized versions of the plaintiffs’ copyrighted works. Since the defendants’ software had been downloaded more than 100 million times, and billions of copyrighted files were being shared every month,16 the recording industry plaintiffs were understandably anxious to get the same kind of
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judicial relief they had obtained in the Napster and Aimster cases.

As in the previous peer-to-peer cases, the recording industry asserted claims against the Grokster defendants for contributory and vicarious infringement. This time, however, the trial court sided with the defendants, granting summary judgment in their favor. The recording industry appealed the decision to the Ninth Circuit, which affirmed. The appellate court held that the defendants could not be secondarily liable for distributing their software because the Sony doctrine shielded them from liability. By strictly applying the rules laid down in Sony and Napster, the Ninth Circuit analyzed whether the defendants were contributory infringers. First, the court considered whether Grokster had constructive knowledge of infringement by considering the substantial noninfringing uses of their software. To this end, the court noted that while 90 percent of the files shared using defendants' software were infringing, the remaining 10 percent were sufficient to constitute substantial noninfringing uses. Therefore, the court held, the defendants did have constructive knowledge, because the software had substantial noninfringing uses.

Without constructive knowledge, the Ninth Circuit would only extend contributory liability if the defendants had both 1) actual knowledge of their users' infringing acts and 2) materially contributed to that infringement. The court determined that defendants lacked actual knowledge because they were neither technically able to supervise illegal file sharing at the exact time a file was copied nor capable of preventing illegal sharing by blocking access to specific unlawful users. Instead, the court decided that the defendants lacked control over their networks, and were only notified of any act of infringement after it had already occurred. Without control, the defendants could not have materially contributed to any infringing acts. The Ninth Circuit therefore concluded that Grokster was not a contributory infringer, and was thus immune from secondary liability.

The recording industry appealed to the U.S. Supreme Court, which granted certiorari to resolve the groundbreaking issue of how the Sony doctrine is to be applied to emerging technologies.

The Supreme Court Decision

The U.S. Supreme Court unanimously held in favor of the recording industry, concluding that the defendants were liable for their end users’ direct infringement, because they created their software for unlawful purposes and encouraged users to infringe. It found that the lower courts erred by applying the Sony doctrine too broadly, stating that, “nothing in Sony requires courts to ignore evidence of intent to promote infringement if such evidence exists.... It was never meant to foreclose rules of fault-based liability derived from the common law.” Thus, the Supreme Court reaffirmed but narrowed the “safe harbor” rule set forth in Sony.

The test established in Sony was never intended to immunize a distributor from secondary liability simply because the product in question was capable of substantial noninfringing use. Rather, the Sony rule simply precludes imputing culpable intent from the mere characteristics of a product. In other words, Sony could not be held liable for consumers’ infringing use of the VCR, because there was no evidence that Sony had intended it to be used for infringing purposes or was aware of any specific act of copyright infringement.

The Court held that the Ninth Circuit read the Sony doctrine too broadly in the Grokster case to mean that “whenever a product is capable of substantial lawful use, the producer can never be held contributorily liable.” In doing so, the Ninth Circuit “converted the case from one about liability resting on imputed intent to one about liability on any theory.” The Sony doctrine was meant only to limit the imputation of culpable intent and liability based thereon. “But nothing in Sony requires courts to ignore evidence of intent if there is such evidence, and the case was never meant to foreclose rules of fault-based liability derived from the common law.” Thus, “where evidence goes beyond a product’s characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, Sony’s staple-article rule will not preclude liability.”

Instead, in Grokster, the Supreme Court applied an inducement test, extending liability if there is evidence that the defendant took active steps to encourage direct infringement. The Court held:

One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, going beyond mere distribution with knowledge of third-party action, is liable for the resulting acts of infringement by third parties using the device, regardless of the device’s lawful uses.

In creating this inducement test, the Grokster Court borrowed a fundamental concept from patent law, which holds that a component of a patented device can be lawfully distributed if it is appropriate for use in alternate ways. Similarly, the Court held that the common law rule that a copyright or patent defendant who “not only expected but invoked [infringing use] by advertisement” was liable for infringement remains in place.

The Court clarified that when an article is “good for nothing else but infringement,” there follows a presumption of unlawful purpose. Yet, if the article has substantial lawful uses in addition to illegal ones, then the court will not presume that the distributor had an unlawful purpose. Justice Souter emphasized, “ordinary acts incident to product distribution, such as offering customers technical support or product updates” would not support liability in themselves without a further showing of “purposeful, culpable expression and conduct.” In fact, in the absence of other evidence of intent, the mere failure to take steps to prevent infringement would not be enough to create liability if a product has a substantial noninfringing use. The Court highlighted that only encouragement of infringement coupled with providing users a tool to infringe gives rise to a claim for infringement.

In Grokster, the record clearly illustrated that the actual purpose of the software was to promote and enable infringement. The defendants admitted that consumers primarily used their software to illegally download copyrighted material. There was also evidence that the defendants took steps to encourage such infringement.

The defendants attempted to leverage Napster’s old user base by offering them an alternative to the original Napster. First, StreamCast named its software OpenNap, a name that closely resembles Napster’s name, to draw Napster users and give them an immediate understanding of the software’s purpose. Second, StreamCast’s internal documents and promotional materials demonstrate that its goal was to become the next Napster and its belief that it would be in a great position to capture Napster’s users if the courts pulled the plug on their rival. Third, StreamCast attempted to obtain the e-mail addresses of Napster users to entice them into using their software instead of Napster. Fourth, StreamCast created a kit for potential advertisers. In it, they described themselves as a company “which is similar to what Napster was.” Indeed, OpenNap was “engineered to leverage Napster’s 50 million user base.”

Similarly, Grokster’s desire to gain Napster’s user base was clear. Grokster’s software was called Swaptor, a name that also invokes Napster. Grokster inserted metatags into its Web site so that search engines would find Grokster’s Web site when searching for “Napster.” These two facts, in conjunction, showed Grokster’s unlawful intent.

Given the existence of evidence suggesting
that the defendants intended to foster infringement, the Court also looked at their efforts to prevent infringement. Again, there was evidence that both companies took active steps to encourage user infringement. StreamCast created a searching tool that allowed its users to specifically search for “Top 40” songs.33 Obviously, StreamCast realized that Top 40 songs were copyrighted material and anyone who downloaded them would be liable for copyright infringement. This searching capability facilitated and encouraged user infringement. Grokster went so far as to create a promotional newsletter sent out to its users. In it, Grokster described the software’s ability to locate popular copyrighted works. The Court distinguished the advertising in Sony, in which the company encouraged customers to use the VCR to “record favorite shows” or “build a library” in its advertisements, by specifically pointing out that neither of these activities were infringing.34

Despite their knowledge of mass copyright infringement, neither defendant made any attempt to impede infringement or develop filtering tools that would prevent certain copyrighted content from being shared with their software. Rather than taking any real steps to filter or impede, StreamCast took steps to prevent third parties from monitoring infringement on StreamCast’s networks. In fact, if StreamCast believed that an individual user was monitoring other users, it would block that user’s computer from utilizing the software. Thus, StreamCast shielded its users’ identities from being revealed and assisted them in remaining anonymous, thereby facilitating their infringement. Even when a third-party company offered to help monitor its network, StreamCast refused to allow it to do so.

The defendants’ business models also gave them an incentive to foster infringement. Both companies distributed their software for free and made money through advertising sales. The ads would appear on a user’s screen while searching or downloading material. Thus, the greater the number of users, the more advertising revenue the defendants earned. The more piracy they facilitated, the greater the number of users.

Thus, the defendants’ conduct in the Grokster case was distinguished from the Sony case by the evidence of the defendants’ intent to encourage infringement. Unlike Napster, Grokster did not actually store any information on its own servers. Nevertheless, there was other evidence in the record to suggest that Grokster knowingly fostered and benefited from infringement. Whereas Sony merely had knowledge that the VCR could be used for infringing purposes, Grokster and StreamCast took affirmative steps to enable infringement. In the words of the Court, the “evidence of the distributors’ words and deeds going beyond distribution as such shows a purpose to cause and profit from third-party acts of copyright infringement.”35 Thus, secondary liability—derived from deep-rooted common law principles and not subsumed by the Sony doctrine—remains a viable claim for plaintiffs to pursue against distributors who knowingly provide users a tool to infringe and foster such infringement.

The Impact of Grokster
The Supreme Court took a practical approach in solving the inequities that were created by Grokster and StreamCast. It was impossible for the plaintiffs to sue each and every direct copyright infringer. The Ninth Circuit’s blind application of the Sony doctrine failed to adhere to fundamental notions of secondary liability principles and likewise lacked common sense because it maintained that companies could facilitate piracy on a mass scale, since the companies had no actual knowledge at the time of the infringement. The Ninth Circuit interpretation supports the theory that as long as distributors turn a blind eye to infringement, secondary liability would never attach. If this were the law, technology innovators would get the wrong message and would be able to violate traditional concepts of copyright law with impunity.

Some leading commentators have expressed concern that the Supreme Court’s decision will chill technological innovation.36 The concern is that any company that develops technology that could be used for an infringing purpose must be concerned about liability, even if that technology has a substantial legitimate purpose. For instance, there is now a greater risk that a company selling technology that allows television viewers to share recorded programs could be exposed to liability. In fact, any software that facilitates streaming content could potentially be at risk. Given the basis for the Supreme Court’s ruling, however, these fears appear to be overblown.

The Supreme Court has laid down a clear lesson to future technology innovators that a business should not be built by ignoring other’s intellectual property rights. The Court applied basic notions of common law and borrowed principles from patent law to explain the common sensibilities that must be considered when there is mass piracy. When a company knows that its technology is used primarily for infringing purposes and it takes steps to encourage that use, it will be exposed to liability. When a company develops a technology that has substantial noninfringing uses and takes steps to discourage illegal uses, it will have the benefit of the Sony shield.

Copyright law encourages creativity in our society, and our common respect for it has and will continue to greatly benefit our world. Infringement not only injures individual artists, but the collective society as a whole, as fewer artists will be given opportunities to foster and flourish if their works are considered public domain. The Supreme Court’s decision in Grokster maintains the balance set by the Sony Court of protecting legitimate technological development that fosters the distribution of original works while simultaneously protecting artists and publishers from rampant piracy that undermines their creative value.

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1 See http://www.ifpi.org/site-content/statistics/worldsales.html.
7 See Grokster, 125 S. Ct. at 2768.
8 A&M Records Inc. v. Napster Inc., 239 F. 3d 1004 (9th Cir. 2001).
9 Id. at 1021-22. The court’s decision effectively shut Napster down as it declared bankruptcy soon after the case was decided. The company reopened and now operates as a legal online music distributor.
10 In re Aimster Copyright Litigation, 334 F. 3d 643 (7th Cir. 2003).
11 Id. at 646.
13 Aimster, 334 F. 3d at 651.
14 Id. at 655.
17 Grokster, 259 F. Supp. 2d at 1031.
19 Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd., 380 F. 3d at 1158, 1160 (9th Cir 2004).
20 Id.
21 Id. at 1165.
23 Id. at 2778.
24 Id. at 2768.
25 Id. at 2778.
26 Id. at 2768.
27 Id. at 2777.
29 Grokster, 125 S. Ct. at 2768.
30 Id. at 2777.
31 Id. at 2780.
32 Id. at 2781 n.12.
33 Id. at 2772.
34 Id. at 2773.
35 Id. at 2774.
36 Id. at 2777.
37 Id. at 2781-82.
Formal Opinion No. 513: Cross-Examination of Former Client as Expert Witness

QUESTION PRESENTED: What ethical considerations apply when an attorney learns that a former client has been designated as an expert witness by an opposing party in a new matter?

SUMMARY OF OPINION: Whether the attorney can undertake or continue the new representation depends largely on the nature of the information the attorney may have received from the prior representation and whether that information is material to his or her employment in the new litigation such that confidential information from the former client might be used or disclosed in the course of the new representation. The options available to the attorney may also depend upon whether the conflict exists at the time the attorney undertakes the representation or arises at a later date when the former client is designated to appear as an expert witness. In either case, there is no ethical impropriety for the attorney to continue with the representation in the current matter, even in the absence of consent from the former client to the attorney’s new representation, so long as the attorney does not possess confidential information from the former client that would be material to the employment in the new matter.


FACTS
Twenty years ago, the inquiring Attorney represented a doctor (the “Former Client”) in a medical board proceeding. The subject matter of the medical board proceeding and its disposition are contained in public records. After plaintiff’s counsel designated the doctor, who had been treating the plaintiff, as an expert witness in the case at hand, the attorney, without revealing any confidences, notified plaintiff’s counsel of his prior professional relationship with the expert. The client-expert had apparently not fully revealed to plaintiff’s counsel his former attorney-client relationship with the Attorney. The plaintiff’s attorney eventually moved to disqualify the Attorney.

DISCUSSION
One of an attorney’s primary duties to a client is that of confidentiality. This duty survives the termination of the attorney-client relationship and forever precludes the attorney from using or disclosing the confidential information to the detriment of the former client. This duty is captured in Business and Professions Code Section 6068(e)(1): 6068. It is the duty of an attorney to do all of the following....(e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her...
client.1

In order to protect clients and the duty of confidentiality, California has adopted Rule of Professional Conduct 3-310(E), which provides:

(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

At its core, this rule is designed to prohibit an attorney from accepting a new engagement that will cause a conflict between the duty owed to a present or former client to maintain inviolate that client’s confidences and the duty owed to the new client to competently represent that client. Where the attorney possesses confidential information from a former or existing client that would be utilized in the representation of the new client, a conflict arises.2

The adversity requirement in Rule 3-310(E) does not require formal adversity, such as litigation between the two clients. Rather, as explained in American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton, 96 Cal. App. 4th 1017, 1039 (2002), adversity within the meaning of this rule can be created in a variety of contexts where the former client’s interest in confidentiality may be put at risk by an attorney’s new employment:

It is inconsequential that American was not a party to the ADO lawsuit. The proscription against adverse representation exists whenever counsel’s employment is adverse to the client or former client, and can exist even though a prior client is not a party to the litigation (Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp., 36 Cal. App. 4th 1832, 1843 (1995)). Conflicts of interests may arise in a variety of circumstances where an attorney assumes a role other than as an attorney at law adverse to an existing client (cf. Manfredi & Levine v. Superior Court, 66 Cal. App. 4th 1128, 1132-33 (1998)).

Accordingly, Rule 3-310(E) “seek[s] to avoid allowing an attorney to take a role that places him in actual or potential conflict with a client.” (American Airlines at 1040.)

Relying on Goldstein v. Lees, 46 Cal. App. 3d 614 (1975), American Airlines reads Rule 3-310(E), which was preceded by former Rule 5, as follows:

Clearly, the acceptance of employment which threatens the revelation or improper monopolization of a former client’s confidences is adverse to the interests of the former client. To be sure, rule 5 implies that an attorney may accept employment on a matter in reference to which he has before obtained confidential information, but nothing in rule 5 sanctions the acceptance of such employment when the representation of the interests of the new client inherently tempts the attorney to reveal or improperly monopolize the confidences of the old. Such a reading of rule 5 would conflict with the policies underlying section 6068, subdivision (e), of the Business and Professions Code; it would needlessly permit attorneys to create the appearance of impropriety. Nor would such an interpretation offer assistance to the new client. Clients are entitled to vigorous and determined representation by counsel. It is difficult to believe that a counsel who scrupulously attempts to avoid the revelation of former client confidences—i.e., who makes every effort to steer clear of the danger zone—can offer the kind of undivided loyalty that a client has every right to expect and that our legal system demands. Rule 5 operates to preclude any impediment to the fulfillment of an attorney’s professional obligation to his client by proscribing any conflict of interest in his representation of past and present clients. (American Airlines at 1041-42.)

When an attorney does possess material, confidential information from a former client, the attorney must obtain the former client’s informed written consent and may not attempt to evade the conflict by agreeing with the new client to restrict the use of any confidential information. As the American Airlines court explained:

It is anathema to the Rules of Professional Conduct to suggest that an attorney can place himself in a situation in which he undertakes adverse representation of a third party, and the client cannot object because the attorney has promised not to disclose the client’s confidential information even though the information may be decidedly helpful to the new client. It is precisely this compromised situation, when the burden of deciding which client to favor is placed solely on the attorney’s shoulders and within the attorney’s sole power to decide, that Rule 3-310 is designed to avoid. (American Airlines at 1039.)

We believe that the application of an attorney’s duty of confidentiality, where a former client has been retained as an expert by an adverse party in pending litigation in which the attorney is of record, involves different considerations and analysis, depending on whether the client/expert has been retained before or after the attorney’s involvement in the litigation. Accordingly, to discuss that distinction, we have presented the following two scenarios:

Scenario One—The Employment of an Attorney after a Former Client Has Been Designated as an Expert by an Opposing Party.

The first scenario, in which an attorney is offered employment by a new client after his or her former client has been designated as an expert by the opposing party, presents a straightforward application of Rule 3-310(E) to an attorney who is evaluating whether he or she is ethically permitted to take on the new representation. Consistent with the requirements of Rule 3-310(E), the threshold question is whether the attorney has “obtained confidential information (from the former client) material to the (new) employment.”

Information from a prior representation could conceivably be material in a variety of ways. For example, it could be material to the very substance of the dispute in the new litigation. More likely, on the facts presented here, confidential information obtained during the course of representing the former client might be useful in cross-examining the expert to discredit him or her in the new litigation. It may or may not be the case that such information is sufficient to implicate the proscription of Rule 3-310(E). (See, e.g., People v. Cox, 30 Cal. 4th 916, 950 (2003), holding that, in the context of a criminal trial, no conflict existed when the prosecution witness was the defense attorney’s former client and the attorney did not possess confidential information.)

Accordingly, if the attorney possesses confidential information from the former client that would be material to his or her employment in the new matter (i.e., information that would be used or disclosed in the representation of the new client)—the attorney may not accept the new representation in the absence of an informed, written consent from both the former and current clients. As noted above, the attorney cannot circumvent the proscription set forth in Rule 3-310(E) by agreeing with the new client that he or she will not use any confidential information obtained from the former client in the new representation.

Scenario Two—A Former Client Is Designated as an Expert Witness by an Adverse Party Where the Former Attorney Is Already of Record in the Same Matter.

In this second scenario, the attorney is representing the new client in litigation before
the former client has been designated as an expert witness by opposing counsel. Thus, it is the former client and opposing counsel who have created the potential or actual conflict. Additional relevant concerns are whether opposing counsel was aware that the expert was a former client of the attorney and whether he or she may have employed the expert as a tactic to disqualify that attorney. Unlike the attorney in the first scenario, who did not yet represent the new client when the expert witness/former client was designated, this attorney has already undertaken representation of the new client before the expert witness/former client has come into the case, and the attorney has done nothing to create the potential or actual conflict.³

As discussed in Goldstein v. Lees, 46 Cal. App. 3d at 620, the attorney’s duty of care and loyalty to the new client includes the obligation to provide vigorous representation, which may require a thorough and comprehensive cross-examination of the former client and now opposing expert. As in the first scenario, if the attorney does not possess confidential information material to the new employment, he or she may continue the representation of the new client without violating the attorney’s duty of confidentiality to the former client. Consequently, as the first step in the analysis, if the attorney does not possess any confidential information about the expert witness/former client or does not possess confidential information material to the current case, there is no conflict. (For example, if the subject matter of the previous representation was wholly unrelated to the current case and of no use or relevance on cross-examination, the attorney is free to continue representing the new client, and no further analysis is necessary.) However, it must be remembered that the attorney, in any event, will be required by Rule 3-310(B) to disclose in writing to the new client the nature of the attorney’s relationship with the expert witness/former client.

The more complex question is raised in the context where the attorney possesses confidential information from the former client that may be material to the new employment, thereby creating potential conflicts with both the former and new clients.

As a threshold matter, we note that under a textual analysis, Rule 3-310(E) does not apply to the second scenario. Rule 3-310(E) states that a member may not accept employment under the constraints set forth in the rule. The rule does not—as do other portions of Rule 3-310—restrict a member from continuing representation when the constraints of the rule are met.⁴ By the very nature of its terms, the rule does not apply if the attorney began his or her employment for the new client in an unrelated matter before learning that a former client was somehow involved in that new matter. In the instant inquiry, the inquiring Attorney had accepted employment of the New Client before learning that his Former Client had treated the plaintiff, which could be read to permit the continuation of the preexisting representation as the New Client’s attorney of record.

Nonetheless, as noted above, Rule 3-310(E) does not stand alone; instead, it must be read with Section 6068(e)(1), which requires an attorney to protect the secrets of a former client. In the event that a reasonably prudent attorney would conclude that the secrets and confidences that came into his or her possession when previously representing an expert witness/former client would be material to a new client’s case, the attorney can continue representation in the event that the former client provides an informed, written consent after written disclosure, in compliance with Rule 3-310(C). If the expert witness/former client refuses to provide written consent, the attorney may ethically seek judicial determination as to whether the former client has waived confidentiality and the right to assert the conflict, by having agreed to be retained as an opposing expert in a matter in which the former client’s attorney has a preexisting role as counsel for an opposing party.⁵

Judicial intervention might take different forms, depending on the particular facts in potential prejudice to the attorney’s new client. For example, the new client may be substantially disadvantaged (both in terms of efficacy and cost) if his or her attorney is forced to leave the case in midstream. (See In re Complex Asbestos Litigation, 232 Cal. App. 3d 572, 586 (1991) [in concurrent conflict situations, considerations, inter alia, for disqualification are the client’s right to be represented by counsel of his or her choice and the financial burden on the client in replacing disqualified counsel] and Hernandez v. Paicuas, 109 Cal. App. 4th 452, 467 (2003) [“A party’s right to select counsel of his or her own choosing may trump the opposing party’s freedom to choose an expert whose designation creates a conflict.”].) Accordingly, the attorney might request that the former client be precluded from acting as an expert because of the unfair consequence to the attorney’s current client if the attorney was unable to remain in the case. Alternatively, the attorney might request that the court order, if the former client stayed in the case as an expert witness, that the former client’s decision constitutes a limited waiver of the attorney’s duty of confidentiality, to the extent the attorney might find it reasonably necessary to use or disclose confidential information in order to properly represent the new client. (See River West, Inc. v. Nickel, 188 Cal. App. 3d 1297, 1313 (1987), where disqualification of trial counsel for plaintiff was reversed on appeal, notwithstanding that this attorney had represented the defendant 30 years earlier in a substantially related matter, because defendant’s present attorney had impliedly waived the right to disqualify the attorney by waiting too long to raise the conflict issue after plaintiff’s counsel had engaged in substantial time and discovery in the matter.⁶)

The committee notes that judicial involvement in such factual scenarios was contemplated by Hernandez v. Paicuius, 109 Cal. App. 4th 452, in which it was stated:

Our disposition of this issue should not be construed as suggesting that disqualification of counsel is the appropriate remedy in all cases in which one party’s attorney represents an expert designated by the other side. A party’s right to select counsel of his or her own choosing may trump the opposing party’s freedom to choose an expert whose designation creates a conflict. And while we know [the expert] was a percipient treating physician as well as a designated expert, the facts developed at trial as to how and when the problems surfaced are not sufficiently clear to allow us to formulate a rule of general application. We can say without hesitation, however, that if the conflict has not been resolved by the time the client/witness is called to the stand, the court is faced with an insuperable obstacle to going forward—an attorney with two clients in circumstances where he or she can be loyal to only one. The court cannot permit, much less preside over, an attorney’s attack on his or her own client. Rather, in the interest of the integrity of the bench and bar, it must declare a mistrial.⁷ (Hernandez at 467-468.)

CONCLUSION

If an attorney is asked to accept representation of a client in a matter in which a former client of the attorney has already been designated as an expert witness, the attorney must determine if his or her present employment might require the attorney to use or disclose confidences obtained from the former client and now expert. If so, Rule 3-310(E) mandates that the attorney may accept the representation only with the informed written consent of the former client.

Where the attorney’s involvement in the matter preceded the former client/expert’s designation, or if the former client does not
consent to such involvement, the attorney has options other than asking for the consent of the former client. In such a case, the attorney may ethically seek an appropriate order from the court, which could include that the expert be precluded from testifying if another expert is available to the opposing party; that the former client's decision to serve as an expert witness unless the former client agrees to a limited waiver of any duty of confidentiality as it pertains to the pending case.

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.


2 Flatt v. Superior Court, 9 Cal. 4th 275, 277 (1994), notes that the chief fiduciary value jeopardized by an attorney’s successive representation of clients with potentially adverse interests is that of client confidentiality whereas in potentially conflicting, simultaneous representations, the attorney’s duty of loyalty is also implicated.

3 Collins v. State of Cal., 121 Cal. App. 4th 1112, 1131 (2004), provides, in part, that the knowing employment of an opposing party’s expert may be grounds for disqualification.

4 Rules of Professional Conduct Rule 3-310(E) provides that “A member shall not, without the informed written consent of the...former client, accept employment adverse to the...former client where, by reason of the representation of the...former client, the member has obtained confidential information material to the employment...”

5 It is also probably prudent, before seeking judicial relief, that the attorney advise opposing counsel of his or her former representation of the expert witness and request that the witness be withdrawn. (See Shadow Traffic Network v. Superior Court, 24 Cal. App. 4th 1067, 1088 (1994), recommending that an attorney who learns that his or her previously retained expert has been hired by an opposing party should first talk with that attorney about not using the expert before moving to disqualify the attorney.)

6 While the committee believes that the attorney could ethically pursue these orders (and there may be other appropriate remedies as well), the attorney should keep in mind that care must be taken not to reveal any confidential information until an appropriate court issues an order that would permit the attorney to do so. (See Collins, 121 Cal. App. 4th 1112, noting that, as to a motion to disqualify an opposing attorney for having retained an expert already hired by the moving party, that the moving party must provide, without disclosing confidential information, the nature of the information allegedly imparted and possessed by the expert as well as its material relationship to the proceeding.)

7 In Hernandez v. Faucon, the plaintiff’s medical expert, who was concurrently represented by defense counsel’s law firm as to malpractice and discipline proceedings, was vigorously cross-examined by that counsel.
When California voters approved Proposition 64 on November 2, 2004, their action amended California’s Unfair Competition Law and affected the right of private litigants to prosecute UCL actions. Under Section 17203 of the amended law, a private plaintiff bringing a UCL action must not only have “suffered injury in fact” but also “lost money or property” as a result of the alleged unfair business practice. Thus, a plaintiff must have the requisite standing to bring a UCL claim.

Furthermore, if the private plaintiff also asserts “representative claims or relief on behalf of others,” the plaintiff must comply with the class action requirements of Code of Civil Procedure Section 382. Under the amended UCL, a private plaintiff may no longer sue as a representative on behalf of the “general public.”

Given the significant potential impact of Proposition 64, most observers anticipated that its application would be tested in the courts like so many ballot initiatives that came before (for example, Propositions 51, 103, and 209). With Proposition 64, the issue immediately framed by many defendants and some courts was whether the amendments to the UCL should apply retroactively to cases and appeals pending when Proposition 64 was approved by the voters.

Those who led the campaign for the passage of Proposition 64 resorted to the initiative process only after repeated attempts in the legislature to circumscribe the UCL were unsuccessful. Indeed, in recent years, while dozens of bills were introduced to amend the UCL, the legislature only passed those that seemed to expand, not narrow, the scope of the statute. As a result, during the 1990s, the number of reported UCL cases more than doubled compared to the prior decade.

Still, a number of recent California Supreme Court opinions significantly limited the remedies available to private plaintiffs under the UCL. The passage of Proposition 64 goes further, substantially gutting the reach of a statute that has been used by plaintiffs and their lawyers with great success.

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The significance of Proposition 64 and the nature of the battle over its passage and application is evidenced by the interests who campaigned for and against the ballot initiative. The opposition to Proposition 64 was led by trial lawyers and consumer groups with a great deal at stake. The support for Proposition 64 came from the business community, including tobacco, banking, insurance, and automotive companies. According to the Foundation for Taxpayer and Consumer Rights, within two months of the 2004 election, 15 corporations that had given $2.2 million to ensure passage of Proposition 64 filed motions to challenge UCL claims then pending against them.7

On April 27, 2005, the California Supreme Court granted review and requested briefing in two cases with divergent rulings on the issue of whether Proposition 64 applies retroactively. In Californians for Disability Rights v. Mervyn’s, LLC, the First District of the California Court of Appeal held that Proposition 64’s amendments to the UCL do not apply to cases already pending at the time of the amendments.8 In Branick v. Downey Savings & Loan Association, the Second District held that Proposition 64 does apply retroactively to cases filed before the initiative was passed.9 The court originally limited its review in Branick to the issue of whether a plaintiff can amend a suit to satisfy Proposition 64’s requirements, but the court subsequently requested briefing on whether the new standing requirement applies retroactively as well.

The supreme court has issued “grant and holds” in various other cases in which briefing has been stayed pending the outcome in Mervyn’s and Branick. The additional cases under review include Thornton v. Career Training Center, Inc. and at least four other published opinions issued by the Fourth District holding that Proposition 64 applies retroactively.10 The other cases under review also include at least one published decision from the Second District, Consumer Advocacy Group v. Kintetsu Enterprises, that reached the conclusion that Proposition 64 does not apply retroactively.11

Not surprisingly, the battle lines for the supreme court’s review process have been drawn very similarly to those that emerged during the campaign over Proposition 64. Amicus briefs opposing the retroactive application of Proposition 64 have been filed by the National Association of Consumer Advocates, Trial Lawyers for Public Justice, and the Electronic Frontier Foundation, among others. On the other hand, those filing amicus briefs supporting the retroactive application of Proposition 64 include the Chamber of Commerce, the California Bankers Association, the California Financial Services Association, and the California Motor Car Dealers Association.

The Lead Cases

The facts underlying the lead cases of Mervyn’s and Branick shed light on the framework in which the supreme court will be making its decision on the retroactivity of Proposition 64. In Mervyn’s, the plaintiff, Californians for Disability Rights (CDR), is a nonprofit corporation that was organized to protect the rights of persons with disabilities. In 2002, the CDR filed a lawsuit claiming that Mervyn’s, which operates 125 retail stores in California, violated California law because it denied store access to persons with mobility disabilities by failing to provide adequate pathway space between merchandise displays. After a bench trial, the court denied the plaintiff’s request for relief and entered judgment in favor of Mervyn’s. The CDR appealed, and while the appeal was pending, Proposition 64 was passed. On appeal, without addressing the underlying merits, the First District denied Mervyn’s motion to dismiss, which was based on Proposition 64, by concluding that the initiative does not apply retroactively to the CDR’s case.

In Branick, plaintiffs Thomas Branick and Ardra Campbell filed a lawsuit against Downey Savings and Loan Association challenging practices involving real estate financing transactions, including alleged misrepresentations concerning the fees charged to consumers. The plaintiffs did not allege that they personally engaged in any real estate financing transaction with Downey. The trial court granted Downey’s motion for judgment on the pleadings based on federal preemption of the plaintiffs’ claims. Proposition 64 passed while the plaintiffs’ appeal was still pending. The Second District reversed the trial court’s finding of preemption but concluded that Proposition 64 applied retroactively to the plaintiffs’ case.

Most striking, perhaps, is the fact that neither Mervyn’s nor Branick appear to involve a plaintiff prevailing, to any degree, on the merits. The plaintiff in Mervyn’s lost at trial. Apparently, the merits were never reached in Branick, although the case clearly would have been remanded for further proceedings but for the passage of Proposition 64.

The supreme court is expected to address all of the Proposition 64 retroactivity issues in Mervyn’s, and, in addition, to address in Branick the retroactivity of the standing requirement and a plaintiff’s ability to amend the pleadings to satisfy that requirement.

During the pendency of the appeals in Mervyn’s and Branick, most of the opinions that have been issued addressing Proposition 64 retroactivity have been either unpublished or depublished.12 As of this writing, however, at least two state appellate published opinions remain good law, both holding that Proposition 64 applies retroactively.13 Notwithstanding this authority, given the uncertainty surrounding the question of retroactivity, many litigants and some courts are electing to stay pending UCL cases until the supreme court resolves these issues, probably early next year.

Analytical Framework

The supreme court will decide the question of whether or not Proposition 64 applies retroactively by reference to at least three analytical approaches.

First, the supreme court will consider the canon of statutory construction that “statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent.”14 The appellate decisions in Mervyn’s and Kintetsu both focused on this canon—and upon the apparent absence of any clear voter intent to apply Proposition 64 to pending litigation—in concluding that the initiative should not apply retroactively.

Second, defendants in UCL cases will direct the court to the “well settled rule that an action wholly dependent on statute abates if that statute is repealed without a saving clause before the judgment is final.”15 The appellate decisions in Branick and Thornton, for example, each focused on this “repeal” rule, and on the characterization of Proposition 64 as the repeal of a statutory right without a “saving” clause, in concluding that the initiative should apply retroactively to pending cases.

Third, the court is likely to consider whether Proposition 64 may be characterized as substantive or procedural. Defendants in UCL cases have argued that the initiative’s amendments to the UCL should be applied to all pending cases because they are procedural.16 Plaintiffs, on the other hand, have argued that the effect of Proposition 64 is substantive, because parties will be deprived of the right to bring any action at all.17 Characterizing Proposition 64 as procedural might allow the court to apply the amendments to pending cases without labeling the initiative as retroactive.18

The characterization of Proposition 64 as procedural or substantive may have an impact on the supreme court’s analysis but, ultimately, the outcome in the Mervyn’s and Branick cases is likely to turn on which of the other two analytical approaches is embraced by the court. The canon that statutes are not retroactive unless the legislature (or the voters) clearly intended retrospective application creates a presumption against the retroactivity of Proposition 64. On the other hand, application of the repeal rule and other rules
governing purely statutory rights creates a presumption that any amendments to the UCL statute apply retroactively absent a saving clause.

The First District in Mervyn’s recognized this conflict and concluded that courts have reconciled the two rules by making the presumption of “prospectivity” the “controlling principle.” Of course, defendants in UCL cases distinguish Evangelatos v. Superior Court—the supreme court’s decision holding that Proposition 51 was not retroactive—on the grounds that the initiative at issue in that case made changes to common law claims rather than purely statutory rights. Adopting this distinction would require the supreme court to conclude that different principles control initiatives affecting common law claims and those affecting statutory rights.

The Second District in Branick reached precisely this conclusion, holding that the presumption of prospectivity “does not apply” when a statutory enactment repeals— even in part, and without a saving clause—a statute providing a purely statutory cause of action. As argued by plaintiffs in UCL cases, the repeal rule of construction is derived from a pre-Evangelatos line of authority, and the rule was not mentioned by the supreme court in rejecting the argument that a repeal of a statute giving tobacco companies immunity should operate retroactively. Nevertheless, it does appear that the conflict between the presumption of prospectivity and the repeal rule has never been addressed directly by the California Supreme Court.

Policy Considerations
Given the applicable law, how will the supreme court in the Mervyn’s and Branick appeals resolve the issue of Proposition 64’s retroactive application? It is impossible to ignore the real-world and broad policy considerations that lie at the heart of any legal analysis of this issue. Indeed, as the U.S. Supreme Court has held, in determining whether a new law has retroactive effect, courts must consider “the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.” In making this determination, courts should be guided by “familiar considerations of fair notice, reasonable reliance, and settled expectations.”

Because Proposition 64 was adopted by the voters, it would seem that the state supreme court’s paramount consideration should be to ascertain the intent of the electorate. Unfortunately, however, the subject of retroactivity was not addressed in the proposition. To be sure, there is language in the ballot materials suggesting that voters supporting passage of Proposition 64 were seeking to immediately curtail “frivolous” litigation. On the other hand, every initiative addresses some current problem (whether or not it applies to pending cases) and, arguably, Proposition 64’s failure to include an express provision of retroactivity is “highly persuasive” of a lack of such intent.

Evidently, California voters adopted Proposition 64 because they were persuaded to grant plaintiffs routine leave to amend their pleadings. However, the question of whether a plaintiff should be allowed to amend the pleadings to satisfy the requirements of Proposition 64 is now under review in Branick. In that case, the defendants have urged the supreme court to hold that the use of substitute plaintiffs should not be permitted because there was no “mistake” in naming parties and, in any event, that the claims of any substituted plaintiffs should not “relate back” for statute of limitations purposes.

Moreover, there will be cases, involving undisputedly “unlawful, unfair or fraudulent” business acts or practices, in which the plaintiff or plaintiffs will not be able to satisfy the new standing requirements of “injury in fact” and “lost money or property.” These cases may include, for example, certain environmental and consumer claims involving violations of state and federal law. Some, perhaps many, of these cases surely had merit at the time they were filed. Nevertheless, the plaintiffs may not be able to satisfy the new standing and/or class action certification requirements under the amended UCL.

Ultimately, the California Supreme Court faces not just a choice of controlling rules and presumptions but also a choice of governing policies and ensuing consequences. On the one
hand, the court can hold that Proposition 64 applies to all cases pending at the time it was passed, resulting in the dismissal of some frivolous cases but also resulting in the dismissal of an unspecified number of actions asserting otherwise meritorious claims. On the other hand, the court can refuse to apply Proposition 64 retroactively. Even so, unmeritorious claims should eventually be dismissed by a trier of fact—but not before an unspecified number of defendants incur otherwise avoidable defense (or settlement) costs. Unless the court can find a way to sort the wheat from the chaff (that is, the meritorious cases from the frivolous cases), the nature of the choice it faces may be regarded, at the very core, as a choice between two very different outcomes, with each supported by very different public policies. 

1 See Bus. & Prof. Code §§17200 et seq.
2 Bus. & Prof. Code §17203.
3 Bus. & Prof. Code §17204.
6 Kraus v. Trinity Mgmt. Serv., Inc., 23 Cal. 4th 1196 (2000) (no disgorgement into a fluid recovery fund in nonrepresentative actions); Cortez v. Purulator Air Filtration Prods., Inc., 23 Cal. 4th 163 (2000) (in a representative action, the court may only order restitution to persons from whom money or property was unfairly obtained).
A county jail has a policy of routinely detaining arrestees after they have been ordered released. A large company pressures its employees to donate money to a fund supporting the candidates of one political party. A slumlord intimidates tenants who complain about building conditions by threatening to call the immigration department and file evictions.

Each of these scenarios involves a violation of a statute or constitutional provision that may only result in minimal economic damages if an individual claim is brought, and may require prohibitively high discovery costs if individual claims are joined. The only effective means to compensate victims under these circumstances is through class actions.

Traditionally, however, a class action under these circumstances would be vigorously opposed by defense counsel on the ground that the damages claims are particular to each individual plaintiff and, therefore, are not sufficiently common to allow certification of the class. While there are responses to that contention, class action attorneys thankfully now have an additional and potentially very effective weapon in their arsenal to counter this argument.

The California Supreme Court’s decision in Venegas v. County of Los Angeles created a great potential for the expansion of class action claims through the proper use of Civil Code Sections 52.1 and 52. Sections 52.1 and 52 now may be used to certify class actions for damages when there is small economic damage and a state or federal statute has been violated through the use of threats, intimidation, or coercion. If Sections 52.1 and 52 are asserted in conjunction with each other, the statutory damages available under Section 52, which are $4,000 per plaintiff, should eviscerate the defense argument that a Section 52.1 class action cannot be certified because the damages are too individualized for each plaintiff. Thus, plaintiffs’ attorneys should be able to certify class actions seeking damages for a violation of Section 52.1 using the statutory damages provided under Section 52. Civil Code Section 52.1, the codification of the Tom Bane Civil Rights Act, provides that:

Recent clarifications have expanded the reach and remedies available under the Tom Bane Civil Rights Act

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1) Anyone who interferes or attempts to interfere by threats, intimidation, or coercion, with another’s exercise or enjoyment of rights secured by the U.S. Constitution or laws of the United States or of California, may be sued for damages, including damages available under Civil Code Section 52, or for injunctive relief. Plaintiffs may bring suit even if the violator was acting under color of law.

2) An action available under this law is independent of any other available action, remedy, or procedure, including actions brought pursuant to Civil Code Section 51.7. Section 51.7 is the codification of the Ralph Civil Rights Act and is commonly referred to as the hate crimes statute.

3) The plaintiff may be awarded a reasonable attorney’s fee.

For many years the reach of Section 52.1 was limited because courts incorrectly interpreted the section as being part of the hate crimes statute’s framework. The hate crimes statute provides a cause of action for a plaintiff who has been subjected to violence, or intimidation by threat of violence, because of the fact, or the perception, of the plaintiff’s race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute.

In Boccato v. City of Hermosa Beach, the court incorrectly applied the hate crimes requirements to a Section 52.1 claim, holding that Section 52.1 only provided relief to members of the classes protected under Section 51.7 against invidious discrimination. Thus the Boccato court concluded that to state a case under Section 52.1, a plaintiff had to be a member of a protected class under the hate crimes statute and the conduct complained of had to be due to the plaintiff’s membership in that protected class. This was an unfortunate restriction on the scope of Section 52.1 claims, since the language of Section 52.1 is much broader than that of Section 51.7. In 2000 the legislature amended Section 52.1 to clarify that Boccato was decided in error and that Section 52.1 claims were not limited to those brought by members of a class protected under the hate crimes statute.

After the legislature’s amendment of Section 52.1, the California Supreme Court held in Venegas v. County of Los Angeles that Boccato’s interpretation of Section 52.1 was not supported by the language of the statute. Venegas applied Section 52.1 to an overdetention in the Los Angeles county jail and, as a result of the opinion, there is little question that Section 52.1 applies generally to constitutional and statutory violations carried out through threat, intimidation, or coercion—not just to claims that meet the requirements of the hate crimes statute. As Justice Baxter said in his concurrence:

“Under section 52.1 as now amended, whenever any person, whether or not acting under color of law, interferes by threats, intimidation, or coercion with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, a civil action may be brought under its provisions for greatly expanded compensatory damages, substantial fines ($25,000), injunctive and other appropriate equitable relief, as well as attorney fees.”

Subsequent cases rejected attempts to limit the statute to hate crimes. The California Supreme Court had earlier characterized Section 52.1 as requiring only “an attempted or completed act of interference with a legal right, accompanied by a form of coercion.” This language was fairly broad, but the scope of the statute had yet to be determined. While California courts have not extensively interpreted the sweep of Section 52.1’s language regarding intimidation, threat, or coercion, those terms in other statutes have been given an expansive interpretation.

The California Supreme Court has observed that portions of Section 52.1 were modeled on the Massachusetts Civil Rights Act of 1979, and also has examined Massachusetts decisions construing the statute. The Massachusetts courts have given a broad reading to their analogue to Section 52.1, ruling in one case that “where one party deprives another of rights due under a contract or makes it impossible, due to sexual harassment, for another to continue her employment,” the statute is violated. In another case, the Massachusetts statute was violated when a security guard ordered a candidate for political office who was distributing handbills to stop doing so. The Massachusetts Supreme Court characterized that holding as supporting the conclusion that the Massachusetts statute’s coercion provision “was satisfied simply because the natural effect of the defendant’s action was to coerce [the candidate] in the exercise of his rights.”

When Section 52.1, as currently interpreted, is coupled with the “per violation” damages provision of Section 52, plaintiffs have access to a potentially powerful weapon for redress of claims that may not have been economically viable to pursue previously. This is so because Section 52.1(b) specifically incorporates and makes available the damages provided under Section 52—including minimum statutory damages of $4,000 for each offense. The conclusion that Section 52.1 incorporates the damages provision of Section 52 is supported by the straightforward language of Section 52.1(b) that a private party “may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under Section 52.” According to one court construing the statutes:

“Section 52—which applies to both access to accommodation claims under section 51 and civil actions for denial of constitutional rights under section 52.1 (Section 52, subds. (a), (b))—created liability for up to a maximum of three times the amount of actual damage suffered by any person denied specified rights “but in no case less than one thousand dollars ($1,000) [now $4000], and any attorney's fees that may be determined by the court in addition thereto.”

An argument against this interpretation of Section 52 is that Section 52(a), which contains the $4,000 damages provision, specifically makes its provisions applicable to Sections 51, 51.5, or 51.6—Section 52.1 is not mentioned. Defendants will assert that Section 52(a) only applies to those three listed statutes. The response to the argument is that it makes a nullity of the language in Section 52.1 providing for damages under Section 52 and contravenes the basic rules of statutory construction.

Class action lawyers should aggressively pursue Section 52.1 claims and the minimum damages of $4,000 per offense to certify appropriate cases. Without the availability of the per violation damages provision of Section 52, certifying cases for those whose civil rights have been violated but have suffered minimal economic damage could prove difficult, though not impossible, due to the “individualized damages” defense argument. With the availability of $4,000 damages per violation under Section 52, this defense argument should be relatively easy to overcome.

Criteria for Class Actions
Understanding the effect that the availability of statutory per violation damages has on certifying a class requires a grasp of basic class action law and procedure. In California, courts draw liberally on federal law regarding class certification and often refer to Rule 23(a) of the Federal Rules of Civil Procedure. The trial court has considerable discretion in determining whether to certify a class, and on appeal a court’s class certification decision is reviewed for an abuse of discretion. Courts should exercise their discretion liberally because “if there is to be an error made, let it be in favor and...
1. As a result of Venegas v. County of Los Angeles, a Civil Code Section 52.1 plaintiff need not be a member of a protected class under Civil Code Section 51.7, the hate crimes statute.
   True.
   False.

2. A constitutional or statutory violation resulting from threats, intimidation, or coercion will support a claim under Section 52.1.
   True.
   False.

3. Attorney’s fees are not available in cases brought pursuant to Section 52.1.
   True.
   False.

4. Portions of Section 52.1 were modeled on the Texas Civil Rights Act of 1979.
   True.
   False.

5. Statutory per violation damages under Section 52 may be available in Section 52.1 claims.
   True.
   False.

6. Absent statutory per violation damages, many damages cases under Section 52.1 might not be certified as class actions on the ground that the damages would be too individualized.
   True.
   False.

7. If statutory per violation damages are not available, a damages class might by certified by the use of aggregate evidence, including statistical sampling.
   True.
   False.

8. The Seventh Amendment may prevent the use of statistical sampling to determine damages in state court cases.
   True.
   False.

9. Which of the following need not be proven to certify a class action?
   A. Numerosity.
   B. Commonality.
   C. Liability.
   D. Typicality.
   True.
   False.

10. There is no violation of Section 52.1 unless violence is involved in the threat, intimidation, or coercion that deprived the plaintiff of a statutory right.
    True.
    False.

11. The use of statutory per violation damages counters the defense argument that a class cannot be certified because:
    A. The damages would be too low to justify a class action.
    B. The damages would be too high to allow a class action.
    C. It would be impossible to determine each class member’s injuries.
    D. The damages are too individualized to allow for class certification.
    True.
    False.

12. Injunctive relief is not available for a violation of Section 52.1.
    True.
    False.

13. In 2000 the California Legislature reaffirmed the ruling in Boccato v. City of Hermosa Beach that Section 52.1 only protects against invidious discrimination.
    True.
    False.

14. Private plaintiffs may obtain $25,000 statutory fines against defendants in a Section 52.1 case.
    A. Yes
    B. No
    C. Probably
    D. Probably not
    True.
    False.

15. Trial courts have very little discretion in determining whether to certify a class.
    True.
    False.

16. A presumption exists against the certification of class actions, and courts are supposed to err on the side of denying certification.
    True.
    False.

17. Cases may be certified as class actions for liability purposes only, with damages left to individual determinations.
    True.
    False.

18. Class actions were designed for civil rights cases in which injunctive relief is sought for a large class that is sometimes difficult to determine with precision.
    True.
    False.

19. Courts have certified class actions under Section 52 based on the statutory damages available under that section.
    True.
    False.

20. California courts may look to cases interpreting and applying the Massachusetts Civil Rights Act of 1979 when deciding cases under Civil Code Section 52.1.
    True.
    False.
Class action plaintiffs can avoid the individualized damages issue by proposing that the class be limited to those who will accept the minimum statutory damages.

In deciding a motion for class certification, the court accepts the plaintiffs’ allegations as true. An inquiry into the merits of the case is improper at the class certification stage.28 “The Court’s inquiry on a class certification motion is limited to whether the requirements of Rule 23 have been satisfied, and is not supposed to extend to whether plaintiff class representatives have successfully stated a cause of action or will prevail on the merits.”29

Rule 23(a) provides that the prerequisites to maintain a class action are:
1) A sufficient number of class members so that joinder is impracticable (“numerosity”).
2) The questions of law or fact are common to the class (“commonality”).
3) The claims of class representatives are typical of the class (“typicality”).
4) Class representatives will fairly and adequately represent the interests of the class (“adequacy of representation”).

In addition, one of the provisions of Rule 23(b) of the Federal Rules must be met. Rule 23(b)(1) provides certain standards for certification that, as a practical matter, are rarely relied upon.30

Rule 23(b)(2) governs injunctive relief class actions and provides for class certification when “the party opposing the class has acted...on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” Indeed, “Rule 23 class actions were designed specifically for civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons.”31 Injunctive relief class actions are relatively easy to certify, so long as the claims asserted arise from the widespread implementation and application of an unlawful policy.

A potential advantage of an injunctive relief claim is that, as a practical matter, certification of a (b)(2) class may make the court more amenable to certification of a monetary relief class. An action that seeks both injunctive and monetary relief may be certified under Rule 23(b)(2), and, if a class qualifies under (b)(2), it often makes it easier for a court to certify the money damages aspect of the case on the ground that money is not the main relief sought.32

Although Rule 23(b)(3) does not say so explicitly, it is the rule that normally controls damages class actions. Rule 23(b)(3) provides that class certification should be granted where “the Court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” In addition, according to Rule 23(b)(2)(D), the “difficulties likely to be encountered in the management of a class action” are major issues in certifying a damages class.

Defendants typically argue in large class actions that a case “is not suitable for class certification because the litigation of the class amounts of restitution does not automatically preclude class certification...” This is the critical issue when a claim is based on a clear, unlawful policy or practice, because defendants will use the argument of individualized damages to try to defeat class certification of cases that otherwise would qualify for class treatment.

The language of Rule 23(b)(3) invites such protestations because, regarding the issue of commonality, it states that common questions must predominate.33 Defendants may dovetail this requirement with the provisions of Rule 23(b)(3) that address the difficulties of the management of the class. They will argue that with such a wide variety of individual damages claims, common questions do not predominate and the class is not manageable. As a result, according to this analysis, the requirements for certifying the class as a damages class are not met.

There may be sound policy arguments for the proposition that the existence of individual damages claims does not change the fundamental equation regarding what constitutes a class. However, the intersection of individual damages and manageability of the class is where the statutory per violation damages come into play. If statutory per violation damages are available, then 1) individual damages determinations are not nec-
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essary, and 2) the class can be certified so that only relief under the statutory damages provision is available. Thus, with statutory minimum damages, manageability of the class and individualized damages determinations are no longer at issue. In the past, this approach was only available in discrimination class actions under Civil Code Section 51 or equivalent statutes, and even then it was not heavily utilized. After Venegas, this remedy is now potentially available in a much wider range of cases under Section 52.1. Class action plaintiffs can avoid the individualized damages issue by proposing that the class be limited to those who will accept the minimum statutory damages. Furthermore, plaintiffs arguably can request that the jury be allowed to determine whether individual damages might not be readily determined. Defendants may be more willing to change illegal policies voluntarily once they recognize the potential economic cost of not doing so.

In the appropriate case, the effort to pursue a class action is a worthwhile one, because it can result in significant policy changes as well as compensation to the class. Defense counsel should similarly be aware that Section 52.1 is likely to be available for claims that, in the past, were determined to be beyond its reach.

Statistical Sampling and Aggregate Evidence

The use of aggregate evidence, including evidence based on a random sample of the class, to establish damages is a new and growing development in class actions. The U.S. Supreme Court has observed, in an antitrust context, that it is sufficient to establish damages “if the evidence shows the extent of the damage as a matter of just and reasonable inference, although the result be only approximate,” for the “wrongdoer is not entitled to complain that they cannot be measured with exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.”

Due process and Seventh Amendment objections have been raised to the use of statistical sampling to determine damages, but these arguments should not be determinative.

Moreover, the Seventh Amendment does not apply to claims brought in state court, and California law has long allowed aggregate determinations of the causation of damages, which is conceptually indistinguishable from an aggregate determination of the amount of damages.

Although not an ideal approach, plaintiffs also can consider circumventing class damages issues by limiting class certification to the question of liability. Rule 23(c)(4) of the Federal Rules of Civil Procedure provides that “when appropriate (A) an action may be brought or maintained as a class action with respect to particular issues.” Thus, plaintiffs can argue that the court should certify the class for liability purposes only, leaving the damages for individual determination.

Developments in California law present significant opportunities for the expansion of the remedies available to redress violations of civil rights. In light of recent judicial clarifications, Civil Code Section 52.1 claims are no longer confined to addressing discrimination claims. Imaginative and creative plaintiffs’ lawyers should be aware of the potential for pursuing claims for groups of people harmed by a pattern of abuse, even though individual damages might not be readily determined. Plaintiffs may be more willing to charge illegal policies voluntarily once they recognize the potential economic cost of not doing so.

In the appropriate case, the effort to pursue a class action is a worthwhile one, because it can result in significant policy changes as well as compensation to the class. Defense counsel should similarly be aware that Section 52.1 is likely to be available for claims that, in the past, were determined to be beyond its reach.

1 See U.S. CONST. art. 4 and CAL. CONST. art. 1, §13 (prohibition against unreasonable search and seizure); LAB. CODE §§1101, 1102 (prohibition of prevention or control of employee political activities by employer); CIV. CODE §§1941, 1942 (warranty of habitability).


3 See CIV. CODE §52.1(a), (b).

4 See CIV. CODE §52.1(g).

5 See CIV. CODE §52.1(h).


7 Id.

8 CIV. CODE §52.1(g).


10 Id. at 850.


14 Jones, 17 Cal. 4th at 335.


18 CIV. CODE §52.2. Although §52.1 contains a $25,000 civil penalty provision, and Justice Baxter stated in his concurrence in Venegas that a $25,000 civil penalty appeared to be available to an individual under §52.1, that interpretation may be flawed. It is likely that §52.1 civil penalties (as distinguished from minimum statutory damages) may be obtained only if sought by the attorney general, a district attorney, or a city attorney due to the specific language of §52.1.


20 “Interpreting constructions which render some words surplusage...are to be avoided.” California Mfrs. Ass’n v. Public Urals, Comm’n, 24 Cal. 3d 836, 844 (1979).

21 For further analysis and additional citations of cases, see Barry Litt, Class Certification in Police/Law Enforcement Cases, 18 CIVIL RIGHTS LITIGATION AND ATTORNEYS’ FE ANNUAL HANDBOOK ch. 3, at 3-4 through 3-25 (2002) [hereinafter LITT].


23 Barbier v. Hawaii, 42 F. 3d 1185, 1197 (9th Cir. 1994); Hilado v. Estate of Marcos, 103 F. 3d 767, 774 (9th Cir. 1996).


26 Lundquist v. Security Pac. Auto. Fin. Servs., 993 F. 2d 1114 (9th Cir. 1993) (citing Robidoux v. Celani, 987 F. 2d 931, 935 (9th Cir. 1993)).

27 Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974); Blackie v. Barrack, 524 F. 2d 891, 901 & n.17 (9th Cir. 1975).

28 Longden v. Sunderman, 123 F.R.D. 547, 551 (N.D. Tex. 1988). In practice, however, courts do consider the merits of the claim, and some courts have indicated that they consider it appropriate to consider the merits at the class certification stage.

29 This may change as plaintiffs’ attorneys in some jurisdictions face greater difficulties in certifying damages claims previously certified under Rule 23(b)(3) of the Federal Rules of Civil Procedure. For example, plaintiffs’ class counsel in the Fifth Circuit have been looking at Rule 23(b)(1) as a potential means to overcome the hurdle posed by Allison v. Cago Petroleum Corp. and its progeny, Allison, 151 F. 3d 402, 426 (5th Cir. 1998) (Certification under Rule 23(b)(3) was not appropriate because “plaintiffs’ claims for compensatory and punitive damages must...focus almost entirely on facts and issues specific to individuals rather than the class as a whole.”).

30 4 NEWBERG ON CLASS ACTIONS, supra note 26, §4.11, at 4-39.


33 Cf. Fed. R. CIV. P. 23(a). This rule’s provision for commonality only requires the existence of common questions of law or fact, not that those questions predominate.

34 The $4,000 figure likely only applies to conduct occurring after Jan. 1, 2002, under normal rules of statutory construction.

achieve judicial efficiencies. The Federal Rules of Civil Procedure permit courts to certify separate issues “in order ‘to reduce the range of disputed issues’ in complex litigation” and “to certify separate issues ‘in order…’ to reduce the range of disputed issues in complex litigation.” Blackie v. Barrack, 524 F. 2d 891, 905 (9th Cir. 1975); Robinson v. Metro-North Commuter R.R. Corp., 267 F. 3d 147, 168-69 (2d Cir. 2001) (District Court should “take full advantage of this provision”).

For example, in In re Fibreboard Corp., 893 F. 2d 706, 710 (5th Cir. 1990), the court noted that “Aggregated damages are not a violation of due process.” In the same vein, see Reynolds Tobacco Co., 204 F.R.D. 150, 160 (S.D. Cal. 1996) (“Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of individual questions so that class certification of the entire action does not violate due process.”). In re Estate of Marcos Human Rights Litig., 910 F. Supp. 1460, 1468-69 (D. Haw. 1995); Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris Inc., 113 F. Supp. 2d 345, 372-76 (E.D. N.Y. 2000) (approving the use of statistical sampling to prove damages in wage and hour class action); Hilao v. Estate of Marcos, 103 F. 3d 767, 785-86 (9th Cir. 1996) (A class action trial based on the use of a randomly selected sample was appropriate for the determination of damages for a class of 10,000 people subject to torture, murder, and disappearance by the Marcos regime in the Philippines); Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc., 113 F. Supp. 2d 345, 372-76 (E.D. N.Y. 2000) (approving the use of statistical sampling to support damages claim). See LITT, supra note 22.


See Summers v. Tice, 33 Cal. 2d 80, 84 (1948); Sindic v. Abbott Labs., 26 Cal. 3d 588, 610-11 (1980); Int see, e.g., Cimino v. Raymark, 151 F. 3d 297 (5th Cir. 1998); Arch v. American Tobacco Co., 175 F.R.D. 469, 493 (E.D. Pa. 1997); Estate of Mahoney v. R. J. Reynolds Tobacco Co., 204 F.R.D. 150, 160 (S.D. Iowa 2001). Cf. In re Chevron U.S.A., Inc., 109 F. 3d 1016, 1017 (5th Cir. 1997); In re Fibreboard Corp, 893 F. 2d 706, 710 (5th Cir. 1990). See, e.g., Valentino v. Carter-Wallace, Inc., 97 F. 3d 1227, 1234 (9th Cir. 1996) (“Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues.”); Sterling v. Velsicol Chem. Corp., 85 E. 2d 1188, 1196-97 (6th Cir. 1988). Class action treatment is appropriate as long as “common questions of law or fact” predominate. See, e.g., Blackie v. Barrack, 524 F. 2d 891, 905 (9th Cir. 1975); Robinson v. Metro-North Commuter R.R. Co., 267 F. 3d 147, 168-69 (2d Cir. 2001) (District courts should “take full advantage of this provision to certify separate issues ‘in order…to reduce the range of disputed issues in complex litigation’ and achieve judicial efficiencies.”).
Nuggets from the Los Angeles Superior Court Web Site

THE LOS ANGELES SUPERIOR COURT WEB SITE, found at http://www.lasuperiorcourt.org, has what you may expect, including court locations and telephone numbers, local court rules, fee schedules, and forms. It also has what you may not expect, such as searchable civil party and criminal defendant indexes, tentative rulings, free Metro passes for jurors, directories of experts, a court date calculator, volunteer and employment opportunities, and a link to pay traffic tickets. The court Web site can assist attorneys in their practice (and possibly in their lives as private citizens) and introduce them to the procedures of other litigation areas.

The site is divided into several sections: LA Court Online, Civil, Family, Traffic, Jury Services, Small Claims, Probate, Criminal, Juvenile, Mental Health, Appellate Division, and About the Court. Most substantive sections include an overview of the area and a summary of what to expect procedurally in a case. For example, clicking on Juvenile leads to a summary of what minors and their parents should expect in juvenile and juvenile traffic court. In the Juvenile section, users can also click on Delinquency Court and General Information to find a historical overview of the juvenile justice system in Los Angeles County. This overview is worth reading as the juvenile court is a different world from what most litigators experience.

Many of the sections contain a link labeled Frequently Asked Questions or Self-Help. The Juvenile Section’s Frequently Asked Questions include the comprehensive “My Social Worker Doesn’t Call Me Back; My Social Worker Doesn’t Do Anything; My Social Worker Is against Me; How Do I Complain about the Social Worker?” as well as “How Do I Get My Kids Back?” and “Can I Get Information about My Case over the Phone or by Mail?” The Probate area’s Self-Help section contains downloadable instruction manuals on such topics as how to transfer small estates without probate, the duties of a conservator, and how to file a creditor’s claim. Some of the sections have links to outside Web sites, such as the California State Bar’s Estate Planning consumer information page and the Los Angeles County Bar Association’s home page and lawyer referral service.

Court Databases

The superior court’s Web site also offers a wide range of online databases, including an index of defendants in criminal cases, a party name search in civil cases, and case documents from general jurisdiction civil cases at the Stanley Mosk Courthouse. The Traffic section allows searches by driver’s license and allows for online payment of traffic fines. In the Small Claims section, users can access an e-filing feature. Searches of the databases are not free, but they are low cost. For $4.75, for example, a user can search for a name on the civil party index or the criminal defendant index, covering Los Angeles County from the early 1990s to the present. To search the database, users need to input a first and last name of an individual or a name of a company. Case numbers are not needed, so users do not need to know that a case existed. The civil party index lists all civil, probate, family law, and small claims cases in which the named individual or entity is or was a party. The list identifies the type of lawsuit of the various cases. A click on the party’s name leads to the case summary. The criminal defendant index lists the felonies with which an individual has been charged from the early 1990s to the present. If available, the list includes the relevant code sections, a description of each charge, the disposition, and disposition date.

The Small Claims e-file program allows users to fill out a ques-

For $4.75 a user can search for a name on the civil party index or the criminal defendant index from the early 1990s to the present.
date on the online calendar, enter the number of court days to calculate, and click on the calculate button. On a resulting screen, users have service and filing deadlines. Unfortunately, the calculator only calculates forward. It would be ideal if it counted backward as well for oppositions, replies, and motions to strike.

The site’s useful information also features searchable local court rules. Users can research the local rules by using the table of contents, which is accessible via the blue bar at the bottom of the home page, or by conducting a keyword search of the rules or of the entire site. This site also includes general information about relevant outside resources. Many of the sections have directories of court-approved professionals involved in the various types of litigation, including investigators, psychologists, psychiatrists, counselors, and expert witnesses.

The Juvenile section’s dependency court link describes several local organizations that try to help the abused and neglected children who find themselves in the system, such as Court Appointed Special Advocates (CASA), Comfort for Kids, Children’s Law Center, and Free Arts for Abused Children. This section gives information about volunteer opportunities, and if you do not have time to give, the Dependency Scholarship and Special Needs Funds now accept donations online.

Traffic Court and Jury Duty

The Traffic section explains what to do if one gets a traffic ticket. Users can pay a traffic ticket, request an extension, and request traffic school, among other options, all online. Each morning long lines form at the traffic court; the more one can do to avoid traveling to traffic court for the purpose of standing in a line, the better. As with the Traffic section, attorneys may need to access the Jury section in a nonprofessional capacity. The Jury section explains what to do when one receives a jury summons and what to expect if one is sworn. This section directs jurors on how to obtain a free Metro pass while serving jury duty for more than one day. Users can even find a listing of some fun places to go Downtown while on the lunch break from jury duty.

Finally, the site even lists job vacancies. About the Court links to LASC’s Human Resource Department, which posts openings for research attorneys. This short list is just a sampling of the many nuggets of information and tools available on http://www.lasuperiorcourt.org. This site can reward any Los Angeles attorney who devotes some time to its exploration. Something valuable can be found on it for every litigator, litigant, and juror.

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Active Liberty: Interpreting Our Democratic Constitution

By Stephen Breyer
Alfred A. Knopf, 2005
$21, 192 pages

THE CONTROVERSIES over Senate confirmations of recent Supreme Court nominees have reopened the debate over how the Constitution should be interpreted. Just as the role of the Court is gaining renewed attention, Associate Justice Stephen Breyer has published his thoughtful views in a new book, Active Liberty: Interpreting Our Democratic Constitution.

Breyer’s purpose is to suggest a theory of constitutional interpretation that gives weight to the “Constitution’s democratic nature” and to the consequences of Supreme Court rulings, thereby yielding what he calls “better law—law that helps a community of individuals democratically find practical solutions to important contemporary social problems.” Whenever a sitting Supreme Court justice offers a first-person analysis of his or her job, lawyers and nonlawyers alike should listen. One does not need to have a case pending before the Court to take a keen interest in how one of the most important decision makers in America undertakes the daunting challenge of interpreting the U.S. Constitution.

What Breyer means by “active liberty” may come as a surprise. He is not promoting judicial activism. Instead, he frames his analysis by distinguishing between what the French political philosopher Benjamin Constant (writing in 1819) called “the liberty of the ancients” and “the liberty of the moderns.” The former consists of “a sharing of a nation’s sovereign authority among the nation’s citizens,” while the latter consists of “the individual’s freedom to pursue his own interests and desires free of improper government interference.” Breyer labels the former (a largely communitarian idea) as “active liberty,” and the latter (a more autonomous idea) as “civil liberty.” Consequently, despite its title, much of Breyer’s project is not about advancing an activist theory of individual rights. Instead, the book seeks, in the name of self-government, to sustain the democratic decisions made by Congress and state legislatures.

The challenge in tracking the implications of a theory so attractively labeled “active liberty” is to remember that every state or federal law that has ever been struck down as a violation of the Constitution was democratically enacted as a part of self-government. Therefore, elevating “active liberty” over “civil liberty” could threaten the Constitution, the Bill of Rights, and the Fourteenth Amendment in their role as restraints on the will of the majority over the rights of the minority.

To put it bluntly, interpreting the Constitution to advance its democratic objectives may sound laudable, but it could do injury to enforcing the Constitution as a guarantor of individual rights. The Constitution establishes a system of limited powers that restrain governmental authority. Should we loosen those restraints simply by characterizing governmental power as the beneficial result of our democratic system? Imagine the same theory—the supremacy of legislative enactments over individual rights—if it were being promoted with the ideological certitude of an Antonin Scalia or Clarence Thomas.

To develop his approach, Breyer quickly descends from abstract constitutional theory to the practical environs of real cases to explain how his notion of “active liberty” applies to free speech, federalism, privacy, affirmative action, statutory interpretation, and administrative law. Breyer modestly defends his rulings on the Court and gently takes issue with fellow justices with whom he has disagreed. Whether or not the reader agrees with Breyer, these discussions leave the distinct impression that it would be an intellectual pleasure to sit with this man and explore these weighty issues. His compassion, civility, and equanimity emerge on every page. Yet that only heightens the need to judge the implications of his theory of “active liberty.”

Take campaign finance reform, for example. Do laws that limit how much one can contribute to a political campaign violate the First Amendment? Does Breyer’s “active liberty” approach help decide that question? He points out that the text and history of the Constitution are of little help. The First Amendment says Congress shall not abridge the freedom of speech, but it does not define “speech.” The Framers said very little about campaign contributions, and there is no evidence that they anticipated, for example, that in the year 2000, the total amount of money spent on the presidential and Congressional elections would be about $1.5 billion.

Money Is Not Speech

Breyer rejects the familiar slogan that “money is speech” but readily agrees that “the expenditure of money enables speech, and that expenditure is often necessary to communicate a message, particularly in a political text.” Breyer justifies his vote in the 2003 case of McConnell v. Federal Election Commission upholding limitations on “soft” money by arguing that to “understand the First Amendment as seeking in significant part to protect active liberty, participatory self-government, is to understand it as protecting more than the individual’s modern freedom.” Breyer purposely shifts the First Amendment away from its historic role as the protector of an individual’s right to free speech to the community’s right to a free flow of information, uncontrolled by money. Or as he puts it, the primary purpose of the First Amendment is “to encourage the exchange of information and ideas necessary for citizens themselves to shape that public opinion which is the final source of government in a democratic state.” Unfortunately, since Breyer sees valuable First Amendment objectives in “active liberty” (the “promotion of a

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democratic conversation”) as well as “modern liberty” (the “protection of the citizen’s speech from government interference”), his theory leaves the issue of campaign finance unresolved.

In the area of affirmative action, Breyer sees “active liberty” at work in the Court’s 2003 decision of Grutter v. Bollinger, upholding the use of race as one, but not the determinative, criterion for admission to the University of Michigan Law School. The question before the Court was whether the use of that criterion violated the equal protection clause, which forbids any state to “deny to any person…the equal protection of the laws.” Two views emerged.

Thomas applied the clause literally to require that state activity be “color-blind.” But, according to Justice Ruth Bader Ginsburg, in implementing the Constitution’s “equality instructions,” government “may properly distinguish between policies of exclusion and inclusion…Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its after effects have been extirpated.”

For the majority in Grutter, Justice Sandra Day O’Connor wrote that “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation, is essential if the dream of one Nation, indivisible, is to be realized.” For Breyer, the best way to explain why the majority chose O’Connor’s vision over Thomas’s is “active liberty,” since “some form of affirmative action is necessary to maintain a well-functioning participatory democracy.”

In the course of Active Liberty, Breyer offers his opinion in the debate over originalism, currently espoused most emphatically by Scalia. According to Breyer, originalism asks “judges to focus primarily upon the text, upon the Framers’ original expectations, narrowly conceived, and upon historical tradition.” For several reasons, Justice Breyer finds originalism unsatisfactory and inhospitable to the arguments he is advancing. He cites the Ninth Amendment.

While drafting the Bill of Rights during the First Congress in 1789, James Madison realized he had a problem. By listing specific rights guaranteed to the people, such as freedom of religion, freedom of speech, the right against self-incrimination, the right to due process, and so on, what if he overlooked a fundamental right? The answer became the Ninth Amendment: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

The amendment dispels the notion that the only rights the people enjoy are the ones expressly listed in the Constitution. Surely anyone dedicated to a strict reading of the text of the Constitution would take the Ninth Amendment into account in interpreting the Constitution. Breyer questions the assumption that originalism results in objective interpretation while other approaches are inevitably subjective. He is skeptical that reliance on the “Founders’ intent,” “history,” or “tradition” ensures certainty, given all the uncertainty over such matters. “Judges are not expert historians,” he notes.

Originalism, Breyer concludes, “has a tendency to undermine the Constitution’s efforts to create a framework for democratic government—a government that while protecting basic individual liberties, permits citizens...to govern themselves effectively. Insofar as a more literal interpretative approach undermines this basic objective, it is inconsistent with the most fundamental original intention of the Framers themselves.”

In Active Liberty Breyer has graciously invited us to share his search for a principled approach to constitutional interpretation. He humbly remarks that the decisions he criticizes may not be wrong and that the ones he endorsed may not be right. By exposing his thinking to our scrutiny, Breyer encourages us to accompany him on this journey.
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Hotel Metropole — Conveniently located in the heart of Avalon on Catalina Island just 5 minutes from the ferry. The Hotel Metropole is a luxury hotel in a beautiful pristine setting offering 48 spacious air-conditioned guest rooms with spectacular views of the ocean, mountains, and the hotel's courtyard. Situated just footsteps from the beach, it is the ideal locale for romantic getaways, family vacations, and corporate functions. The look of relaxed elegance imparts a sense of peace and serenity, which echoes the overall island ambiance of balmy breezes and soothing waters. The Hotel Metropole is adjacent to the Metropole Market Place, an open-air marketplace with cobblestone walkways and sparkling fountains featuring a potpourri of boutiques, specialty shops, delis, cafes, and fine dining at two ocean-view restaurants. Guest rooms feature king-size beds, cable TV, DVD players and rental library, and amply stocked snack bars. Each of the bright rooms is appointed with comfortable fruitwood furnishings in an aesthetically pleasing blend of colors to match the seaside ambience. Many rooms have Jacuzzi tubs and private balconies, and adjoining rooms are available for families and groups. The hotel's spectacular 1800 square-foot apartment, the Beach House, offers panoramic views and an added level of luxury, including two bedrooms, two Jacuzzi baths, a fully equipped kitchen, dining area, large living room with big screen TV and stereo, and over 1,000 square feet of private deck space. Other in-room amenities include plush terry cloth robes (seasonal), complimentary continental breakfasts, and wireless Internet. Room service and day spa also available. 205 Crescent Avenue, Avalon, CA 90704, reservations and information (310) 510-1884, (800) 300-8528, Web site: www.hotel-metropole.com.

Hotel Oceana Santa Barbara—This 122 room, beachfront property features sweeping views of the Pacific Ocean. Situated in Santa Barbara’s West Beach, guests are within a stone’s throw of Stearns Wharf and all the fantastic Santa Barbara sights and shops. The hotel features 2 heated pools with colorful cabanas, a Jacuzzi, and beautiful parks and gardens for our guests to enjoy. For the ultimate pampering experience, guests can choose from an array of treatments and massages offered in our spa. And if that’s not relaxing enough, sip your evening cocktail on balconies dripping with fragrant “giant honeysuckle” vines or simply enjoy the ambiance surrounding our plush outdoor living room. Old world charm, cool fountains, palm trees and tropical flowers are plentiful. Call our toll free number at (800) 965-9776 and reserve your oceanfront room right away. Hotel Oceana Santa Barbara, 202 West Carrillo Boulevard, Santa Barbara, CA 93101, (800) 965-9776, fax (805) 965-9937, e-mail: reservations SB@hoteloeana.com. Web site: www.hoteloeana.com.

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CLE Preview

Integration of Legal Technologies

On Tuesday, December 6, the Los Angeles County Bar Association will present a program for litigators who are using or are considering using automated litigation support tools to manage the evidence (documents, transcripts) in a case of any size. Further attention will be directed to case calendar and case pleading management. Presenters Russell Jackman and Alex Lubarsky will compare and demonstrate the basic features of the leading litigation support tools: Introspect, Summation, Concordance, and CaseMap/TimeMap. Promotional discounts will be offered. This is a must for the solo litigator or large firm litigation support manager who wishes to leverage technology to get desired results in litigation. The program will take place at the LACBA/LexisNexis Conference Center, 281 South Figueroa Street, Downtown. Reduced parking is available with validation for $9. On-site registration, the meal, and the presentation will begin at 5:30 P.M. and continue to 8:45. The registration code number is 009149. The prices below include the meal.

- $65—CLE+Plus members
- $90—LACBA members
- $115—all others

3.25 CLE hours

Ethics 2005—Keeping Current in a World of Change

On Saturday, December 10, the Los Angeles County Bar Association and the Professional Responsibility and Ethics Committee will present a program featuring James I. Ham, Diane L. Karpman, Judge Michael D. Marcus, Joel Alan Osman, Ellen A. Pansky, David B. Parker, Jon L. Rewinski, and Ira Spiro on four ethics subjects: conflicts with clients, fee disputes, lawyer-to-lawyer issues, and ethical issues in mediations and arbitrations. The program will take place at the LACBA/LexisNexis Conference Center, 281 South Figueroa Street, Downtown. Reduced parking is available with validation for $9. On-site registration, the meal, and the presentation will begin at 9 A.M. and continuing to 1 P.M. The registration code number is 009135. The prices below include the meal.

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- $100—all others

4 CLE ethics hours

SEARCHING DATABASES AND TAX RETURNS FOR PROPERTY

On Tuesday, December 13, the Los Angeles County Bar Association will present a program titled "Use of Electronic Database Searches and Income Tax Returns to Uncover, Discover, and Recover Property, Locate People, and Avoid Being Sued for Malpractice." Marc Kaplan, who is an attorney and CPA, will present the seminar. Part one will be an in-depth analysis of individual, partnership, and corporate income tax returns—and how to understand them and find hidden assets and liabilities. Part two will cover the use of free and premium databases to run searches on individuals and businesses, as well as how to find people, property, and undisclosed assets. Those in attendance will learn what records are available quickly, easily, and inexpensively. Attorneys can also learn how database searches yield dramatically higher judgments, can locate missing people, find hidden entities and assets, and uncover critical information about a case or party. Use of information against an adverse party and the ethical and malpractice implications of database searching will also be discussed. The program will take place at the LACBA/LexisNexis Conference Center, 281 South Figueroa Street, Downtown. Reduced parking is available with validation for $9. On site registration, the meal, and the presentation will begin at 5:30 P.M. and continue to 8:45. The registration code number is 009169. The prices below include the meal.

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A Call for Contractual Jury Waivers in California

LITIGATION MAY BE A COST of doing business, but most Californians are not in the business of litigation. California residents should have every legitimate means available to mitigate the impact of litigation on their businesses and their lives. California Supreme Court Justice Ming Chin has urged the state legislature to authorize predispute jury trial waivers by private contract. This call for legislative action deserves strong and widespread support.

On August 4, 2005, the California Supreme Court held in *Grafton Partners, L.P. v. Superior Court of Alameda County*¹ that under current California law, prelitigation contractual jury trial waivers are invalid in state courts. Under the state constitution, the right to a jury trial can only be waived in the manner specified by the legislature. The court found that the legislature had not authorized the waiver of a jury trial by private contract.

The case attracted intense interest, including 15 amicus curiae briefs. Many of these briefs advanced policy arguments in an effort to convince the court to uphold predispute jury waivers. But the court rejected these arguments, reasoning that the state constitution requires the legislature, not the courts, to authorize the waivers. While Justice Chin in his concurring opinion agreed with the legal result reached by the majority, he openly urged the legislature to enact legislation authorizing predispute jury waivers.

Alternative dispute resolution has become increasingly popular in recent years. It is perceived to be a means for avoiding many of the so-called evils of litigation, including its expense and runaway juries.

Adding predispute jury waivers as one more form of ADR could only have a beneficial effect. Contracting parties will gain more flexibility in tailoring a dispute resolution approach that is suitable to their own needs. The jury waiver alternative would ensure parties that they can avoid the one-size-fits-all remedy of traditional litigation. The option of predispute jury waivers would conform California law with the majority of state and federal jurisdictions, thus bringing California into the mainstream rather than trailing the pack.

Each form of ADR has its own benefits and drawbacks. Arbitration, perhaps the most common form of ADR, entails an added layer of expense—for the arbitrator or arbitrators as well as for the arbitration service and the rental of the arbitration venue, among other costs—that does not exist in a conventional bench trial. Absent a specifically drafted arbitration agreement, pretrial discovery in arbitration can be too limited, increasing the chance of an incorrect outcome. Moreover, the limited grounds on which a court may vacate an arbitration award provide little protection against an arbitrator whose ruling is simply wrong.

Judicial reference, while offering broader appellate rights than arbitration, still requires the parties to pay for the referee, which can be a significant expense. Stipulating that a judge pro tem will hear the case entails similar costs.

Jury waivers, by contrast, provide a more cost-effective means to adjudicate a dispute while still providing parties with discovery rights and the option of appellate review. (Mediation, of course, can be utilized by the parties irrespective of any other form of dispute resolution that the parties might have chosen.)

Bringing California in line with the rest of the country would make the state a more attractive place to do business. This would boost the state economy by creating jobs and increasing the tax base for the very governmental entities that provide and fund the state court system. In fact, these same governmental entities have been known to find themselves on the wrong end of questionable jury verdicts. Certainly, California does not benefit from a perception that its legal system is hostile to the business community. The increased costs of litigation and irrational jury verdicts only serve to increase the costs that all California residents pay for insurance, credit, goods, and services.

Objections will undoubtedly be raised regarding predispute jury waivers. Critics will call them contracts of adhesion, point out the proverbial fine print, and raise other issues of so-called procedural unconscionability. But these responses are nothing new. The same issues already arise in the arbitration context, and there is a well-established body of law by which arbitration clauses are evaluated for enforceability. Similar concerns regarding jury waivers can be addressed either judicially, as they have been for decades, or legislatively. The potential for some incidental difficulties in implementing such a useful tool as jury waivers should not flatten prevent the use of that tool. Analogies to babies and bath water come to mind.

California’s legal system must keep pace with those of other states. As the sixth largest economy in the world, California is a bellwether and needs to be on the leading edge. Offering contracting parties the flexibility to resolve a dispute in the manner they deem most appropriate is one way this objective can be accomplished. After all, alleviating the impact of litigation is a significant benefit, because the burden of litigation is ultimately borne by all Californians.

The option of predispute jury waivers would conform California law with the majority of state and federal jurisdictions.


Carl Grumer is a partner in the Los Angeles office of Manatt, Phelps & Phillips, LLP, where he specializes in commercial litigation and creditors’ rights. Thomas McMorrow is a partner in the Sacramento office of Manatt, where he specializes in legislative and regulatory matters.
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