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Does a two-lawyer couple who write their own marriage vows have a fool for a client? Jack and Jill, both lawyers, fall in love and marry. They write poetic, passionate, yet surprisingly guileless marriage vows that include the phrase: “I promise that our relationship will always come first.” As a marriage vow, it is a lovely thought. As a contractual provision, it is a recipe for a dispute.

The conflict arrives. Jack wants to keep a Sunday golf date with his buddies and a prospective client. Jill wants him to attend a brunch for her mother's birthday. Jill pulls out the printed marriage vows from the keepsake drawer and invokes the “relationship first” clause, taking an interpretive view that attending each other's family events is an obligation implied from the phrase “our relationship.” Jack takes a strict constructionist view, interpreting the word “our” as limited to Jack and Jill, exclusive of extended family relations.

Is the Jack and Jill story far-fetched? Or does being trained as a lawyer and practicing law affect a lawyer’s communications and behavior in intimate relations? Psychologist Fiona Travis, author of *Should You Marry a Lawyer?* (Niche Press 2003), provides many examples of lawyers applying their lawyer skills inappropriately to their personal relationships, such as cross-examining spouses during arguments.

The law values precision of thought and reason over emotion. Law schools train law students to intellectually dissect even the most heartrending fact patterns. Yet, intimate relations require emotional intelligence, an ability to accept the radical idea that people are entitled to their feelings—including feelings that defy rational explanation.

This discussion raises the question: Should lawyers marry lawyers? Or would such inbreeding result in clichéd clashes of *Adam’s Rib* proportions? Travis thinks not and provides data that two-lawyer marriages fare better than one-lawyer marriages. Similarly, a 1999 study of dual-doctor marriages by the Case Western Reserve University Department of Sociology and School of Medicine found that doctors in dual-doctor marriages are happier and more content at home than one-doctor couples. Because lawyers, like doctors, form a subculture in our society, with their own language, education, and rites of professional passage, marrying within the subculture assures a measure of mutual understanding and commonality of perspective.

But the legal profession is a subculture of the self-selected. The law attracts those who value critical thinking, whose preferred tool in life is reason. Of course there are exceptions, but people who value emotions over rationality tend not to become lawyers. So two people who value critical thinking are more likely to get along better than a critical thinker and an emotion surfer.

Let’s not justify coldness, however. Both dual-lawyer and one-lawyer couples would benefit if we lawyers did not take pride in turning mouthfuls of water into ice cubes. Reason dictates that because human beings have emotions, rational human beings should strive to understand the power and importance of emotions in human interaction. This starts with admitting that many of us lawyers have an emotional attachment to the safety of reason and a fear of the ambiguities that accompany emotion. We may have to develop some emotional chops to have better relationships.

Jack and Jill would be well advised to put the marriage vows back in the keepsake drawer and instead discuss the emotions involved in the dispute. Jill may feel abandoned. Jack may feel stifled. Once the emotions are out on the table, the couple can proceed to bring their brainpower to bear on reassuring and accommodating each other. Lawyers can start practicing their emotional skills by thinking of their most intimate relationship and then finishing this sentence: “I feel…” Next comes the critical part. Go try this at home.

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R. J. Comer is a partner at Allen Matkins Leck Gamble & Mallory LLP, where he specializes in land use law and municipal advocacy. He is the chair of the 2005-06 Los Angeles Lawyer Editorial Board.
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Court Deadlines after a Disaster

HURRICANE KATRINA’S RECENT DEVASTATION of New Orleans included the flooding of courthouses and the destruction of law offices. In California, courts and lawyers may have to confront natural disasters such as earthquakes, wildfires, and landslides, as well as problems of a more human origin, such as power failures, terrorist attacks, anthrax scares, or riots.

The job of gauging the impact of a disaster on timing requirements rests in the hands of the Judicial Council. In particular, Government Code Section 68115 vests the Judicial Council’s chair with wide-ranging powers to mitigate a disaster’s effects on the ability of litigants to file documents. These powers arise during war, insurrection, pestilence, public calamity, the destruction of a courthouse, or when mass arrests threaten orderly court operations.

The chair may, with proper public notice, authorize court sessions anywhere within the relevant county or transfer civil cases pending trial to adjacent counties. The chair may also declare the dates of an emergency condition that interferes with the public’s ability to file papers to be holidays for purposes of computing time for the filing of papers or conducting court proceedings. Such an order provides relief because Code of Civil Procedure Sections 12 and 12a exclude holidays from the computation of legal time requirements.

A holiday declaration likewise extends the time for courts to conduct proceedings that otherwise would be subject to deadlines. These extensions must be kept to the fewest number of days necessary. The chair also has authority to grant extensions affecting matters such as temporary restraining orders, detention hearings, and other deadlines under penal and juvenile law.

When the Judicial Council issues an emergency order, the courts strictly construe it and show little sympathy to litigants who miss deadlines. For example, in Power Partners International, Inc. v. Dominion Energy, the trial court’s jurisdictional deadline to decide a motion for judgment notwithstanding the verdict would have expired on October 27, 2003. Wildfires, however, prompted an emergency order that closed the court and declared October 27 through 29 to be judicial holidays, thus moving the court’s deadline to rule to October 30. The trial court did not hear the posttrial motions, however, until October 31, when it granted JNOV.

The court of appeal voided the order, holding that the trial court’s jurisdiction expired on October 30. The appellate court rejected the argument that the assigned judge’s courtroom was closed on October 30, noting “the fact that an individual judge is not in attendance at an otherwise open courthouse does not create a courtroom-specific section 12h holiday for affected litigants.”

The Power Partners court cited Bennett v. Suncloud, another example of strict adherence to an emergency order. In Bennett, the plaintiff’s statute of limitations was to expire on January 18, 1994, and the plaintiff attempted to file a complaint that day at a “branch office” courthouse. This was the day after the Northridge earthquake killed 57 people and injured over 1,500. Because the courthouse was closed and cordoned off with yellow tape, the plaintiff could not file his complaint until the next day. The trial court later sustained the defendant’s demurrer on limitation grounds.

On appeal, the court of appeal explained that the closing of a branch courthouse did not suffice to create a holiday under Section 12b, because the language of that statute specifically excludes branch offices. Nonetheless, the court reversed the judgment because the plaintiff had presented a document indicating that the Downtown courthouse was also closed on January 18, thus raising a factual issue sufficient to overcome a demurrer.

The chair of the Judicial Council also has powers under Rule 45.1 of the Rules of Court to address appellate emergencies necessitated by an earthquake, fire, or other public calamity. This rule allows the chair to extend the deadline by 14 days for any act required to be done under the rules. The rule also allows the chair to authorize specified courts to extend deadlines by up to 30 days.

Rule 45.1, enacted in 1995, appears to be aimed at creating a flexible approach to emergency rules. Before the adoption of Rule 45.1, the Judicial Council enacted ad hoc emergency rules of appellate practice. For example, one week after the October 17, 1989, Loma Prieta earthquake, the council enacted former Emergency Rules A and B of the California Rules of Court. Rule A provided exclusions of time for specified acts between October 18 and November 1, 1989. Rule B extended the time for filing notices of appeal. Likewise, former Rules C and D arose in response to the January 17, 1994, Northridge earthquake. These four earthquake emergency rules remained on the books until they were repealed in 2002, having served their intended purpose. These rules may have given rise to the geographic flexibility embedded into Rule 45.1, because the lettered rules applied equally across regions unaffected by the specific earthquakes giving rise to the rules. The newer rule, Rule 45.1, avoids this anomaly by allowing specific courts to allow extensions. One emergency rule remains in effect today: Rule E, adopted September 11, 2001, excludes that date from any appellate court time computations.

Inevitably, California will confront disasters. At best, practitioners can hope that the need for Emergency Rule F will not arise soon. But when disaster strikes, California attorneys need to keep an eye on the Judicial Council or risk that their cases will become the disaster’s next victim.

1 Gov’t Code §68115(a) & (b); see Ross v. Austill, 2 Cal. 183 (1852) (The time and place of holding court should not be left in doubt.).
2 Gov’t Code §68115(c).
4 Gov’t Code §68113(d).
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THE CONCEPT OF AN ALTER EGO pervades American culture and law. The public readily comprehends the significance of the connection between Dr. Jekyll and Mr. Hyde as well as Superman and Clark Kent, among numerous literary and pop culture examples. Law students are versed in the theory of piercing the corporate veil. Trial lawyers routinely assert the alter ego doctrine on behalf of their clients.

Despite this familiarity, the practical utility of the alter ego doctrine in litigation actually is widely misunderstood and overestimated. Indeed, California courts recognize that “[a]lter ego is an extreme remedy, sparingly used.”

The alter ego doctrine is essentially an equitable device used by the courts to prevent abuses by those improperly using the legal shield provided to a corporate entity:

Ordinarily, a corporation is regarded as a legal entity separate and distinct from its stockholders, officers and directors. Under the alter ego doctrine, however, where a corporation is used by an individual or individuals, or by another corporation, to perpetrate fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, a court may disregard the corporate entity and treat the corporation’s acts as if they were done by the persons actually controlling the corporation.

These abuses are inherently fact-specific and subject to interpretation. California courts have developed two threshold requirements for the application of the alter ego doctrine and identified several relevant factors to be considered. In Sonora Diamond Corporation v. Superior Court, the California Court of Appeal delineated the “two conditions that must be met before the alter ego doctrine will be invoked” and listed other determinative elements:

First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. “Among the factors to be considered in applying the doctrine are commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other.” Other factors...include inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers. No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied.

Federal common law is very similar to California common law, and federal courts draw upon it for guidance.

Raising the Issue

Litigants often include alter ego allegations in their pleadings as an attempt to expand the number of potentially liable individuals or entities and to extend the courts’ jurisdictional authority over those additional parties. The initial pleading requirements for alleging alter ego status in California courts are minimal. In federal court, by contrast, “[c]onclusory allegations of ‘alter ego’ status are insufficient to state a claim. Rather, a plaintiff must allege specifically both the elements of alter ego liability, as well as the facts supporting each.” Nonetheless, state and federal courts uniformly hold that an alter ego claim cannot be maintained simply by alleging that it may be difficult for the injured party to enforce a judgment or recover losses from the wrongdoers.

The alter ego issue is commonly raised and decided by a procedural challenge at the outset of an action, including motions to quash service of process or dismissal for lack of personal jurisdiction. Foreign individuals and entities challenging personal jurisdiction in California are afforded greater deference since state and federal courts recognize that “[g]reat care and reserve should be exercised...
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when extending [American] notions of personal jurisdiction into the international field."

Reported decisions actually applying or upholding the application of the alter ego doctrine to establish liability are rare. The recent federal decision in *Shanghai Automation Instrument Company, Ltd. v. Kuei* illustrates the proper application of the doctrine and the significance of detailed pleadings. In *Shanghai Automation*, a Chinese corporation and two individuals from California formed a joint venture to assemble laptop computers in China for export to California. A California corporation owned and controlled by the individuals received 7,000 computers from the joint venture but failed to pay for them. The Chinese corporation commenced an action in federal court in California against the individuals and their corporation under claims for breach of contract, conversion, and several other theories. Based upon the factual allegations in the complaint and the documentary evidence submitted by the plaintiffs, the district court found that the alter ego doctrine was applicable because the individual defendants used their California corporation as a “mere shell” in an attempt to avoid personal liability. The court entered a default judgment in excess of $22 million against the corporate defendant and one of the individual defendants (the action was stayed against the other individual defendant, who had sought bankruptcy protection).

State and federal courts also may apply the alter ego doctrine to amend a judgment to add additional judgment debtors. The rationale for this type of postjudgment relief is that “the court is not amending the judgment to add a new defendant but is merely inserting the correct name of the real defendant.” However, to satisfy due process concerns, the judgment creditor must establish the existence of an alter ego relationship and “that the new party controlled the litigation, thereby having had the opportunity to litigate.”

**Alternative Theories**

Resourceful litigants often combine their allegations based on the alter ego doctrine with alternative theories of liability, including agency, the “representative services doctrine” (a form of agency), aiding and abetting, and ratification. The factual circumstances may favor and support an agency theory over an alter ego theory of liability since “[u]nlike liability under the alter ego or veil-piercing test, agency liability does not require the court to disregard the corporate form.”

In 1994, the California Legislature enacted the Beverly-Killea Limited Liability Act—codified as Corporations Code Sections 17000 through 17655—to govern limited liability
companies. These companies are hybrid business entities that provide their members with “limited liability to the same extent enjoyed by corporate shareholders, but permit the members to actively participate in the management and control of the company.” Recognizing the potential for abuse, the legislature included a statutory provision specifically stating that “a member of a limited liability company shall be subject to liability under the common law governing alter ego liability...”

There are no reported decisions applying the alter ego doctrine in the context of a limited liability company under the Beverly-Killea statutory scheme. However, in 2005, a California court held that while “managers of limited liability companies may not be held liable for the wrongful conduct of the companies merely because of the manager’s status, they may nonetheless be held accountable under Corporations Code section 17158, subdivision (a) for their personal participation in tortious or criminal conduct, even when performing their duties as manager.” The law delineating liability under an alter ego theory in these situations awaits future development in the courts.

Litigants often invoke the alter ego doctrine but are rarely successful. Still, under the proper circumstances, it can be a powerful and effective equitable device for litigants before and after judgment.

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2 “The doctrine of piercing the corporate veil...is the rare exception, applied in the case of fraud or certain other exceptional circumstances.” Katzir’s Floor & Home Design, Inc. v. M-MLS.Com, 394 F. 3d 1143, 1149 (9th Cir. 2004) (quoting Dole).
8 See, e.g., Sonora Diamond, 83 Cal. App. 4th at 537-40 (motion to dismiss); American Tel. & Tel. Co. v. Compagnie Bruxellis Lambert, 94 F. 3d 586, 591 (9th Cir. 1996) (motion to dismiss). In addition, while the issue may be raised by demurrer in state court, reported appellate decisions are scarce because unsuccessful litigants rarely appeal such preliminary procedural decisions.
11 Shanghai Automation, 194 F. Supp. 2d at 1001-03.
13 NEC Elecs., 208 Cal. App. 3d at 778 (citations omitted).
14 In re Lavender, 180 F. 3d at 1121 (citation and internal punctuation omitted).
16 Bowoto, 312 F. Supp. 2d at 1238.
18 CORP. CODE §17101(b).
The Enforcement of Implied Contracts after Grosso v. Miramax

IN THE ENTERTAINMENT INDUSTRY, which depends upon a constant supply of fresh ideas, pitch meetings play an important role. When these meetings are successful, they bring financial benefits to the idea discloser who is paid for the use of a concept, treatment, or script and to the pitch recipient who helps turn the material that was pitched into a movie, television show, or other creative product. However, the reality is that most of these meetings end with the pitch recipient taking a pass and the next great idea never seeing the light of day.

Between a pass and a green light lies an area that has kept many entertainment lawyers busy over the years. Disputes arising out of creative submissions tend to follow a similar pattern: A writer pitches a treatment to a producer. No agreement is reached, and the writer and producer go their separate ways, but the producer later makes a movie that the writer believes is derived from the treatment. The writer sues, claiming the circumstances in which he pitched the treatment created an implied understanding that if his ideas were used, the writer would receive credit and compensation. The producer denies that there is a contract, denies using the writer’s ideas, and denies that his movie bears any meaningful resemblance to the ideas pitched.

The law surrounding these “theft of idea” claims has swung like a pendulum, first favoring idea disclosers, then swinging in favor of recipients, and, recently, with the Ninth Circuit’s decision in Grosso v. Miramax Film Corporation,1 swinging back in favor of disclosers. This movement has resulted in large part from evolving judicial attitudes concerning the interplay between state law idea claims and federal copyright law. It is a longstanding principle of intellectual property law that ideas are generally “free as the air,” lacking any concrete property rights.2 Reflecting this fundamental maxim, copyright protection does not extend to an idea but only to the particular expression of an idea. For example, the concept of good against evil is an unprotected idea, free for all to use. A more fleshed-out version of this concept might contain the following plot points: The forces of evil have tightened their grip on a particular region, and a small, outnumbered group of freedom fighters band together to fight the tyrannical forces, and after numerous struggles it appears that evil will prevail, until an unlikely hero arises to lead the freedom fighters to victory in a climactic final battle. While this is certainly a more detailed conception of good against evil, it is still an idea, capable of being expressed in different ways. Two classic expressions of the idea can be seen in the Lord of the Rings trilogy and the Star Wars saga.

Because ideas can be expressed in numerous different ways and with varying degrees of abstraction, a grant of protection for an idea would bring the development of new creative expression to a halt. At the same time, ideas do have a recognized value in the entertainment industry. Producers or development executives will often be willing to pay for a good idea that can be developed into copyrightable expression.

Thus, while ideas are not protected by copyright law, the disclosure of ideas may, under appropriate circumstances, be protected by contract. The major legal opinion recognizing this principle in California is Desny v. Wilder,3 a case decided by the California Supreme Court 50 years ago. Desny was a writer who claimed that Billy Wilder and Paramount Studios misappropriated his idea for a movie about the life story of Floyd Collins, a boy who made national headlines in the 1920s after falling into a cave. Desny alleged that he submitted his idea during telephone conversations with Wilder’s secretary and argued that the parties had a mutual understanding that if his ideas were used, he would be paid reasonable compensation. After Wilder and Paramount produced a movie using the Collins story without paying Desny, he filed a lawsuit.

Desny could not bring a cause of action for copyright infringement because his ideas were too abstract, and Collins’s story was readily available in the public domain. However, the California Supreme Court held that “the policy that precludes protection of an abstract idea by copyright does not prevent its protection by contract.”4 The court reasoned that the parties to a contract such as what arose in the case are not bargaining for the idea itself, which is not protectable, but instead are bargaining for the writer’s services in disclosing the idea.5

Implied Contract
Desny recognizes that there are two ways that a contract may arise during an idea submission. First, either before or after disclosure, the writer may obtain an express promise from the recipient, written or oral, that he will be paid if his ideas are used. Second, in the absence of an express contract, an implied contract may arise when the conduct of the parties and the circumstances surrounding the pitch or submission create an implication that if the recipient uses the discloser’s ideas, the discloser will be paid.6 For example, if a development executive invites a writer to come to his offices to give a pitch, and says that he hopes the parties can do business together, these circumstances indicate that the parties likely understand that the writer expects to be paid if his ideas are used. On the other hand, if a writer blurts out an idea on a crowded bus, he does not have an implied...

At least in the Ninth Circuit, implied contract claims will no longer be subject to copyright preemption challenges.

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contract with anyone, because the circumstances do not indicate that anyone understood that there were any conditions to that disclosure. As the California Supreme Court noted in Desny, “[t]he idea man who blurs out his idea without having first made his bargain has no one but himself to blame for the loss of his bargaining power.”

In Faris v. Enberg, the California Court of Appeal underscored the requirement that there be a mutual understanding of an expectation of payment in order for an implied contract to be formed. The plaintiff developed an idea for a sports quiz show and revealed it to Enberg in the hope that he would be interested in being an emcee or participating in production of the show. Shortly after the meeting, the plaintiff saw Enberg participating in a show that was similar in format to the plaintiff’s idea. Under these circumstances the court held that no implied contract could have arisen because “it would be entirely inconsistent with Desny to hold that an implied-in-fact contract could be created because a telephone call was returned or because a request was made for an opportunity to read the work that was unconditionally submitted.” In the court’s opinion, the plaintiff never conveyed to Enberg that he expected to be compensated for revealing his idea. Under these circumstances the court held that no implied contract could have arisen because “it would be entirely inconsistent with Desny to hold that an implied-in-fact contract could be created because a telephone call was returned or because a request was made for an opportunity to read the work that was unconditionally submitted.”

Federal Preemption

The continuing viability of implied contract claims under Desny was called into question in the years after Congress passed the 1976 Copyright Act, which made copyright the exclusive province of federal law. The 1976 act preempts state laws concerning actions that seek to protect rights equivalent to those protected by copyright. Section 301 of the Copyright Act sets forth two requirements that, if satisfied, will result in the preemption of a state law claim. First, the state law right must involve “works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright.” Section 102 of the act sets forth the various categories of works of authorship, such as literary and musical works, that fall within the subject matter of copyright. This provision also exempts from copyright protection certain fundamental concepts that may be embodied in a work of authorship, such as ideas, procedures, processes, and systems.

The second preemption requirement is that the state law must create “legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106.” which lists exclusive rights held by copyright owners, including the right to reproduce, adapt, distribute, perform, and display a copyrighted work. This requirement has been sometimes referred to as the “extra element” prong, because courts have held that a state law right is qualitatively different than a right protected by the Copyright Act if the state law requires proof of an additional element that is not required when protecting the federal right.

In applying the preemption requirement imposed by the 1976 act, courts in the Central District of California dramatically scaled back the ability of writers to assert breach of implied contract claims arising from the submission of their ideas. While plaintiffs would sometimes bring these claims in state court, defendants would often remove them to federal court, arguing that they could only be presented as federal copyright claims. Many of these cases were then dismissed on preemption grounds.

With regard to the first preemption requirement, these courts held that ideas embodied within a tangible medium of expression come within the subject matter of copyright, even though ideas are not themselves protected by copyright. For example, in Selby v. New Line Cinema Corporation, the court noted that while an item listed in Section 102(b)—such as an idea, procedure, or process—is outside the scope of copyright protection, it is nevertheless within the subject matter of copyright as set forth in Section 102(a). This is because “the shadow actually cast by the Act’s preemption is notably broader than the wing of its protection.” Under this line of reasoning, as long as underlying ideas are written, the “subject matter” prong of the preemption test will always be satisfied. Therefore, idea disclosers must rely on the second requirement of the preemption test in order to avoid having their breach of implied contract claims preempted.

In applying the second preemption requirement to implied-in-fact contract claims, Central District courts purported to apply a “fact-specific” approach to determine whether the contract claim was qualitatively different from a copyright infringement claim. In applying this test, the courts stated that they would not rely on a simple laundry list of the alleged elements of the state law claim at issue. Instead, they would look into the actual allegations underlying the claims in order to determine whether the gravamen of the state law claim was the same as the rights protected under the Copyright Act. In the Central District, several courts held that the implicit promise to pay inherent in an implied contract did not prohibit any conduct beyond that already prohibited by the Copyright Act. As the court noted in Selby, these types of claims fell “squarely into the category of contract claims that allege no additional rights other than promising not to benefit from the [plaintiff’s] work.”

In the courts that found implied contract claims preempted, a plaintiff’s only remedy was a claim for copyright infringement. However, if the allegedly infringing work only used ideas similar to those contained in the pitched work, as opposed to the substantially similar expression needed to prevail on a copyright claim, writers who claimed that their ideas were used without compensation would be left without a remedy.

Until late 2004, the Ninth Circuit had not decided whether implied contract claims are preempted. In Grosso, the court determined that such claims are not preempted, holding that a writer who submitted a screenplay to a studio could sue the studio for making a movie containing similar ideas, even if the movie was not similar enough to the screenplay to support a copyright infringement claim.

The Grosso Decision

According to the plaintiff Grosso, he developed a script about the high stakes world of Texas hold ‘em poker titled The Shell Game. After completing his script, Grosso sent it, unsolicited, to a development company, Gotham Entertainment Group. Grosso alleged that Gotham made it clear that it accepted unsolicited material. Gotham’s principal shareholder was a former Miramax executive who had a “first look” deal with Miramax. The two companies were located in the same building, and at least 20 different projects passed from Gotham to Miramax around the same time that Grosso submitted The Shell Game. While Grosso never submitted the script directly to Miramax, he contended that Miramax had the opportunity to view The Shell Game as a result of its relationship with Gotham.

In 1998, Miramax released Rounders, which Grosso contended was developed directly from, and based upon his screenplay for The Shell Game. Grosso filed a lawsuit in state court against Miramax and the writers and producers of Rounders. He alleged that when he submitted his script, the parties had the expectation and understanding that he would receive compensation if the defendants used the script or any part of the script to make a movie.

Initially, the case followed the path of prior Central District implied-in-fact contract cases: The defendants removed the lawsuit to federal court, where the district court dismissed Grosso’s implied contract claim on the grounds that the claim contained no “extra element” that prevented it from being preempted by the Copyright Act. Grosso then
amended his complaint to assert claims for copyright infringement. But these claims were later dismissed on summary judgment after the district court found that Grosso could not prove that Rounders was “substantially similar” to The Shell Game. While both works were set in the world of high-stakes poker, this was merely an idea, and that idea was expressed differently in the two works.

On appeal, the Ninth Circuit upheld the Central District court’s summary judgment ruling, agreeing that Grosso could not maintain a claim for copyright infringement. While The Shell Game and Rounders both featured poker settings, the court found that the plots, themes, settings, and characters in Rounders and The Shell Game were all different, and the only similarity in dialogue came from the use of poker jargon and street slang, which was not protectable.

However, the Ninth Circuit overruled the lower court’s decision that the Copyright Act preempted Grosso’s breach of implied contract claim. The court held that if parties have an implied agreement to pay for the use of an idea, even if the idea was contained in a copyrighted work, this “transforms the action from one arising under the ambit of the federal statute to one sounding in contract.”

The court therefore concluded that Miramax’s alleged implied promise constituted an extra element under the second prong of the preemption test.

Practitioners hoping for an extended discussion of preemption and the prior Central District opinions on the subject were disappointed by the Ninth Circuit’s Grosso opinion. The decision is exceedingly brief and makes no mention of the trend of lower federal courts to preclude idea theft lawsuits that involve ideas fixed in writing. However, Grosso’s brevity is a sign of its clarity: Under the Ninth Circuit’s reasoning, idea claims will presumably never be preempted so long as the plaintiff alleges an actual agreement with the defendant—even if the agreement is merely implied from conduct.

Now, after the Grosso decision, a plaintiff may take “two bites at the apple” when portions of a pitched script are used without compensation. The plaintiff may assert a copyright infringement claim based upon substantial similarity of expression and an implied contract claim based upon the use of the underlying ideas contained in the written script.

Implications of Grosso

An interesting question raised by Grosso is whether it comports with business reality to allow plaintiffs who have pitched full-fledged written scripts to assert implied contract claims for the use of ideas embodied in those scripts. When a writer pitches a completed script to a producer, it is reasonable to assume that the parties have a mutual implied understanding that if the script is used, the writer will be compensated. However, do the parties really expect that they also have a contract for the use of any underlying ideas that have been expressed in the script? Is it reasonable to assume that Miramax could have truly understood that by accepting the script for The Shell Game, it was agreeing not to make any other poker movie without compensating Grosso? Of course, it is difficult to know exactly what the parties agreed to, because by definition the terms of an implied-in-fact contract are not expressed.

It is common for a plaintiff asserting a breach of implied contract claim to allege a mutual understanding that he or she would be paid if all or part of the script were used. However, any given movie script will contain hundreds of distinct ideas, depending upon how generally or specifically they are described. If producers truly understood that by accepting a pitch, they would be deemed to have agreed to pay for the use of even the most general ideas found there, it is questionable whether producers would ever be willing to hear pitches.

Suppose a writer pitches a script to a producer about a little league baseball team full of misfits, coached by an alcoholic, irascible manager. The team starts out losing and at the bottom of the league, but miraculously turns the season around, winding up in the climactic championship game in the final scenes. Depending upon the circumstances surrounding the pitch, there may be an implied contract that if the producer uses the script to make a movie about a little league baseball team full of misfits, coached by an alcoholic, irascible manager, that the writer will receive credit and compensation. But what if the producer instead makes a movie about professional women’s baseball team during World War II, coached by an alcoholic, irascible manager, that starts out losing but eventually finds itself in the championship game? Did the parties agree that if the producer used the underlying elements contained in the script, the writer would be paid? If so, how far does this extend? If the producer made another movie about little league baseball, completely unrelated to the pitched script, would compensation be owing? What about a movie about baseball in general?

By holding that a plaintiff can sue for breach of implied contract when the plaintiff’s “ideas” are concretely embodied in a copyrighted screenplay that is not substantially similar to the defendant’s movie, the Grosso court has greatly expanded protection for writers and others in the business of disclosing ideas, while greatly increasing the recipient’s risk in accepting these ideas.

Even if pitch recipients can ultimately
demonstrate that they never would have agreed to compensate the discloser for a movie about poker or baseball, Grosso ensures that a breach of implied contract claim making these allegations can no longer be dealt with via a demurrer or motion to dismiss. Furthermore, these types of cases may not be amenable to resolution on summary judgment because they will ultimately turn upon the factual circumstances surrounding the pitch meeting. While it is uncertain whether juries will be receptive to these types of claims, defendants may be reluctant to find out. The Grosso decision may force defendants to settle claims in order to avoid the costs of an extended lawsuit and an uncertain verdict.

While Grosso clearly gives more bargaining power to plaintiffs in implied contract cases, the decision may, ironically, end up hurting more writers than it helps. In light of the court’s ruling, recipients of intellectual property will likely become even more selective about those writers from whom they accept pitches or submissions. Many studios and development companies already require that writers submitting materials sign written "submission releases" acknowledging that the recipient may have acquired material with similar ideas from other sources, and that it has no obligation to the writer if it uses such material. In light of Grosso, idea recipients may insist that more idea disclosers sign these agreements before they agree to accept a pitch. The agreements are also likely to become more onerous, going so far as to require disclosers to waive their right to bring breach of implied contract claims in exchange for the recipient’s agreement to hear the pitch. Even companies that currently do not require submission releases as a condition to hearing a pitch may be forced to reevaluate their policies in light of the outcome of post-Grosso lawsuits.

Recipients will also likely limit the pitches they hear to those made by individuals who have established reputations or are represented by established agents. Good representation breeds greater credibility and can act as a filter because idea recipients may be less worried that a writer represented by a good agency will bring a frivolous lawsuit. Pitch recipients may also be less inclined to ask for a waiver from established talent. Conversely, most development and production companies will end the practice of accepting unsolicited pitch materials. While receiving unsolicited material may not constitute the appropriate circumstances necessary to establish the existence of an implied-in-fact contract, most idea recipients will likely not want to spend the money on litigation necessary to establish this fact.

It has been over a year since the Grosso
decision was published, but it may still be too early to tell what its ultimate effect on the industry will be. The Supreme Court denied Miramax’s petition for certiorari in October 2005, so it is clear that, at least in the Ninth Circuit, implied contract claims will no longer be subject to copyright preemption challenges. What is less clear is whether lower courts will attempt to dispose of these cases in other ways, such as by granting summary judgment. At the time of this writing, no published decisions have cited Grossio.

Grosso may be viewed as a logical response to a void that existed as a result of earlier case law—an effort to swing the pendulum back toward writers who, by virtue of lower federal district opinions, were often left without a remedy when their ideas were used without compensation. An unintended effect of the decision may be to hurt writers who lack clout and contacts by denying them access to the pitch meetings that are so important to their industry.

1 Grosso v. Miramax Film Corp., 383 F. 3d 965 (9th Cir. 2004).
3 Desny, 46 Cal. 2d 715.
4 Id. at 733-34, 741-42.
5 Id. at 737-38; See also Donahue, 245 Cal. App. 2d at 609.
6 Desny, 46 Cal. 2d at 738.
7 Id. at 739.
9 Id. at 319.
10 Id. at 318.
12 Id.
15 Id.
17 See Valente-Kritzer Video v. Pinckney, 881 F. 2d 772, 776 (9th Cir. 1989) (A fraud cause of action founded on an allegation that the defendant “misrepresented its intent to perform [a] contract” was “qualitatively different” from a copyright claim because of the additional element of misrepresentation.).
22 Selby, 96 F. Supp. 2d 1053.
23 Id. at 1058.
24 Id. (quoting United States ex rel. Berge v. Board of Trs. of Univ. of Ala., 104 F. 3d 1453 (4th Cir. 1997)).
25 Idema, 162 F. Supp. at 1190.
26 Id.; see also Diels, 916 F. Supp., 991-92 (C.D. Cal. 1996); Selby, 96 F. Supp. 2d at 1061; Entous, 151 F. Supp. 2d at 1160.
28 Selby, 96 F. Supp. 2d at 1062.
29 Grosso v. Miramax Film Corp., 383 F. 3d 965 (9th Cir. 2004).
30 Appellant’s Brief, at 5, Grosso v. Miramax Film Corp., No. 01-57255 (9th Cir. Sept. 3, 2002).
31 Id. at 11.
32 Id. at 5.
35 Id. at 21.
36 Grosso, 383 F. 3d 965, 968 (9th Cir. 2004).
37 Id.
38 Id.
39 Id.
40 Id.
The California Supreme Court has left the door open to the enforcement of contractual waivers of jury trials and class action arbitrations.

California courts have long struggled with the inherent tension between a general policy favoring freedom of contract and a desire to scrutinize the contractual choices individual parties make. Enforcing contracts as written promotes, in the aggregate, certainty and predictability in the marketplace, which economic theory predicts will lead to lower prices and greater choices for consumers. Doing so, however, may lead to seemingly unfair outcomes for consumers in individual cases. Courts of this state have shown a special concern for the plight of the individual party, especially in those cases in which there is an appearance of bargaining inequity. As a result, whether out of concern for individuals or distrust of market-directed outcomes, California courts have a tradition of striking down contract terms believed to be unconscionable or otherwise violative of public policy.

The latest incarnation of this (perhaps ultimately unresolvable) debate between paternalism and freedom of contract has arisen in the context of private agreements for dispute resolution, specifically the enforceability of jury trial waivers and class action waivers. The California Supreme Court recently held that both these contractual provisions may be contrary to California public policy under certain circumstances, although in each case the court left the door open for enforcing such waivers. The court’s doctrine thus reflects a strong paternalistic leaning, but one that is nonetheless coupled with uneasiness about reducing contractual freedoms.

**Predispute Jury Trial Waivers**

The California Supreme Court’s recent ruling in *Grafton Partners L.P. v. Superior Court*1 significantly changed the legal landscape regarding the enforcement of predispute jury trial waivers, which appear as standard terms in most contracts, and which would not have been expected.
to become the center of a firestorm. A predispute jury trial waiver is included in a contract or other agreement before the parties have any knowledge of the existence of a dispute among them. The clause provides that if there ever is a dispute, the parties agree not to demand a jury trial. Many business clients favor these clauses to avoid the increased costs, delays, and awards that are, rightly or wrongly, perceived to accompany jury decisions.

In Grafton, the court categorically held that a jury trial waived contained in a commercial agreement would not be enforced, disapproving of the court of appeal’s decision in Trizec Properties, Inc. v. Superior Court. The Trizec court had held that an “unambiguous” jury trial waiver is “neither illegal nor contrary to public policy,” recognizing that “in many commercial transactions advance assurance that any disputes that may arise will be subject to expeditious resolution in a court trial would best serve the needs of the contracting parties as well that of our overburdened judicial system.”

The Grafton court’s ruling occurred in the context of an accounting firm’s retainer agreement with an investment company—two sophisticated business entities. The court reasoned that a contractual waiver of jury trial violated the right under the California Constitution to a jury trial in civil cases, because no statute expressly authorized predispute jury waivers. This is because the jury trial right is “fundamental” and “too sacred in its character to be frittered away.” The court in Grafton held that Code of Civil Procedure Section 631, which expressly authorizes waiver of a jury trial during a pending action, did not implicitly allow contracts whereby each party agrees to waive a jury trial if litigation later is filed.

Although the court stated that its hands were tied by the absence of statutory authorization for a predispute jury trial waiver, the court also suggested strongly that contracting parties, no matter how sophisticated, cannot understand the potential implications of a jury trial waiver until after litigation has been filed, because only litigation will “sufficiently focus the attention of the litigants to produce a considered decision whether to demand—and pay for—a jury trial based on an informed understanding of the stakes involved.”

Moreover, the court expressed skepticism for those who would “uncritically endorse unregulated freedom of contract.”

In a concurring opinion, Justice Chin urged the state legislature to consider whether a prohibition of predispute jury trial waivers truly serves the public good, or whether the California high court has now impaired commercial dealings through excessive regulation of what private parties may choose to negotiate. Justice Chin stated that the court’s doctrine “adheres to a strict parsing of Code of Civil Procedure section 631” and urge[d] the Legislature to enact legislation expressly authorizing predispute jury waivers.” Justice Chin continued that the court “should join other jurisdictions in recognizing that ‘there is no abstract public policy against contractual waivers of the right to civil jury trial.”

In addition, Justice Chin cautioned that the majority’s decision would prohibit a “knowing and voluntary waiver if parties filed their action in state court” even though a federal court nevertheless might allow such a waiver as a “practical matter.” The majority echoed these views, expressing that contractual jury trial waivers may be upheld someday if the legislature enacts appropriate statutory safeguards, “which may determine which limitations best serve both private and public interests, keeping in mind the potentially divergent concerns of business entities negotiating commercial contracts, on the one hand, and consumers presented with form contracts, on the other.”

It remains to be seen whether the legislature will take action in response to this ruling, and whether the federal courts will view the question of the enforceability of a predispute waiver as a substantive or procedural matter for Erie purposes. Although no Grafton-related bills had been introduced in the legislature as of mid-January 2006, industry groups may seek to have such legislation introduced in the near term.

Class Action Waivers

Agreements that require consumers to arbitrate their claims on an individual basis and forbid participation in class action or private attorney general litigation have been hotly litigated nationwide and present fertile ground for the free market/individual protection debate. Most jurisdictions that have ruled on the issue enforce class action waivers. In contrast, recent decisions in California reflect greater skepticism toward these provisions. Nevertheless, under appropriate circumstances, courts in California may enforce class action waivers if the contract otherwise validly selects the law of a state that allows them.

In Discover Bank v. Superior Court (Boehr), the California Supreme Court examined the validity of a class action waiver contained in an arbitration provision set forth in a consumer credit card agreement. In Boehr, a California credit card holder, purportedly on behalf of a nationwide class, alleged that Discover Bank had a practice of posting certain credit card payments late. Although the case was filed in California, the plaintiff pleaded all his claims under Delaware law because the agreement governing the card contained a choice-of-law clause providing for application of Delaware and federal law.

In 1999, years before the suit was filed, Discover Bank had added an arbitration provision with a class action waiver to its customers’ card agreements. This was accomplished via a change-in-terms notice, included as an insert with customers’ monthly billing statements, which allowed the cardholder to reject the amendment, cease using the account, and pay off any existing balance under the prior terms. The arbitration provision expressly stated that the Federal Arbitration Act (FAA) would govern. The plaintiff did not notify Discover Bank of any objection to the arbitration provision or cease using his account before the deadline provided for in the change-in-terms notice. As a result, Discover Bank moved to compel arbitration of the plaintiff’s claims.

Initially, the trial court upheld the class action waiver and ordered the plaintiff to arbitrate on an individual basis. The plaintiff moved for reconsideration after the Fourth District Court of Appeal’s decision in Szetela v. Discover Bank, which held that a similar class action waiver provision was unconscionable under California law. The trial court then reconsidered its original ruling and denied the motion to compel arbitration. Discover Bank sought writ relief from the Second District Court of Appeal, which issued a writ, finding that “the prejudice to Discover Bank that would be caused by altering the parties’ agreement is clear.” The appellate court rejected the Szetela ruling, holding that the parties’ contractual choice should be respected and that the FAA mandated enforcement of the arbitration provision as written, including the class action waiver.

The California Supreme Court granted review to resolve the apparent split between the appellate districts in Boehr and Szetela.

In its opinion in the Boehr case, a 4-3 majority of the California high court stated that “at least under some circumstances” class action waivers would not be enforceable under California law. In particular, the court said that a waiver may be exculpatory and unconscionable when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money. The court also noted that when “a consumer is given an amendment to its cardholder agreement in the form of a ‘bill stuffer’ that he would
be deemed to accept if he did not close his account, an element of procedural unconscionability is present." Although, strictly speaking, the court’s statements concerning unconscionability were dicta (because they were unnecessary to the disposition of the appeal), these statements nevertheless are important because lower courts in California may apply similar reasoning.

The court also held that the FAA does not preempt an unconscionability defense to the enforcement of class action waivers under California state law. The court reasoned that the unconscionability doctrine in this context is not limited to arbitration agreements but applies to contracts generally. The court held that since whether a class action waiver is lawful does not depend on whether it is part of an arbitration clause, the arbitration clause did not immunize the class action waiver from review pursuant to ordinary unconscionability analysis. The California Supreme Court did not, however, hold Discover Bank’s arbitration provision to be unconscionable.

The court’s decision, and its underlying reasoning, reflects California’s traditional protection of consumer interests. In particular, the Boehr court focused on the availability of a remedy for consumers’ small-dollar claims, recognizing that the class action device may serve an important public purpose. The court also expressed doubt that individual small claims court litigation, administrative proceedings, or informal resolution could serve as “adequate substitutes” for class action proceedings seeking to redress claims of intentional wrongdoing to large numbers of people, causing predictably small amounts of damage. For similar reasons, a limited number of other states have also found class action waivers unenforceable.

However, the Boehr decision is at odds with the general trend nationwide. The majority of jurisdictions that have ruled on this issue allow enforcement of class action waiver provisions pursuant to ordinary freedom-of-contract principles. These courts generally hold that class actions merely constitute a procedural device and that it is not unconscionable for contracting parties to determine how disputes between them may be resolved.

For example, in Strand v. U.S. Bank National Association ND, the court held that class action waiver provisions are enforceable under North Dakota law. The Strand court reasoned, “Merely restricting the availability of a class action is not, by itself, a restriction on substantive remedies. The right to bring an action as a class action is purely a procedural right. A class action is not a substantive remedy.” In Hutcherson v. Sears Roebuck & Company, an Illinois court held that the class action waiver provision was not “so one-sided or oppressive as to render the agreement unconscionable” since the arbitration provision provided “financial protections to card holders with the burden of [arbitration] costs falling primarily on [the card issuer].” Other courts have found sufficient grounds to uphold a class action waiver as enforceable when the waiver is clearly set forth in the arbitration agreement.

Choice-of-Law and Forum Selection

The California Supreme Court’s rulings in Boehr on the potential unconscionability of class action waivers and FAA preemption did not settle the issue of whether parties’ agreement to waive class actions can be enforceable, even when small-dollar consumer claims are at issue. Indeed, it did not even settle the question of whether Discover Bank’s class action waiver could be enforced. In that case, the parties had agreed to apply the law of Delaware, which enforces class action waivers. The California Supreme Court thus declined to rule on the critical issue of whether the Delaware choice-of-law provision is enforceable to the extent that it would lead to the enforcement of class action waivers. Instead, it remanded the case and gave the lower court a road map to guide its ruling on this issue.

Under California law, a court must evaluate the enforceability of a choice-of-law provision using the test set forth in Section 187(2) of the Restatement (Second) of Conflict of Laws. First, the court should determine whether the chosen state has a substantial relationship to the parties or their transaction or whether any other reasonable basis for the parties’ choice of law exists. If not, the analysis ends, and the choice-of-law provision is unenforceable. Second, the court must determine whether the chosen state’s law is contrary to a fundamental public policy of California. In the absence of such conflict, the analysis ends, and the choice-of-law provision must be enforced. Third, even if the chosen state’s law is contrary to California fundamental public policy, the court still must determine whether California has a “materially greater interest than the chosen state in the determination of the particular issue.” If so, the parties’ choice of law will not be enforced; if not, the choice-of-law clause will be upheld.

On remand, the Second District Court of Appeal applied the test set forth by the California Supreme Court and concluded that Delaware law controlled, mandating enforcement of Discover Bank’s arbitration agreement as written, including the class action waiver. First, the court found that there was a substantial relationship between the parties and Delaware and a reasonable basis for the con-
tractual choice of Delaware law.\textsuperscript{39} This conclusion was based upon Discover Bank’s Delaware domicile and the Delaware statute\textsuperscript{40} requiring application of Delaware law.\textsuperscript{41} Second, the court concluded that “California does not have a materially greater interest in determination of the issue than Delaware,” noting that the plaintiff was only asserting claims “under Delaware law and none under California law, on behalf of a putative nationwide class, and against a bank that is domiciled in Delaware.” The court recognized that “California does have a strong interest in protecting its consumers” but that “California has no greater interest in protecting other states’ consumers than other states have in protecting California’s.”\textsuperscript{42}

In rendering its decision, the court of appeal in Boehr left unresolved the question of whether California has a fundamental public policy against class action waivers, finding this issue “unnecessary” to its analysis. The court also stated that the issue is “difficult to resolve” because the California Supreme Court “declined to decide the issue” and there are no “bright-line rules for determining what is and what is not contrary to a fundamental public policy of California.”\textsuperscript{43} The Boehr plaintiff has filed another petition for review with the California Supreme Court.\textsuperscript{44}

Proponents of class action waivers may argue that no fundamental public policy against class action waivers exists, since the California Supreme Court only held that class action waivers are unconscionable “under some circumstances.” In his concurring and dissenting opinion in Boehr, Justice Baxter supported this conclusion, distinguishing unconscionability as “simply a matter of contract law” and expressing that a difference in unconscionability law does not rise to the level of a fundamental public policy against class action waivers that may bar enforcement of a choice-of-law provision.\textsuperscript{45} Proponents may also argue that the lack of a pronouncement by the California Legislature of a general policy prohibiting enforcement of class action waivers demonstrates a lack of fundamental public policy. In addition, the waiver of class action rights arguably does not implicate fundamental public policy, because the modern class action is a device of recent vintage, gaining broad judicial acceptance only after adoption in 1966 of significant changes to Rule 23 of the Federal Rules of Civil Procedure.\textsuperscript{46}

On the other hand, the California Supreme Court majority in Boehr suggested in dictum that class action waivers in standard consumer contracts may violate California’s statutory policy against exculpatory clauses under Civil Code Section 1668.\textsuperscript{47} Civil Code Section 1668 provides that “contracts which have for their object, directly or indirectly, to exempt anyone from responsibility from his own fraud, or willful injury to the person or property of another, or violation of law” are against California public policy. Accordingly, opponents of class action waivers may argue that a class action waiver is a statutory violation under Section 1668 and therefore contrary to California fundamental public policy.

Although the Boehr ruling on the choice-of-law issue is a victory for those seeking to enforce class action waivers, particularly when the defendant is not domiciled in California and the claims are alleged on behalf of a putative nationwide class (or a class otherwise consisting of non-California residents), the decision did little to resolve the issue in California, as four more recent appellate court decisions illustrate.

In Aral v. Earthlink, Inc.,\textsuperscript{48} the Second District Court of Appeal refused to enforce an arbitration agreement containing a class action waiver and a clause requiring that arbitration hearings occur in Georgia in spite of a choice-of-law provision selecting the laws of Georgia to govern the agreement. (This was the same district, but a different division, that decided Boehr.) Under the facts of the case, the plaintiff, a California resident, ordered DSL Internet service from Earthlink but allegedly did not receive the kit containing the equipment needed to operate the service for approximately five weeks. Earthlink is a Delaware corporation with its principal place of business in Georgia. The plaintiff alleged that he was overcharged since he was billed from the date he ordered service. Significantly, the plaintiff filed a complaint alleging only a California claim under the Unfair Competition Law (UCL),\textsuperscript{49} and proposing a class definition limited to California residents.

Following the test set forth by the California Supreme Court in Boehr, the Aral court found the class action waiver was substantively and procedurally unconscionable under California law and that there was no FAA preemption.\textsuperscript{50} Unlike the ruling on remand in Boehr, however, the Aral court, focusing on the combination of the forum-selection clause and the class action waiver as well as on the primacy of California’s interest, ultimately held that the claims were not subject to arbitration despite the parties’ express agreement. The court explained:

The fundamental policy at issue is not simply the right to pursue a class action remedy, but the right of California to ensure that its citizens have a viable forum in which to recover minor amounts of money allegedly obtained in violation of the UCL. Forcing consumers to travel to a far location and depriving them of any hope of class litigation would pose an insurmountable barrier to recovery of small sums unjustly obtained, and undermine the protections of the UCL. There is no doubt that California has a “materially greater interest than [Georgia] in the determination of [this] particular issue...”\textsuperscript{51} The Aral court saw no conflict with Boehr, stating, “there is a significant distinction between the present case and the situation in Discover Bank.”\textsuperscript{52}

The First District Court of Appeal also struck down an arbitration clause in Klussman v. Cross Country Bank,\textsuperscript{53} finding the Delaware choice-of-law provision contained in defendant Cross Country Bank’s cardholder agreement unenforceable to the extent that it barred classwide relief. Although the arbitration clause at issue did not contain an express class action waiver, it designated the National Arbitration Forum (NAF) as the arbitral forum, and the relevant NAF rules prohibited classwide arbitration unless all parties consented. Significantly, albeit on the unique facts in that case, the Klussman court ruled on the fundamental public policy issue left unsettled by the Boehr remand decision. The court found “no doubt” that “Delaware’s approval of class action waivers, especially in the context of a ‘take it or leave it’ arbitration clause, is contrary to fundamental public policy in California.”\textsuperscript{54} The Klussman court reasoned: [Boehr] establishes the fundamental nature of California’s concern with protecting consumers from unscrupulous practices, particularly when only small individual amounts are at issue. Several public policy interests of California are at stake, including the statutory policies against exculpatory waivers, prohibiting enforcement of unconscionable contract provisions and against waivers of laws established for a public purpose.\textsuperscript{55} The Klussman court concluded that the “right to seek classwide redress is more than a mere procedural device in California.”\textsuperscript{56}

Consistent with Aral, Klussman found California’s interest in the issue to be “materially greater” than Delaware’s since the plaintiffs sought to represent a class “composed solely of California residents with California statutory claims,” and “California has a number of significant contacts with the subject matter of this action.” The Klussman court noted that “California’s interest becomes even more intense” when the agreement “impose[s] hidden waivers without actual notice or a realistic opportunity to reject the waiver.”\textsuperscript{57}

Two other recent, published cases, Gentry v. Superior Court\textsuperscript{58} and Jones v. Citigroup, Inc.,\textsuperscript{59} upheld class action waivers, in spite of the public policy concerns raised in Boehr, based on findings that the plaintiff had a meaningful opportunity to reject the waiver but neglected to do so. In Gentry, the class action waiver was included in an
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employment agreement that employees received when first hired. They were informed that unless they opted out of arbitration within 30 days, they would be required to arbitrate all employment-related claims on an individual basis and would forego the ability to participate in class action litigation. Seven years later, the plaintiff filed a putative class action lawsuit based on alleged violations of overtime laws. The superior court compelled arbitration and enforced the class action waiver, and the court of appeal denied writ relief. In a published decision, the court focused principally on the fact that acceptance of the class action waiver was not a condition of the plaintiff’s employment and gave the plaintiff an opportunity to opt out.

Jones involved an arbitration provision that was made part of a credit card agreement by inclusion of a change-in-terms notice in the consumer’s billing statement. The notice stated, however, that the consumer would be allowed 26 days to decide whether she would agree to the new provision and its class action waiver. If the consumer had notified the card issuer before the deadline and ceased using the card for new transactions, she would have been allowed to pay off her existing card balance under the agreement’s original terms. However, the customer did not do so. She continued to use the card and even applied for a new card with the same issuer. The superior court denied the card issuer’s motion to compel arbitration, but on appeal a split panel of the court of appeal reversed. The Jones court found that, because the consumer made no effort to object contemporaneously to the introduction of the new term, the element of procedural unconscionability had not been satisfied.

Significantly, both Gentry and Jones were decided under California law. Together they stand for the proposition that even if a class action waiver is deemed to have elements of substantive unconscionability, it will be enforced if the plaintiff fails to present sufficient evidence of procedural unconscionability.

Recent cases analyzing jury trial and class action waivers are exemplars of the historical debate over the role of contract, as opposed to the state’s determinations of what is best, in ordering human relations. This debate will no doubt continue in judicial and legislative forums. However, at least when the manner of private dispute resolution is at issue, the California courts seemingly lean heavily (if not overwhelmingly) on the side of state control, and in favor of traditional litigation.

To respond to these concerns, practitioners should consider carefully, when drafting agreements, how alternative dispute resolution provisions may interact with other con-
tract terms, such as forum-selection or choice-of-law provisions. If a group of terms, taken together, both lack substantial business justification and would severely impair consumers’ ability to obtain relief for major violations of their rights, the California courts can be expected to scrutinize those terms more carefully. If, by contrast, there are sound reasons for particular contract terms, the terms will be more likely to be upheld.

In Boehr, for example, a Delaware statute mandated that, for regulatory reasons, the contract be subject to Delaware law. In Aral, by contrast, the Georgia forum-selection clause was perceived to serve no business interest other than to make it more difficult for consumers to proceed in arbitration. It is also important for practitioners to be mindful of how contractual terms are disclosed, as the California courts consider this a factor as well. In Klussman, for example, the consumer could not readily determine, simply by reading the disclosures received at the time of contracting, that class-wide arbitration was forbidden. As these various rulings show, different contracts and different claims may be analyzed differently as the law in this area continues to develop.

3 Id. at 1619.
4 “In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute.” Cal. Const. art. I, §16.
5 Grafton, 36 Cal. 4th at 956.
6 Id. at 961.
7 Id. at 964.
8 Id. at 966.
9 Id. at 968 (Chin, J., concurring) (citations omitted).
10 Id.
11 Id. at 966.
12 See Erie R.R. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938) (Federal courts are to apply federal law in procedural matters and state law in matters of substantive state law.).
15 Grafton did not address the question. The Grafton court distinguished arbitration agreements from jury trial waivers since arbitration agreements are specifically authorized by statute, the California Arbitration Act. Code Civ. Proc. §§1280 et seq.
16 Boehr, 36 Cal. 4th at 152.
17 Specifically, the arbitration clause states: ARBITRATION OF DISPUTES. In the event of any past, present or future claim or dispute (whether based upon contract, tort, statute, common law or equity) between you and us arising from or relating to your Account, any prior account you have had with us, your application, the relationships which result from your Account or the enforceability or scope of this arbitration provision, of the Agreement or of any prior agreement, you or we may elect to resolve the claim or dispute by binding arbitration.
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It is a widely held myth that to protect privileged documents or communications from discovery, a lawyer must prepare a privilege log that lists the author, recipient, and the nature or title of each document for which a claim of privilege is made. Preparation of a document-by-document log can be very expensive. Further, a number of litigation protections are not aimed at communications but at analytical, investigatorial, and similar processes. These protections include the work product doctrine, the peer review immunity, and the deliberative process immunity. Providing the detailed information that typically appears in a standard privilege log often seriously invades the province of these protections.

A familiar circumstance giving rise to this problem occurs when one party serves a discovery request for all documents regarding an internal investigation—conducted by attorneys for a company in anticipation of litigation—into an alleged corporate fraud. These investigations frequently generate thousands of documents, including memos containing legal analyses, notes of witness interviews, and e-mail messages to persons involved in the investigation. A privilege log for such an investigation conceivably might consist of hundreds of pages. Moreover, the inclusion in the log of standard information concerning the author, recipient, subject matter, and date of requested, albeit privileged, information would provide a virtual road map of what the lawyers were thinking and doing during the investigation—the very processes that the work product doctrine is designed to shield.

Lawyer are commonly confronted with a discovery request that has the goal of forced production of a privilege log for the improper purposes of either getting a “peek in the window” at privileged or protected information or simply imposing costs on the responding party. These requests are made even though the demanding party has no real expectation that they will result in the production of any documents.

Fortunately for parties facing such requests, neither federal nor California law requires that a document-by-document privilege log be prepared in all cases. Indeed, the words “privilege log” do not appear in either the Federal Rules of Civil Procedure or the

by MICHAEL G. ROMEY and DAVID D. JOHNSON

LOGGING RIGHTS

A privilege log is a traditional—not a statutory—means of protecting documents from discovery.
FOR ATTORNEYS PRACTICING IN THE NINTH CIRCUIT

AND IN CALIFORNIA STATE COURTS, THERE IS CONSIDERABLE FLEXIBILITY IN THE FORM OF THE INFORMATION REQUIRED TO ESTABLISH PRIVILEGES OR PROTECTIONS.

suits to serve this purpose for claims of attorney-client privilege, because it provides the facts necessary for a court to determine that the document truly represents a communication between a lawyer and a client—namely, the identity and character of the communication and the names of the participants. However, for “process” protections rather than communications privileges, the facts in a privilege log disclose not only substantial protected material but also much information that is completely irrelevant to the applicability of these protections. For example, while a memorandum written by a lawyer or a hospital peer review committee member may have a date or recipient, the date of the memorandum and the existence of a recipient may not necessarily be relevant to a determination of the status of the memo as the work product of an attorney or the record of a hospital peer review committee.

Ninth Circuit Rulings

For attorneys practicing in the Ninth Circuit, recent cases have made it clear that there is considerable flexibility in the form of the information required to establish privileges or protections. The language of Rule 26(b)(5) of the Federal Rules of Civil Procedure is fairly broad. When information is withheld based on a claim of privilege or protection, Rule 26(b)(5) requires the party doing so to “make the claim expressly” and “describe the nature of the documents, communications, or things not disclosed in a manner, that without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.” The Advisory Committee Notes to the 1993 Amendment to Rule 26 explain that a document-by-document privilege log may not be required when the preparation of the log is prohibited by its cost or if the log itself would reveal privileged information:

In some when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories....In rare circumstances some of the pertinent information affecting applicability of the claim, such as the identity of the client, may itself be privileged; the rule provides that such information need not be disclosed.

Federal courts have applied Rule 26(b)(5) in a widely varied fashion, with some courts permitting blanket objections to discovery requests and other courts finding the presence of a waiver if a standard document-by-document privilege log is not served within 30 days pursuant to Rule 34 of the Federal Rules of Civil Procedure. Rule 34(b) requires a discovery request to “set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity.” In its May 2005 ruling in Burlington Northern & Santa Fe Railroad Company v. United States District Court, the Ninth Circuit held that “boilerplate objections or blanket refusals inserted into a response to a Rule 34 request for production of documents are insufficient to assert a privilege.” The court, however, did not designate one particular method that a party must use to establish the basis for its privilege claims:

A district court should make a case-by-case determination, taking into account the following factors: the degree to which the objection or assertion of privilege enables the litigant seeking discovery and the court to evaluate whether each of the withheld documents is privileged (where providing particulars typically contained in a means of sufficiently establishing the privilege, one of which is the privilege log approach). Significant alternatives to standard privilege logs that have been held acceptable by federal courts include declarations and “category privilege logs.”

State Court Authority

Attorneys practicing in California state courts also have authority for selecting among various approaches in establishing the bases for privileges or protections. The Civil Discovery Act is similar to Rule 26(b)(5) in that it requires a party responding to a demand for production of documents to do both of the following:

(1) Identify with particularity any document...falling within any category of item in the demand to which an objection is being made.

(2) Set forth clearly the extent of, and the specific ground for, the objection. If an objection is based on a claim of privilege, the particular privilege invoked shall be stated. If an objection is based on a claim that the information sought is protected work product..., that claim shall be expressly asserted.

In contrast to the federal rule, California courts have held that “blanket” objections made in a response to a discovery request are sufficient to preserve privileges or protections. Under California law, the failure to serve a privilege log does not act as a waiver of privileges or protections. Further, several recent state court cases have held that a privilege log is not specifically required by the Civil Discovery Act. In Hernandez v. Superior Court, the court of appeal noted that:

[T]he expression “privilege log,” does
1. The Ninth Circuit and California state courts have held that the proponent of a privilege bears the burden of proof to establish that the privilege applies.
   True. False.
2. Under the Federal Rules of Civil Procedure, to establish that a privilege applies, the proponent of a privilege must provide sufficient information to enable other parties to assess the applicability of the privilege.
   True. False.
3. In some cases, providing the information required in a standard privilege log for each document—such as the names of the authors and recipients or the date, title, or subject matter—can reveal privileged or protected information.
   True. False.
4. Under the Federal Rules of Civil Procedure, if information relevant to the establishment of a privilege is itself privileged, that information must be disclosed.
   True. False.
5. Federal courts in some circuits have held that a party waives privileges by failing to timely serve a privilege log.
   True. False.
6. In In re Grand Jury Investigation (United States v. The Corp.), a 1993 case, the Ninth Circuit held that in response to a request for production of documents, a party must produce a privilege log to preserve any privileges.
   True. False.
7. In its May 2005 ruling in Burlington Northern v. Santa Fe Railroad Company, the Ninth Circuit held that boilerplate objections included in a response to a discovery request are presumptively sufficient to preserve privileges.
   True. False.
8. The Ninth Circuit held in Burlington Northern that providing the particulars typically included in a privilege log is presumptively sufficient to preserve privileges.
   True. False.
9. In Burlington Northern, the Ninth Circuit held that a court should determine on a case-by-case basis the information needed to assert a privilege.
   True. False.
10. California courts have held that boilerplate objections made in a response to a discovery request are sufficient to preserve privileges or protections.
    True.
not appear in section 2031 or anywhere else in the Code of Civil Procedure, whether in black letters or any other color. The expression is jargon, commonly used by courts and attorneys to express the requirements of subdivision (g)(3) of section 2031.16

The court of appeal further noted that “[t]he purpose of a ‘privilege log’ is to provide a specific factual description of documents in aid of substantiating a claim of privilege in connection with a request for document production.”17 While a court may order production of a privilege log in response to a motion to compel,18 Hernandez and its progeny indicate that a wide variety of methods are permissible to support a claim of privilege or protection—as long as the methods provide information that is sufficient for the court to evaluate the privilege or protection claim.

Alternatives to Standard Logs

Among the more common alternatives to standard privilege logs are declarations and category privilege logs. The key in both methods is to provide enough information so that a court will be able to evaluate the applicability of the privilege or protection to particular documents.

A declaration by itself may be appropriate when a discovery request seeks production of an entire class of privileged documents. For example, in a 1974 case, the California Court of Appeal relied only on an “argumentative memorandum” filed by the responding party, a declaration filed by the requesting party, and related documentary evidence to determine that the peer review immunity applied to records of several hospital committees.19

In a more recent federal case, a plaintiff sought production from defendant General Motors of documents relating to an internal corporate investigation conducted by William H. Webster, a former federal judge and former director of the Federal Bureau of Investigation and the Central Intelligence Agency. These documents are referred to in the case as the “Webster reports.” To support General Motors with its claims of attorney-client privilege and work product protection for the Webster reports, Webster submitted a declaration in which he:

1. Stated that he had been retained by General Motors to conduct an internal investigation in anticipation of litigation.
2. Provided the date of his retention.
3. Gave a brief description of the subject of the investigation.
4. Stated that his investigation was performed with the expectation of confidentiality.
5. Provided a general description of the type of work involved and materials generated by the investigation.
6. Stated that the materials represented his work product.20

The court held that the declaration was sufficient, stating that “[t]he nature of the information set forth in the affidavit is sufficiently comprehensive to establish the privileged nature of the material sought.”21

A category privilege log may be appropriate when more detail is required to demonstrate that particular types of documents are privileged. Category privilege logs are not as well known as document-by-document privilege logs, but they have been in use, at least occasionally, for decades. The concept of a category privilege log is also specifically referred to in the Advisory Committee Notes to the 1993 Amendment to Rule 26, which state that it can be sufficient to describe privileged documents “by categories.”22

In United States v. United States Optical Company, a 1965 district court case, the federal magistrate held that a category privilege log submitted in support of invocations of the informant’s privilege and work product protection was sufficient to establish the claims. The items in the log included:

A. Documents as to which a claim of work product privilege is asserted.
1. Memoranda prepared by government attorneys for the purpose of advising their superiors of the theory of the case, together with the responses made by such superiors.
2. Memoranda prepared by government attorneys reporting on conferences with defense counsel.
3. Memoranda prepared by government attorneys reporting on oral interview with persons in the ophthalmic industry.
8. Letter prepared by government attorneys, addressed to persons in the ophthalmic industry, requesting information concerning the industry.
11. Communications to the Department of Justice from persons other than those identified heretofore in this case as witnesses for the government, informing of alleged violations of law in the ophthalmic industry.

A similar approach was mandated by a federal magistrate in Imperial Corporation of America v. Shields, a 1997 Southern District of California case involving a document request for substantial amounts of information protected by the work product doctrine and the attorney-client privilege. The court ordered the responding plaintiff to:

[P]roduce a privilege log as to documents for which a privilege or protection is claimed; that contains the following information:

1. An aggregate listing of the numbers of the withheld documents;
2. An identification of the time periods encompassed by the withheld documents;
3. An affidavit containing the representation(s) that:
   (a) the withheld documents were:
      (1) either prepared to assist in anticipated or pending litigation, or
      (2) contain information reflecting communications between (i) counsel’s representatives, and (ii) plaintiffs or plaintiffs’ representatives, for the purpose of facilitating the rendition of legal services to plaintiffs; and,
   (b) intended to be confidential communications.24

The information required in a category privilege log will largely depend on factors such as the nature of the document request and the variety of the types of privileged documents that exist. The only essential element is that the log (or declaration) must contain sufficient detail for a court to determine that the protection sought for the documents by the responding party is applicable.25

Invoking Protection

While there is Ninth Circuit and California state court authority for the use of alternative methods to establish privileges and other litigation protections, courts and attorneys still bring to this issue an ingrained expectation that a standard privilege log is the one method that is necessary and required.

In its 2005 ruling in Burlington Northern, the Ninth Circuit stated that while other alternatives to establishing privileges exist, only “providing particulars typically contained in a privilege log is presumptively sufficient.”26 Accordingly, a party considering the use of an alternative to a standard privilege log in a federal court may want to seek a protective order to ensure that the court will consider its form of proof sufficient.27

Another approach is for a responding party to meet and confer with the demanding party to reach an agreement that the proposed form of proof is acceptable.

Responding parties in California cases are in a slightly better position than responding parties in federal cases. Recent California decisions have held that serving boilerplate objections invoking the relevant privileges or protections avoids a waiver of them.28 However, these same cases also state that boilerplate objections do not meet the requirements of the Civil Discovery Act and may be subject to sanctions other than a waiver.29 Further, a motion to compel filed by the demanding party may result in a court order to produce the very privilege log the responding party wished to avoid.30
To prevent such a result, a responding party should consider either preemptively serving, or at least meeting and conferring with the requesting party concerning, the document that will be used to provide the basis for the responding party’s claimed privileges or protections.

1 See, e.g., R. Wei & I. Brown, California Practice Guide: Civil Procedure Before Trial §8:1474.5 (2005) (“To comply with [Code of Civil Procedure] §2031.240(b), the responding party should prepare a ‘privilege log’ that identifies each document for which a privilege is claimed, its author, recipients, date of preparation, and the specific privilege claimed.”).
3 Evid. Code §1157.
6 See In re Grand Jury Investigation (United States v. The Corp.), 974 F. 2d 1068, 1070-71 (9th Cir. 1992) (“[t]he party asserting the attorney-client privilege has the burden of proving that the privilege applies to a given set of documents or communications.”; Santa Rosa Mem’l Hosp. v. Superior Court, 174 Cal. App. 3d 711 (1985) (The party asserting the hospital peer review discovery immunity has the burden of proving that the privilege applies). The applicability of the hospital peer review discovery immunity is dependent on whether the document in question constitutes or reflects the “proceedings” or “records” of a hospital peer review committee. The identity of the author of the document, its recipients, or its subject matter are not relevant factors for consideration. See Evid. Code §1157(a); Alexander v. Superior Court, 119 Cal. App. 4th 1060, 1073-74 (2004). Peer review immunity applies if the documents in question are “‘records’ of medical staff committees.”; Cedars-Sinai Med. Ctr., Inc. v. Superior Court, 12 Cal. App. 4th 579, 587 (1993) (“Section 1157 prevents...discovering the identity of the physicians who participated” in peer review processes.).
8 Fed. R. Civ. P. 26, Advisory Committee Notes to 1993 Amendment.
10 Burlington N., 408 F. 3d at 1149.
11 In re Grand Jury Investigation (United States v. The Corp.), 974 F. 2d 1068, 1071 (9th Cir. 1992).
12 For Ninth Circuit precedent for the use of declarations to establish the basis for privileges, see In re Grand Jury Investigation, 974 F. 2d at 1071. For Ninth Circuit precedent on the use of category privilege logs, see Imperial Corp. of Am. v. Shields, 174 F.R.D. 475 (S.D. Cal. 1997).
15 Id.
16 People ex rel. Lockyer, 122 Cal. App. 4th at 1073.
19 Id.
20 See also SEC v. Thrasher, No. 92 Civ. 6987 (JFK), 1996 WL 125661 (S.D. N.Y. Mar. 20, 1996) (“[u]n appropriate circumstances, the court may permit the holder of withheld documents to provide summaries of the documents by category or otherwise limit the extent of his disclosure. This would certainly be the case if a document-by-document listing would be unduly burdensome and (b) the additional information to be gleaned from a more detailed log would be of no material benefit to the discovering party in assessing whether the privilege claim is well-founded.”; United States v. Gericare Med. Supply Inc., No. Civ. A.99-0366-CB-L, 2000 WL 33156442 (S.D. Ala. Dec. 11, 2000) (“The plaintiff provided a privilege log by category rather than by individual document...A document-by-document privilege log would have revealed the identity of each person interviewed, information that itself would reveal the plaintiff’s strategy and mental processes. Rule 26(b)(5) does not require a party to sacrifice work product protection in order to assert it, a category-by-category log was appropriate.”).
22 Imperial Corp. of Am. v. Shields, 174 F.R.D. 475, 479 (S.D. Cal. 1997); see also Southern Scrap Material Co., LLC v. Fleming, No. Civ. A. 01-2554, 2002 WL 3174124 (E.D. La. Dec. 5, 2002) (category privilege log deemed acceptable by the court). See United States v. KPMG LLP, 316 F. Supp. 2d 30 (D.D.C. 2004) (denying request to permit accounting firm to prepare a category privilege log, although the court “acknowledge[d] both the burden of preparing the standard privilege log and the Court’s discretion to permit KPMG to prepare a less burdensome category-by-category privilege log.” The court stated that “[t]he essential function of a privilege log is to permit the opposing party, and ultimately the court, to evaluate a claim of privilege. Allowing KPMG to prepare an even less detailed, category-by-category privilege log would not further this determination.”).
23 Burlington N. & Santa Fe R.R. Co. v. District Court, 408 F. 3d 1142, 1149 (9th Cir. 2005).
24 Id. at 1149 n.3.
27 Best Prods., Inc. v. Superior Court, 119 Cal. App. 4th 1181, 1189 (2004) (if a response to a request is too general, the requesting party may file a motion to compel and “[i]n that context, defendant could be required to produce a privilege log that is sufficiently specific so the trial court could determine whether a specific document is or is not privileged.”).
The recent U.S. Supreme Court decision in *Kelo v. City of New London* generated an outpouring of public sentiment and a flood of proposed legislation in California presumably designed to cure a problem that may not exist in the state. In *Kelo’s* wake, sound redevelopment projects have become whipping boys for reform efforts. Proponents of redevelopment reform who are reacting to *Kelo* appear to lack an understanding of the statutory provisions underlying the adoption of redevelopment plans in California. Moreover, the would-be reformers also fail to appreciate the current limitations on the powerful but necessary tool of eminent domain.

By the end of 2005, five committees of the California Legislature had held joint hearings on three separate occasions to consider the ramifications of *Kelo* in the state. The result of these heavily subscribed hearings is that the legislature is poised in the 2006 legislative year to reconsider parts of the Community Redevelopment Law (CRL), particularly those sections concerning the existence of blight. Legislative reformers, however, appear to be ignoring the state’s Eminent Domain Law, which is more closely connected to *Kelo* than any other part of California law.

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*The Weight of Kelo*

by Bruce Tepper

The controversy surrounding the *Kelo* decision may lead to ill-advised changes in California’s Community Redevelopment Law.

Bruce Tepper is a Los Angeles attorney who litigates land use and environmental cases within and outside of California. A member of the *Los Angeles Lawyer* Editorial Board, Tepper currently serves as the lead trial and appellate attorney for California City in its adoption of the 2nd Redevelopment Plan Amendment.
To be sure, blight serves as the jurisdictional prerequisite to any city’s use of redevelopment, and redevelopment in California allows a public agency to condemn private property and then transfer that property to a private entity for inclusion in economic development projects. By ignoring the regulatory limits and scope of authority regarding the exercise of the power of eminent domain, reform efforts miss the essential nexus between Kelo and redevelopment, which is the flash point for most of the public’s concerns about the case.

Kelo involved New London, Connecticut—a distressed city plagued with high unemployment and a declining population. The city approved a 90-acre development plan for revitalization that included a waterfront hotel, a pedestrian river walk, a U.S. Coast Guard Museum, 80 new residences, and commercial and office space. The plan was projected to create in excess of 1,000 jobs and to increase taxes and other revenue. The New London Development Corporation (NLDC)—the city’s nonprofit development agent—acquired most of the land for the development plan through voluntary sales, but negotiations with the petitioners failed, and the NLDC initiated condemnation proceedings.

The issue before the Supreme Court was whether the taking of the property satisfied the “public use” requirement of the Fifth Amendment to the U.S. Constitution. A majority of the Court affirmed the NLDC’s authority to take the land for a public use. In reaching its conclusion, the Court was careful to recognize that many states such as California have statutes that “carefully limit the grounds upon which takings may be exercised.” Since the Court specifically acknowledged that California has carefully limited the exercise of eminent domain to make sure that the type of taking that occurred in New London does not occur in California, one must question whether the recent push for redevelopment reform is grounded in sound policy and logic or is actually more opaque.

Ever since the Kelo decision reaffirmed the use of eminent domain for residential property to further the purpose of commercial and industrial development, the state legislature has been scrambling for a convenient vehicle—including proposed constitutional amendments—to avoid the elimination of eminent domain in redevelopment settings. In California, the use of eminent domain to facilitate commercial and industrial development has been limited to “blighted” portions of redevelopment project areas. Blight conditions often persist when owners of blighted property refuse to participate willingly in redevelopment efforts. Eminent domain is particularly useful in redevelopment settings to acquire property from these “hold-out” property owners—that is, the owners who sell last in order to extract the highest prices.

Although most of the energy for reform from the public is directed toward the taking of property by eminent domain, the focus of the legislature seems to be on redesigning the blight statutes—a task last performed in 1993 when AB 1290, the Redevelopment Reform Act of 1993, was enacted. Focusing on four cases decided after the passage of AB 1290 and one case that is still being litigated, legislative staff and consultants have opined that the blight definitions should be adjusted periodically to react to court decisions. Addressing the more visceral issue of eminent domain appears to be a bit too hot for the legislature at the moment. But adjustments to the California Eminent Domain Law, as set forth in the Code of Civil Procedure, might be a more appropriate response to Kelo than redefining blight in state redevelopment law.

The California City Case

It seems an odd place to start a campaign for redevelopment reform, but legislators are concerned about a challenge to the validity of a redevelopment plan amendment that facilitated a $63 million project in the high desert community of California City. The case is now pending before the Fifth District Court of Appeal. With the added pressure of politically tinged prodding by the attorney general, the staff of five committees of the Senate and Assembly have nevertheless charged ahead. California City is located in an area that, 35 years ago, the California attorney general deemed to have been afflicted by land sales fraud:

The City was not formed as a result of commerce and was conceived as a money-making scheme designed to lure unwitting and primarily foreign investors to the promise of wealth created from exploitation of desert land. As a result, the City is characterized by lots without ingress or egress, without roads, utilities or easements thereof, and without any infrastructure amenities appropriate for any purpose other than resale.

Common terms for these conditions described by the attorney general are “antiquated subdivisions,” “prematurely subdivided lots,” “irregular lots,” and “paper lots.” The California City lots labeled with one of these terms could not be developed because there were few or no access easements for roads or utilities, and the prohibitively expensive cost to connect roads and utilities to the rest of the city was estimated to be $2.8 million to $4.5 million per lot. The inability to develop these lots has had a profound impact on both Kern County and California City, including a long-term tax default rate for the affected areas that is 10 times that of the rest of Kern County and California City.

The CRL has for 50 years considered antiquated subdivisions to be a blighting condition for purposes of establishing the right to launch a redevelopment plan. It provides that a blighting condition is “[t]he existence of subdivided lots of irregular form and shape and inadequate size for proper usefulness and development that are in multiple ownership.”

When the CRL was amended in 1983 to add the requirement that blighted areas be “predominantly urbanized,” the blighting condition characterized by antiquated subdivisions was held to satisfy the urbanization requirement—no matter where the antiquated subdivisions were located. When AB 1290 was adopted, antiquated subdivisions were given a complete pass with regard to qualifying on their own for blight and urbanization requirements.

In this context, California City in 2002 passed a 2nd Redevelopment Plan Amendment that added 15,000 acres of land afflicted by the blighting condition of antiquated subdivisions. The entire amendment area was undeveloped, which is hardly surprising in view of the existence of these blighting conditions. Both a redevelopment consultant and a civil engineer assessed, quantified, and then documented the existence and effects of these conditions. At the same time the 2nd Redevelopment Plan Amendment was adopted, the city negotiated with Hyundai Motor America to create a test track facility in the afflicted area with the proviso that Hyundai undertake “land readjustment” of a portion of the amendment area, construct the roads, and connect the utilities to the city. California City commenced eminent domain proceedings on 128 undeveloped parcels to acquire them for the Hyundai Test Track Project. To date, all but nine parcels have been acquired. It would be fair to characterize these nine property owners as holdouts.

The California City’s 2nd Redevelopment Plan Amendment was challenged in court by five property owners who were aligned with certain holdout condemnees. As the matter approached trial, the attorney general weighed in with an amicus brief—which was provided to five newspapers, including the Los Angeles Times and the Sacramento Bee—that characterized the 2nd Redevelopment Plan Amendment as the “poster child for redevelopment abuse.” The amicus brief mischaracterized the factual setting for the 2nd
Redevelopment Plan Amendment and the requirements of Health and Safety Code Section 33031(a)(4), asserting that this section was limited to urban settings and that the larger lot sizes characterizing the project area for the 2nd Redevelopment Plan Amendment could not comply with the provision of Section 33031(a)(4) concerning “inadequate size for proper usefulness and development.” The Kern County Superior Court rejected the assertions of the attorney general and of the plaintiffs and upheld the validity of the 2nd Redevelopment Plan Amendment in all its aspects. The matter is now on appeal.

The California City Redevelopment Agency was using its eminent domain power when it condemned the remaining nine hold-out property owners whose property was needed for the Hyundai Test Track Facility (which has been constructed and operational since January 2005). These property owners, each of whom is an unabashed land speculator and none of whom has ever developed any portion of his or her property, are in no way comparable to the plaintiff in Kelo, whose longtime residence was taken by New London for commercial development.

California City’s use of eminent domain for redevelopment was hardly an abuse of the CRL. Not only is California City continuing to carry the burdens of a city conceived in a land sale fraud, but the area around it is highly damaged, as evidenced by the long-term property tax foreclosure rates. California City’s distressed land could not be remedied without the extraordinary measures afforded by the CRL.

Proposed Changes to Blight Statutes

The first of the three joint hearings by five committees of the California Legislature to address proposals for state action in the wake of the national outcry over the Kelo decision was held in August 2005. Reactions to Kelo, like those from other states, were strong, and public attendance was heavy. In California, the use of eminent domain for commercial development occurs only in redevelopment settings, so the legislative committees focused on tightening the definitions of blight in order to limit its applicability. The so-called McClintock Solution, which would eliminate eminent domain for redevelopment purposes, served as the backdrop for the hearings. Because the McClintock Solution is considered harmful to much of the commercial development occurring in municipalities, there was a sentiment among legislative staff to show that regulatory scrutiny was being applied to eminent domain for redevelopment.

The current statutory framework defines blight as:

(1) an area that is predominantly urbanized, as that term is defined in Section 33320.1, and is an area in which the combination of unsafe building, unhealthy conditions, substandard lots, incompatible adjacent uses, and irregular lots in multiple ownership is so prevalent and so substantial that it causes a reduction of, or lack of, proper utilization of the area to such an extent that it constitutes a serious physical and economic burden on the community which cannot reasonably be expected to be reversed or alleviated by private enterprise or governmental action, or both, without redevelopment. A blighted area may also be one that is economically blighted.

Economic blight involves:

(1) Depreciated or stagnant property values or impaired investments, including, but not necessarily limited to, those properties containing hazardous waste.

(2) Abnormally high business vacancies, abnormally low lease rates, high turnover rates, abandoned buildings, or excessive vacant lots in an area dev-
developed for urban use and served by utilities.

(3) A lack of necessary commercial facilities that are normally found in neighborhoods, including grocery stores, drug stores, and banks and other lending institutions.

(4) Residential overcrowding or an excess of bars, liquor stores, or other businesses that cater exclusively to adults, that has led to problems of public safety and welfare.

(5) A high crime rate that constitutes a serious threat to public safety and welfare.30

The Health and Safety Code includes specific provisions characterizing “urbanization” in redevelopment project areas.31 “Predominantly urbanized” means not less than 80 percent of the land in the project area: (1) Has been or is developed for urban uses; or (2) Is characterized by the condition described in paragraph (4) of subdivision (a) of section 33031; or (3) Is an integral part of one or more areas developed for urban uses which are surrounded or substantially surrounded by parcels which have been or are developed for urban uses. Parcels separated by an improved right-of-way shall be deemed adjacent for the purpose of this subdivision.32

At the Joint Interim Hearing on Redevelopment and Blight conducted on October 26, 2005, much of the criticism about redevelopment abuse concerned the perception that “bare land” redevelopment projects were still being undertaken by redevelopment agencies.33 Some of the criticism was directed at redevelopment agencies—like the one in California City—that use the “antiquated subdivision” section of the blight statutes as an artifice. To be sure, California City is the only known redevelopment project adopted solely by reference to the “antiquated subdivision” section of the blight statutes. The project area is entirely undeveloped and, without Section 33320.1(b)(2), would not qualify as “urbanized.” In contrast to other reported decisions documenting abuse stemming from the adoption of redevelopment plans, California City’s history—including its formation as a product of land fraud—serves as the paradigm for the “antiquated subdivision” blighting conditions set forth in Health and Safety Code Section 33031(a)(4). The conditions that exist in California City are hard to fake and very difficult to document. Accordingly, Health and Safety Code Section 33031(a)(4) seems an unlikely target for redevelopment reformers.

On the other hand, Health & Safety Code Section 33031(a)(2) identifies “factors that prevent or substantially hinder the economically viable use or capacity of building or lots,” and subsection (a)(3) clarifies that “adjacent or nearby uses that are incompatible with each other and which prevent the economic development of those parcels for other portions of the project area” have been the subject of more frequent redevelopment misuses than any other part of the CRL.34 Focusing on greater precision in statutory definition than currently exists in these subsections of the blight statutes would have a far more meaningful effect on the perceived misuses of redevelopment.

Finally, the use of redevelopment to address issues of contaminated properties—an increasingly important focus of redevelopment—is understated by including contaminated property as a limited component under the category of economic blight.35 The hearing elicited suggestions that consideration be given to expanding the role of contaminated property in establishing the existence of blight.

Addressing California’s Real Kelo Problem

Although some postulate that California has no Kelo problems of its own because the CRL’s first requirement to establish the existence of blight operates as a limit on the use of eminent domain for redevelopment, recent lower court federal cases in the Central District suggest otherwise.

The decision in 99 Cents Only Stores v. Lancaster Redevelopment Agency36 focused on the Lancaster Redevelopment Agency’s adoption in 1983 of the Amargosa Redevelopment Project, which contained 4,600 acres. The project was amended in 1997 to extend the time for the exercise of the power of eminent domain. To implement its redevelopment plan, the redevelopment agency entered into a Disposition and Development Agreement to construct a shopping center known as the Power Center, which would include Costco, Wal-Mart, Homebase, and, later, a 99 Cents Only Store, among others.37 The Power Center was a commercial success, generating significant sales tax revenues for the City of Lancaster.38

In 1998, Costco sought to expand its store and exercise the leverage that only a significant sales tax generator can muster. It demanded a portion of the site leased by 99 Cents Only Stores or threatened to fund a site outside the city.39 With 99 Cents Only Stores refusing to renegotiate its lease, the redevelopment agency took the first steps to acquire 99 Cents Only Stores’ leasehold interest through condemnation proceedings by adopting a resolution of necessity.

Prior to the city’s filing of the condemnation lawsuit, however, 99 Cents Only Stores filed an action in federal district court alleging, among other claims, that Lancaster’s attempt to condemn its property interest violated the public use clause of the Fifth Amendment because the condemnation would “serve no purpose other than to appease a purely private entity, Costco.”40 The complaint sought equitable relief under federal civil rights law.41

Lancaster rescinded its resolution of necessity, the statutory step that precedes the filing of an eminent domain case. The district court held that Lancaster’s refusal to enter into a stipulation “agreeing not to condemn 99 Cents’ Leasehold interest at Costco’s behalf” weighed “heavily against the finding of mootness.”42 and abstention.43 The court noted that the U.S. Supreme Court clearly disfavors federal injunctive relief against state action based on what is informally called “[o]ur federalism.”44 Because Lancaster had yet to initiate a condemnation action, however, Younger abstention was not directly applicable.45 The city contended that, since Lancaster had not filed a condemnation case, the federal action was not ripe for adjudication. Moreover, the city professed to apply a deferential standard—the “reasonable relationship” standard. The court telegraphed its holding when it stated that no “judicial deference is required, for instance, where the ostensible public use is demonstrably pre-textual.”46

The precedent-setting aspect of the decision was its analysis of public use. The court characterized the leasehold interest of 99 Cents Only Stores as “commercially viable, unblighted real property.”47 After this pronouncement, the court determined the leasehold estate not to be blighted by making a distinction between blight under state law and blight under federal law.48 According to the court, property could be blighted under state law and yet not blighted under federal law for the purpose of establishing a constitutionally permissible public use:

Lancaster must present a valid public use within the meaning of the Takings Clause supporting its decision to condemn 99 Cents’ property interest. Lancaster’s failure to show that 99 Cents’ leased property was blighted at the time of its attempted condemnation was determinative of 99 Cents’ federal takings claim only. Its significance under California law is an issue the Court need not resolve.49

The unusual circumstances of the case include the fact that in a 1997 Plan Amendment, in which the redevelopment agency renewed its eminent domain authority, Lancaster had not made a new determination of blight but instead relied only on its 14-year-old blight finding. Lancaster contended before
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the court that the “loss of Costco” would cause what it described as “future blight.” The court declared that the prevention of future blight was an inadequate public use within the meaning of the takings clause. The concept of future blight has long been rejected by California courts.

The 99 Cents Only Stores court was the first federal court to set a boundary on the motives allowed by the lenient rational basis standard for public use that was established in Berman v. Parker and Hawaii Housing Authority v. Midkiff. On appeal, the Ninth Circuit, in an unpublished decision, returned the matter to the district court for consideration of the injunction in view of Lancaster’s decision to sell Costco a less encumbered property.

Cottonwood Christian Center v. Cypress Redevelopment Agency involved an 18-acre parcel at a commercially significant intersection in the City of Cypress. The owner of the parcel, Cottonwood Christian Center, was pursuing a conditional use permit (CUP) to build a church facility, including a 4,700-seat auditorium. Cottonwood’s property was located in the Los Alamitas Race Track and Golf Course Redevelopment Project. In the 12-year period between the adoption of the redevelopment plan and the filing of the lawsuit, Cypress had proposed at least four different designs for the area surrounding the property. None of these designs had evolved beyond the concept stage.

Ultimately, Cypress rejected Cottonwood’s CUP application, seeking instead to site a Costco on Cottonwood’s property. In response to the denial of its CUP, Cottonwood filed an action in federal court, alleging violations of the U.S. and California Constitutions along with various state statutes. The redevelopment agency, in turn, initiated a condemnation action “for redevelopment purposes” after the adoption of the resolution of necessity. Cottonwood sought a preliminary injunction in district court to halt the condemnation proceedings.

Unlike the court in 99 Cents Only Stores, the district court applied a strict scrutiny standard in light of the recently enacted Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) in assessing the viability of an injunction. RLUIPA prohibits any governmental agency imposing or implementing: A land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that the imposition of the burden on that person, assembly, or institution - (A) is in furtherance of the compelling governmental interest; and (B) is the least restricted means of furthering that compelling governmental interest.

The district court also held that the strict scrutiny standard was applicable under the free exercise clause of the First Amendment. Cypress asserted two interests for refusing to grant Cottonwood’s CUP and condemning its property: “blight and generating revenue for the City.” The district court held that “[n]either interest is sufficiently compelling to justify burdening Cottonwood’s religious exercise.”

The factual settings in 99 Cents Only Stores and Cottonwood are not unique and occur frequently in California. Notwithstanding what occurred in 99 Cents Only Stores and Cottonwood, it is difficult, because of Younger abstention principles, to obtain relief from a federal court either immediately prior to or after the commencement of a redevelopment eminent domain action. Accordingly, it was suggested to the legislative committees that they more closely tie condemnation to conditions of blight by requiring redevelopment agencies in resolutions of necessity to make parcel-specific findings of blight and thereby link the proposed project to the blighting conditions identified by the agencies.

Further, a California condemnee should be entitled to challenge the condemners’ right to take its property while drawing down the “probable compensation” deposited with the
court. Property owners facing condemnation should be allowed to use the deposits while their challenges are ongoing. Finally, in commercial condemnation settings, a deposit for goodwill should be required prior to the execution by the court of an order of prejudgment possession. This procedure would avoid the extinction of businesses prior to a determination of the right to take and should continue even through an appeal.

Because the CRL limits the right to take private property in California, the _Kelo_ decision did not change existing California law. However, _Kelo_-type factual settings occur frequently in California. The way to address _Kelo_-type issues is to require a site-specific blight finding at the time of the hearing on a resolution of necessity.

Those seeking redevelopment reform should base their proposals on reported California decisions invalidating redevelopment plans and not upon perceived abuses reported anecdotally by the press. Legitimate concerns exist regarding the use of the blight statutes by agencies in recent reported decisions. Nevertheless, real redevelopment reform will only occur if the legislature brings a precise focus to its efforts.

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2. See SCA 12 (Torlakson & Kehoe), SCA 15 (McClintock, et al.), SCA 22 (Mullin & Nation), SCA 53 (Kehoe), SB 1066 (Kehoe, et al.), SB 1099 (Holingsworth), AB 590 (Walters, et al.), AB 1162 (Mullin & Salinas). See also SCA 20 (McClintock), SB 1206 (Kehoe), and SB 1210 (Torlakson).


4. The committees represented at the joint interim hearing were the Senate Local Government Committee, the Senate Transportation and Housing Committee, the Assembly Housing and Community Development Committee, the Assembly Local Government Committee, and the Assembly Judiciary Committee. The hearings were held on August 17, 2005, in Sacramento; October 26, 2005, in San Diego; and November 17, 2005, in Sacramento.


6. See _supra_ note 3, at 16-19. But see SB 1210 (Torlakson) (which takes a meat ax to the eminent domain process while sidestepping the substance of _Kelo_).

7. The court acknowledged that the city was not confronted with blight but with the need for economic rejuvenation.

8. The court stated: "Under California law, for instance, a city may only take land for economic development purposes in blighted areas." _Kelo_, __ U.S. __, 125 S. Ct. 2655, 2668 n.23 (2005).


10. See SCA 12 (Torlakson & Kehoe), SCA 15 (McClintock, et al.). See also SB 1206 (Kehoe) and SB 1210 (Torlakson).

11. Blight is a statutorily defined set of conditions existing in a "predominantly-urbanized" area within the city or a county, the existence of which "predominate" and the elimination of which cannot be accomplished without the combined efforts of the private and the public sectors. _Health & Safety Code_ §§ 33030, 33031. See also _Health & Safety Code_ §§ 33030.1, 33032.1.


13. See, _e.g._, _Health & Safety Code_ §§ 33030, 33031.


18. _Neilson_, 5th Dist. Case No. F049143.


21. _Health & Safety Code_ § 33031(a)(4). See also _Health & Safety Code_ § 33031(b)(2)(B) (determining that property with these characteristics is also deemed urbanized no matter where it is located) and _former Health & Safety Code_ § 33042.

23 At the Joint Interim Hearing on Redevelopment and Blight held on October 26, 2005, the assertions of the attorney general, unfounded as they were, were echoed by Mark Stibers, consultant to the Senate Transportation and Housing Committee.


27 HEALTH & SAFETY CODE §33031(a).

28 HEALTH & SAFETY CODE §33030(b)(1).

29 HEALTH & SAFETY CODE §33030(c).

30 HEALTH & SAFETY CODE §33031(b).

31 HEALTH & SAFETY CODE §33320.1.

32 HEALTH & SAFETY CODE §33320.1(b)(2).

33 See SUMMARY REPORT FROM THE JOINT INTERIM HEARING ON REDEVELOPMENT AND BLIGHT (Oct. 26, 2005).


35 See HEALTH & SAFETY CODE §33031(b)(1).


37 Id. at 1125-27.

38 Id. at 1126.

39 See 99 Cents Only Stores, briefs of parties in connection with the appeal to the Ninth Circuit.

40 99 Cents Only Stores, 237 F. Supp. 2d at 1127.


42 See also San Remo Hotel v. San Francisco, 145 F. 3d 1095, 1101 (9th Cir. 1998).

43 See Williamson County Reg’l Planning Comm’n v. Hamilton Bank, 473 U.S. 172, 192 (1985) (Governmental action must be in the form of a final decision that affects actual, concrete injury in order for the matter to be ripe.).

44 99 Cents Only Stores, 237 F. Supp. 2d at 1129.

45 Id. at 1128.

46 99 Cents Only Stores, 237 F. Supp. 2d at 1128.


48 See also San Remo Hotel v. San Francisco, 145 F. 3d 1095, 1101 (9th Cir. 1998).

49 See Williamson County Reg’l Planning Comm’n v. Hamilton Bank, 473 U.S. 172, 192 (1985) (Governmental action must be in the form of a final decision that affects actual, concrete injury in order for the matter to be ripe.).

50 99 Cents Only Stores, 237 F. Supp. 2d at 1129.

51 Id. at 1128.

52 Id. at 1128.

53 Id. at 1130 n.2.

54 Id. at 1130.

55 Id.


60 Cottonwood, 218 F. Supp. 2d at 1222.

61 CODE CIV. PROC. §1263.110.

62 See supra note 60.

63 Id.

64 See, e.g., Gabae, 419 F. 3d at 1040-42.
Formal Ethics Opinion No. 515: Ethical Issues Arising from Agreements between Attorney and Client to Split an Award of Statutory Attorney’s Fees

FACTS: Client, a nonprofit organization, approaches Law Firm to represent Client in a public interest case involving enforcement of important public rights under state law. Because of the limited financial resources of Client and the possibility of recovering fees for the enforcement of the important public rights, Law Firm proposes a retainer agreement offering Client the following fee terms:

Client will pay for Law Firm’s legal services on the case based on Law Firm’s regular hourly rate, up to a certain sum, at which point Law Firm will continue to accrue its charges but without client having any obligation to pay them. If the case is successful, Law Firm will move for an award of private attorney general fees pursuant to Code of Civil Procedure Section 1021.5 and attempt to recover from the defendants in the case the full amount of the fees earned. For example, Law Firm agrees to cap Client’s fee obligation at $50,000, Law Firm accrues a total of $80,000 of attorney time working on the case. If the case is successful, Law Firm would move the court for the award of private attorney general fees in the amount of $80,000. If the court awards $80,000 in fees, Law Firm will receive $30,000 for its non-compensated time and reimburse the balance to client. If the judge awards less than $80,000, the fees awarded will be paid first to the Law Firm to the extent of its unpaid compensation with any amount of the award over and above the unpaid compensation to be reimbursed to the client.1

QUESTION PRESENTED: Does the fee agreement proposed above constitute an improper fee split that would be prohibited by Rule of Professional Conduct 1-320?

SUMMARY OF OPINION: Rule of Professional Conduct 1-320 prohibits a member of the bar from sharing a legal fee with any person who is not a lawyer. The agreement described above does not violate RPC 1-320 because the reimbursement to the client, if any, is a refund of an overpayment, not a sharing of an earned fee. The agreement anticipates the possibility of receiving an award of private attorney general fees pursuant to Code of Civil Procedure Section 1021.5. An award of “private attorney general” fees pursuant to Code of Civil Procedure Section 1021.5 is properly made to the attorneys rather than to the plaintiffs themselves.2 If such fees are awarded in an amount that would result in an excess recovery of fees (i.e. fees greater than the value of the legal services agreed to by the parties) the attorneys can, and indeed must, under the terms of the retainer agreement, refund the amount of overpayment to their clients without violating RPC 1-320.3

DISCUSSION

The agreement contemplates the possibility that Law Firm will pay over to client some portion of the statutory attorney fee award that Law Firm recovers from the defendants. California Rule of Professional Conduct 1-320 states, subject to several exceptions, which are not applicable here:

Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer.

The proposed agreement does not violate RPC 1-320 for the simple reason that no fee sharing is contemplated. The only possible shifting of any portion of the eventual attorney fee award from the attorney to the client would be in the nature of a refund, rather than a fee split. The hypothetical assumes that the law firm and the client had agreed that the firm’s fees would be charged at not more than its usual hourly rates and that the total value of the legal services (hours worked x $ per hour) was $80,000, of which $50,000 was paid up front by the client. Any court ordered award of fees greater than $30,000 would result in a payment to the attorneys greater than that contemplated by the agreement.

The LACBA Professional Responsibility and Ethics Committee (PREC) prepares written opinions and responds to questions by lawyers concerning lawyers’ ethical duties and responsibilities. You may access PREC’s formal opinions through LACBA’s Web site at www.lacba.org/showpage.cfm?pageid=427. Formal opinions are completed within six months to a year. If you have a legal ethics issue (not currently in litigation), please contact Grace Danziger at (213) 896-6407 or gdanziger@lacba.org.
The fiduciary duties that an attorney owes a client encompass the fairness of fee agreements and billings. Rule of Professional Conduct 4-200(A) expresses this requirement stating: “A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.” This and all other Rules of Professional Conduct “are not only ethical standards to guide the conduct of members of the bar; but they also serve as an expression of the public policy to protect the public.” Attorney fee agreements are evaluated at the time of their making and must be fair, reasonable, and fully explained to the client. Such contracts are strictly construed against the attorney. As long as the agreed fee is “fair, reasonable and fully explained to the client” and as long as the attorneys abide by the terms of the agreement (see Severson & Werson v. Bollinger, 235 Cal. App. 3d 1569 (1991)) no ethical violation arises.

The fee agreement contemplates that the attorney’s maximum fee would be the normal hourly rate multiplied by the hours worked. The agreement further contemplates that if the combined total of the fees advanced by the client and the court awarded fees exceeds amount of fees agreed to by the parties the excess would be refunded to the client. Applying the above analysis to the hypothetical facts, it is clear that the attorneys cannot retain an award of attorney fees that would result in a total fee greater than that contemplated in the retainer agreement. Refunding the excess is the obvious solution to avoid this problem. The mere fact that this may involve a payment of part of the court awarded fees from the attorneys to the client does not violate RPC 1-320. The excess amount to be refunded is not a fee earned pursuant to the terms of the retainer agreement and therefore cannot be the subject of an improper fee split.

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

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1 In many cases brought under Code of Civil Procedure §1021.5, courts calculate the attorney fee award to include a multiplier based on a variety of factors relating to the case. Press v. Lucky Stores, Inc., 34 Cal. 3d 311, 322 (1983). The facts of this inquiry do not include any discussion of a multiplier being applied, so we have not addressed the effect of that issue in this opinion.


3 A different result might arise if the statutory fees sought were awarded to the party and not the attorneys or if there was an agreement to split any overpayment between the party and the attorneys.


Servers for Lawyers and Law Firms

THE RAPID INCREASE OVER THE LAST DECADE in the amount of data that law firms must manage has forced them to invest significantly in computers, sometimes with frustrating results. Indeed, the growth of data has often outpaced the ability of attorneys and firms to handle basic customer service issues such as finding documents, conducting research, and tracking billable hours.

Someone at a law firm may perform a small amount of research and conclude that the solution is a legal software program that promises document depository and other functions. The legal software program option can provide some help, but legal applications are usually written by competing companies and therefore do not integrate well. For instance, a firm may discover that its accounting program will not communicate with its document depository program, which offers nothing to help with marketing efforts.

In most cases, a bigger and better step toward a solution is a server. However, lack of an understanding of what a server is can lead firms to continue to invest in technologies that are not needed. A server is more than a storage or a data backup device. A true server provides applications and integrates general functions. In addition to protecting and backing up data, the major functions that law firms need from their servers include sharing calendar and contact data, searching and maintaining document depositories, conducting and recording legal research, accounting, and marketing. A file server, which only backs up data, is not sufficient. What is also needed is an application server or servers.

The Servers

The diversity of a law firm’s needs—from calendar and contact software to browser-accessible databases—suggests that firms should consider application servers as a solution. The servers that are currently available to support various legal practice functions include the application server, the exchange server, the CRM server, the share point server, the project server, and the SQL server.

On a network, the application server may serve as the authority for usage. Users cannot access any feature on the network without first logging on to this server and gaining access rights to the programs they need. By limiting access to applications, the server acts as a gatekeeper. It provides a network administrator with the power to assign rights and resources to each person, department, and remote user.

Next, the exchange server, as the name implies, handles the data that is widely exchanged, including calendaring, e-mail, VoIP (voice over Internet protocol), and contacts. The CRM (customer relationship management) server performs a similar function. The exchange server and the CRM server should work in tandem. When a CRM and exchange server are working well, the firm’s contact data is accessibly and accurately maintained and easily shared across applications such as Outlook and devices such as computers and PDAs.

A SQL (structured query language) server is what replaces the file server that many users think of as a server. The SQL server is the machine that the other servers and computers access for their data. The SQL server houses the critical data to which all the other computers in the firm refer. This computer must be properly secured and backed up but still be accessible. A SQL server can be linked to the firm’s Web site and accessed through a user name and password, just as it would be on a local area network. This allows attorneys to perform meaningful work on their cases from wherever they can get online. For that matter, visitors, clients, and opposing counsel can be granted access rights via the application server so that they too may visit the firm’s Web site to view the data that they have been given permission to view. (Additionally, the CRM server, for example, can monitor client activity for purposes such as marketing and billing.)

The use of a SQL server to create an extranet (the firm’s Web-accessible database and workspace) can significantly increase client satisfaction. An extranet allows clients to take more active roles by accessing case information, retrieving documents, accessing billing information, and more. This automation lightens the burden of a law firm’s staff in answering client calls. Clients can check the same information that a firm’s staff member would check.

This advanced functionality, however, requires advanced software. For example, Active Directory is the main application in an application server environment, and it is not easy to understand. No one who is untrained in Active Directory should try to manage its complex and important functions. A group of well-integrated servers needs a trained network administrator and a trained database admin-

A law firm’s knowledge base, however, extends beyond names, addresses, e-mail, and calendars. Share point and project servers maintain document depositories, share deadlines, track timelines, and categorize documents, research, or other information. These servers allow data to be cross-referenced by case, department, person, or firm. When properly established and maintained, share point and project servers automate case tracking and allow the proper access to a central case database from anywhere on the Internet. These servers, in turn, draw upon the data stored on the SQL server, which is often the heart of a large-scale Web-accessible data system.

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administrator who understand the needs of a law firm and can configure the servers to manage the flow of data and usage. A firm’s lawyers should not be obliged to contend with various drives, servers, and virtual desktops in order to do their work. The desired result—in which as much as possible is accessible from a browser-based interface—puts most off-the-shelf legal software to shame.

Active Directory, the nervous system of all functionality and security on the network, monitors and allows or rejects requests from users, databases, applications, departments, DNS, and other variables. All network resources—data, documents, accounting, marketing, backups, and security—are managed via this single juncture, no matter how many servers are running. A configuration mistake in Active Directory can, for example, let opposing counsel log on not only to a firm’s work product. The use of application servers, configured and managed at the Active Directory level, places the power of any number of servers, users, remote locations, and security in one place. A configuration error would have serious consequences.

Cost

The cost of this much power and manageability depends on the number of application servers. One application server with a 10-user license costs nearly $5,000. Although this typically includes hardware, software, and installation and configuration, it is no small expenditure for a small law firm. Continued maintenance is also required.

Many application server programs come as a bundled package. For one price, the buyer receives several application server packages. For instance, Small Business Server Premium 2003 includes Exchange Server, SQL Server, and Share Point Server. Buying a bundled server package will save money, but it is confusing to sort out which program to use and how to use it. An alternative is to outsource. Before taking this step, however, make sure the company understands the unique needs of a law firm.

So many legal programs exist that the process of maintaining a computerized law office has become very complicated. The solution is a combination of properly configured application servers, which have enough disk space, computing power, and application integration capabilities to make computers work for lawyers rather than the other way around. The productivity and flexibility that integrated server technologies provide can give a sustainable competitive advantage. To accomplish this, the right application server for a firm’s tasks, properly configured at the Active Directory level, is the overall winner in technology for the law office.
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CLE Preview

20th Annual Environmental Law Super Symposium

ON THURSDAY, APRIL 6, the Environmental Law Section will present the 20th Annual Environmental Law Super Symposium, titled: “Clean Air and Water with Room to Grow: Meeting the Environmental Challenges to Southern California’s Future Development.” As in the past, the symposium will provide a vital update of the many developments occurring in the field of environmental law. The presentations will cover the significant environmental challenges involved in planning for Southern California’s future development. Keynote speakers will be S. David Freeman and Maureen F. Gorsen. Additional speakers include Jan Chatten-Brown, Beth S. Dorris, Peter R. Duchesneau, Kenneth A. Ehrlich, Richard W. Esterkin, Viviana L. Heger, Jennifer Hernandez, David L. Huard, Linda Krop, Charles J. Malaret, Lewis Maldonado, Harvey Morris, Sarah E. Morrison, Margarita Padilla, Martha Sharp, Caren Trogovich, and Malcolm C. Weiss. The program will take place at the Los Angeles Marriott Downtown, 333 South Figueroa Street. Valet parking is available for $9. On-site registration and a continental breakfast begins at 8 A.M., with the program continuing from 8:30 A.M. to 4:15 P.M., with a break for lunch. The registration code number is 009285.

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Witness Examination Workshop

ON FRIDAY, MARCH 31, the Trial Advocacy Project and the Litigation Section of the Los Angeles County Bar Association will present the “Witness Examination Workshop,” a two-part program that provides introductory and advanced level instruction on how to examine a witness under oath. The format for the first part of the program is lecture with questions and answers, covering, among other things: a formula for direct examination, how to lay the foundation for demonstrative evidence, how to create a strategy for cross-examination, how to control the witness, and how to employ advanced techniques (such as “leading by prior question” and “anticipatory rebuttal”). The second part of the program is a workshop in which participants will conduct direct examination and cross-examination of witnesses. The speaker will be Michael Schwartz of the Trial Advocacy Group. The workshop will take place at the LACBA/Executive Presentations Mock Courtroom, at 281 South Figueroa Street, Downtown. Reduced parking is available with validation for $9. On-site registration and lunch will begin at 1 P.M., with the workshop continuing from 1:30 to 5:30 P.M. The registration code number is 009241.

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

For a full listing of this month’s Association programs, please consult the County Bar Update.
The Unfairness of the Class Action Fairness Act

FEBRUARY 18, 2005, IS A LEGAL MILESTONE: that, years hence, may be remembered for various acts of political folly, misconceptions, and targeted hostility toward select members of the legal profession. That date marks the enactment of the Class Action Fairness Act of 2005 (CAFA), a statute heralded by President Bush and Congress as an antidote to that enemy within, that culprit responsible for all that is purportedly wrong with America—trial lawyers. This legislation owes its origins, in part, to the prevailing assumption that plaintiffs’ attorneys, myself included, exert an unnecessary cost on corporations, that we routinely initiate “frivolous” lawsuits against innocent defendants, and that we must be stopped. I understand this misplaced rage, but I also know this particular piece of legislation is unwise and unnecessary. The act complicates things, leaves a number of serious legal issues unanswered, forces both sides to reconsider certain tactics, and may actually leave the court system with even more cases to adjudicate.

I would be remiss if I did not make some defense of class action litigation. If litigants had to individually argue these sorts of cases the result would be nothing short of chaotic. Cases would overwhelm judges and staff, costs would skyrocket, and, hard as it is to imagine, politicians would further condemn lawyers as a group.

What these elected officials—Democrats and Republicans alike—really object to is that too many class action lawsuits are successful. It should come as no surprise that principal supporters of CAFA are large corporations (and political contributors) that find themselves accused of wrongdoing. But this legislation did not emerge spontaneously; it is the product of a sustained campaign against attorneys who, through preparedness and presentation of evidence, successfully represent clients with a legitimate claim against a corporation, government agency, or private individual.

The real question is: How will CAFA reconfigure the legal landscape? The act is relatively straightforward, insofar as it targets attorneys who receive large fee awards, mitigates “unjustified” awards among plaintiffs, and clarifies language about various legal rights. While I certainly second the idea that transparency should govern the relationship between attorney and client, the act’s attempt to restrict large fee awards is one of many troubling (and unintentionally ambiguous) aspects of this legislation. The act’s economic unfairness originates from a grave misperception: that plaintiffs’ attorneys make too much money, thus compelling a congressional response. Are plaintiffs’ attorneys, then, the first of many professionals to face this brand of congressional scrutiny? How much longer until Congress decides that doctors or actors or athletes—or defense attorneys—make too much money? Actually, according to Public Citizen, median attorneys’ fees were only 21.9 percent of the recovery—not more money than all class members combined received, as claimed by the Chamber of Commerce’s Institute for Legal Reform.

The act also destroys a sacrosanct principle among conservatives—federalism. Since, under CAFA, federal jurisdiction attaches whenever there is diversity of citizenship between any plaintiff and any defendant and when there is more than $5 million at stake, these new rules expand federal power and actually increase the total number of class action lawsuits. Indeed, the reason the act was passed is because of the advantages state courts confer, at least for most plaintiffs’ attorneys, versus the more narrow opportunities on the federal level. Simply stated, it is hypocritical to brandish the Constitution and publicly recite the Tenth Amendment while simultaneously erasing important rights among the individual states.

Most federal courts already deal with too many cases. As early as 2003, the U.S. Judicial Conference, a committee of federal judges across the political spectrum, asked Congress to ensure “that federal courts are not unduly burdened and states’ jurisdiction over in-state class actions is left undisturbed.” CAFA defies that request, ignoring a bipartisan plea from a coequal branch of government. Even William H. Rehnquist, a longtime proponent of states’ rights, criticized the act’s approach. “As the Judiciary’s workload continues to grow,” he cautioned, “the current budget constraints are bound to affect the ability of the federal courts efficiently and effectively to dispense justice.”

Far from inaugurating a new era of fewer lawsuits and greater judicial independence, CAFA is a classic example of the law of unintended consequences and legal chaos. For the sad truth is that, while wrongfully shifting (and thus abrogating) power from the individual states to the federal judiciary, this act overwhelms judges at almost every level. The biggest potential loser in all of this is, sadly (and not as a cliché), the American people. As consumers, they deserve the right, long respected by the states and their respective courts, to seek—as a class—a redress of grievances against individual, corporate, or governmental defendants. The act changes this dynamic for the worse. Plaintiffs must either assemble themselves along state lines (one class for, say, California, another for New York), which can be a logistical challenge, or enter federal court, which is certainly not better. Years hence we may look upon this act as one of those inevitable, albeit regrettable, phenomena that marry a false enemy (plaintiffs’ lawyers) with demands for congressional action. Rather than await future vindication, it is our duty to expose the act’s flaws now.

Jerome Ringler is a partner in the law firm of Ringler Kearney Alvarez LLP. He specializes in class actions and complex commercial tort matters.
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