

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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REPORT

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Letter from the President

Recently board members from ABTL's five chapters throughout the state met to discuss planning of joint events and issues of concern to all the chapters. We had a report on the progress of planning for the 1999 Annual Seminar, which will be held in Phoenix on October 29-31. The group was excited about the prospects for this event. The faculty is absolutely first rate, and the format is unique. We also heard about the first Seminar for the new millenium, which will be back in Maui, and we tentatively decided to try to arrange for the Inn at Spanish Bay, near Monterey, for the Seminar in 2001.



Richard J. Burdge, Jr.

The ABTL website received a fair amount of attention, because we are still in the process of building it to include those things that will be of value to the members. It has only been up and running for about a year, and we do not have a full time staff to support it. Nevertheless, navigating through the information about each ABTL chapter is easy, and the

types of information about each chapter has been growing as we get accustomed to posting new information in a timely manner. We also have an increasing variety of links to other sites that are likely to be of interest to business trial lawyers. We decided to add links to each of the U.S. District Court sites as well as some of the Superior Courts that we have not linked to yet. Soon our site will be an easy starting place when you want to find the site for any court before which you are likely to appear.

Each President reported on the "state" of his or her chapter, and I am pleased to say that all the chapters are doing well. Since

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Objections: The Moment of Truth

After weeks of briefing, your summary judgment motion is about to be heard. It's a big case, and you've prepared carefully. Leaving nothing to chance, you had the firm's smartest first-year lawyer prepare 15 pages of objections to your opponent's declarations, with a few objections to his points and authorities and notice of motion thrown in for good measure.

The courtroom is packed — 30 matters on the calendar today — but you're among the first and the tentative is in your favor. When the court calls the matter, it announces it wants to hear from your opponent first. Things are going well.

The judge isn't buying what your opponent is trying to sell. Visibly more than ready to conclude the argument and move the calendar, the judge turns to you and brusquely asks if you have anything to add. Of course, the judge already knows the answer. Recalling the rule you learned on your first day at the firm — "When you're winning, shut up

and sit down!" — you try to suppress your elation while responding "No, your honor." The hammer falls. Motion granted. You eagerly volunteer to give notice as you rush for the door to call your expectant client and share the good news.

A year or so and some tens of thousands of dollars later, you're at oral argument in the court of appeal. You're expecting to nail the case closed for good.

But there's a danger signal — even though you're the respondent, the court wants to hear from you first. The presiding justice asks, "Counsel, what about that October 15 letter? Doesn't that create a triable issue of fact?"

A softball? "No, your honor. That letter is rank hearsay."

"Really? Did you object to it?"

"Certainly," remembering your 15 pages of objections.

"Did the trial court rule?"

A pregnant pause. "Does that matter?"

"It certainly does."

Another uncomfortable moment of silence. The justice continues.

"Now, then, doesn't this letter create a triable issue of fact?"

What's the court talking about? Simple. In *Ann M. v. Pacific Plaza Shopping Center*, 6 Cal. 4th 666, 670, n.1 (1993), the Supreme Court said:

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Hon. Paul Turner

In the trial court, defendants made a series of objections to evidence submitted by *Ann M.* in opposition to the summary judgment motion. The trial court did not rule on the objections. Because counsel failed to obtain rulings, the objections are waived and are not preserved for appeal.

Houston, we have a problem. The judgment is going to be reversed. You're about to go back to where you started over a year ago.

And your client is about to be really unhappy.

But since this is just a story, let's assume you can simply re-file the motion and try again. This time when the trial judge asks if you have anything to add, you're ready.

"Your honor, we've filed objections. I'd like to ask the court to rule on them."

A pregnant pause.

"Counsel, I've got 30 cases on the calendar today. How many objections did you file?"

"Well, your honor, I felt that most of plaintiff's evidence was inadmissible —"

"I counted them. You filed 167 different objections. Do you think I'm going to keep 30 cases waiting while I rule on every objection?"

"Well, your honor, *Ann M.* says that —"

"I know what the cases say. But I've got a calendar to run. Look — I'm only going to consider admissible evidence. Isn't that good enough?"

"Uh, yes, I guess so."



Robin Meadow

Round Two in the Court of Appeal.

"Counsel, what about that October 15 letter? Doesn't that create a triable issue of fact?"

Confidently: "No, your honor. That letter is rank hearsay."

"Really? Did you object to it?"

"Certainly."

"Did the trial court rule?"

No problem. "Yes, it did. The trial court said it would only consider admissible evidence."

"But was there a ruling on your hearsay objection?"

"That was the ruling."

"What about *Ann M.*?"

This time you're ready. "Your honor, in *Biljac Associates v. First Interstate Bank of Oregon*, N.A., 218 Cal. App. 3d 1410, 1419 (1990), the court said that '[n]othing in the statute or rules requires a written or other formal ruling for the record.' The court also said, 'We review summary judgments de novo [citation], and the parties remain free to press their admissibility arguments on appeal, the same as they did in the trial court.' So, your honor, this court can evaluate the objections itself, even if there wasn't a formal ruling."

You await the court's compliment on your preparedness.

"Counsel, with all due respect to our colleagues in the First District, *Ann M.* is crystal clear Supreme Court authority. You've got to get a ruling. Without a ruling, the objection is waived. Now let's talk about that October 15 letter."

Your client is really, *really* unhappy. So are your partners when the client decides it's time to look elsewhere.

Pure fiction? Hardly. True, such an extended sequence of mishaps is pretty unlikely — at some point a realistic or sympathetic court will probably decide that you've done as much as you need to do to preserve your objections, and it will reach the merits. But as to the governing rules, the Court of Appeal was right both times.

The General Rule:

Lack of a Ruling Waives the Objection

At first blush, *Ann M.* might seem like an anomaly. Since review of summary judgments and summary adjudications is de novo, *AARTS Productions, Inc. v. Crocker National Bank*, 179 Cal. App. 3d 1061, 1064-65 (1986), why should it matter how the trial court ruled? But the fact is that *Ann M.* — explicit Supreme Court authority — says that it does. And far from being an anomaly, *Ann M.* is only one of many decisions that say the same thing. (See below.) One of the cases *Ann M.* cites, *Haskell v. Carli*, 195 Cal. App. 3d 124 (1987), discusses the subject in detail and has been repeatedly cited with approval by both the Supreme Court and the courts of appeal. There, the court of appeal reversed a summary judgment in part on the basis of evidence to which the moving party had properly objected, because the party waived the objection by not obtaining a ruling on it. Undertaking a detailed analysis of the summary judgment law, the court held that "[f]ailure of counsel to secure such a ruling [i.e., a ruling on the objections] waives the objection." *Id.* at 129. Observing that "the waiver rules did not apply to summary judgment proceedings prior to the 1980 amendment of Code of Civil Procedure, section 437c," *Id.*, the court noted two important changes:

[S]ection 437c, subdivision (b), now provides "[evidentiary] objections not made either in writing or orally at the hearing shall be deemed waived." Section 437c, subdivision (c), further sets forth that the trial court must consider all evidence unless an objection has been raised and sustained: "In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained...."

Id. at 129-30; see *Golden West Baseball Co. v. Talley*, 232 Cal. App. 3d 1294, 1301, n.4 (1991) (same). (Note that the 1990 amendment changed the language of subdivision (b) to eliminate the phrase "either in writing or orally.")

This is not a new concept — getting a ruling has historically been essential to preserving an evidentiary objection. *E.g.*, *Fibreboard Paper Products Corp. v. East Bay Union of Machinists*, 227 Cal. App. 2d 675, 698 (1964) (objection during trial; "Counsel for defendants did not request a ruling nor did he press his objection when the offer was subsequently renewed. Under the circumstances the objection was abandoned and waived."). But the summary judgment statute makes the common-law principle explicit: Since under subdivision (b) the court *must* consider evidence *unless* it has sustained an objection, and since the objection can't have been sustained unless the trial court actually ruled, without a ruling there's no basis for arguing that the trial court should not have considered the evidence. The result: Inadmissible evidence may defeat your client's position. Justice Mosk put it succinctly in *People v. Rowland*, 4 Cal. 4th 238, 259 (1992), discussing a trial objection:

No ruling was made below. Accordingly, no review can be conducted here. "[T]he absence of an adverse ruling precludes any appellate challenge." [Citation.] In other words, when, as here, the defendant does not secure a ruling, he does not preserve the point. That is the rule. No exception is available.

Biljac and its Progeny: An Escape?

The *Biljac* decision does appear to permit a trial court to decline to rule on specific evidentiary objections and to simply disregard inadmissible evidence in determining whether to grant or deny a summary judgment motion, without creating a waiver of objections. In *Biljac*, "[p]laintiffs filed voluminous evidentiary objections and a request that the court give written rulings on all objections." *Biljac Associates*, 218 Cal. App. 3d at 1419. The trial judge's unsurprising reaction was that "[i]t would be a horrendous, incredibly time-consuming task that I think would serve very little useful purpose." *Id.* at 1419, n.3. Accordingly, he concluded, "I am going to disregard all those portions of the evidence

that I consider to be incompetent and inadmissible." *Id.* As noted above, the Court of Appeal concluded that because appellate courts review a summary judgment de novo, "the parties remain free to press their admissibility [of evidence] arguments on appeal" when the trial judge declines to specifically rule on evidentiary objections. *Id.*

Division Two of the Court of Appeal in San Francisco has adopted the *Biljac* approach. In *Gatton v. A. P. Green Services, Inc.*, 64 Cal. App. 4th 688, 692 (1998), the same Court of Appeal division that issued *Biljac* eight years earlier discussed the concept of an "implicit" sustaining of an evidentiary objection to deposition testimony:

Summary judgment contemplates the use of deposition transcripts (§ 437c, subd. (b)); *Villa v. McFerren* (1995) 35 Cal.App.4th 733, 749 [41 Cal.Rptr.2d 719]) subject, however, to admissibility objections made and sustained by the court (§ 437c, subd. (c)). Green objected to the Woodrow deposition transcript as inadmissible hearsay, and the court implicitly sustained the objection. We independently review the deposition's admissibility (*Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1419-1420 [267 Cal.Rptr. 819]) and the legal effect of facts properly presented (*Parsons v. Crown Disposal Co.* [(1997)] 15 Cal.4th 456, 464).

Gatton, with its references to an implicit order sustaining an objection to a portion of a deposition transcript and the de novo standard of review for summary judgment rulings, appears to be consistent with the *Biljac* analysis.

But if *Biljac* and *Gatton* really do stand for the proposition that failing to obtain a ruling on an evidentiary objection does not waive the objection on appeal, they are directly at odds with a veritable legion of cases dating back well over a century. In addition to the decisions cited above, *Ann M.*, *Haskell*, *Golden West Baseball Co.*, *Fibreboard Paper* and *Rowland* and the venerable decisions in *People v. Stanford*, 43 Cal. 29, 32 (1872) and *People v. Westlake*, 62 Cal. 303, 309 (1882), overruled on another ground by *People v. Conkling*, 111 Cal. 616 (1896), these include cases involving both trial objections, *People v. McPeters*, 2 Cal. 4th 1148, 1179 (1992); *Goodale v. Thorn*, 199 Cal. 307, 315 (1926); *Campbell v. Genshlea*, 180 Cal. 213, 220 (1919); *Smith v. Smith*, 163 Cal. 630, 631 (1912); *People v. Staver*, 115 Cal. App. 2d 711, 723 (1953); *People v. Pratt*, 77 Cal. App. 2d 571, 578 (1947); *People v. Rhodes*, 212 Cal. App. 3d 541, 554 (1989), and objections raised in connection with summary judgment and other motions, *Valenzuela v. GAB Business Services*, ___ Cal. App. 4th ___, 99 Daily Journal DAR 3983, 3984 n.6 (Apr. 30, 1999); *Laird v. Capital Cities/ABC, Inc.*, 68 Cal. App. 4th 727, 736 (1998); *Cheyanna M. v. A. C. Nielsen Co.*, 66 Cal. App. 4th 855, 858-59, fn.2 (1998); *Stevenson v. Baum*, 65 Cal. App. 4th 159, 163 (1998); *California State Electronics Assn. v. Zeos Internat. Ltd.*, 41 Cal. App. 4th 1270, 1275 n.4 (1996); *Hagen v. Hickenbottom*, 41 Cal. App. 4th 168, 175 (1995); *Jane D. v. Ordinary Mutual*, 32 Cal. App. 4th 643, 654 n.2 (1995); *Knight v. City of Capitola*, 4 Cal. App. 4th 918, 924 n.2 (1992); *Ramsey v. City of Lake Elsinore*, 220 Cal. App. 3d 1530, 1540 (1990); *Howell v. State Farm Fire & Casualty Co.*, 218 Cal. App. 3d 1446, 1459 n.9 (1990); *Imperial Casualty & Indemnity Co. v. Sogomonian*, 198 Cal. App. 3d 169, 178 n.7 (1988); *People v. Obze*, 41 Cal. App. 3d 541, 554 (1974), disapproved on another ground by *People v. Rollo*, 20 Cal. 3d 109, 120 n.4 (1977).

Despite this overwhelming authority, only one Court of Appeal opinion has explicitly addressed the *Ann M.* requirement where the trial court made a *Biljac*-type of ruling. In *Laird*, 68 Cal. App. 4th 727, the trial court ruled, "The objections to Plaintiff's declaration, where inconsistent with the deposition testimony, are sustained. Other than this specific ruling, the court has relied only on admissible evidence." *Id.* at 736. After criticizing both sides for failing to "deal adequately" with the trial court's evidentiary rulings, *id.*, the Third District, albeit without citing the decision,

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The Ugly Side of Law Firm Beauty Contests: Conflicts of Interest

The process of prospective clients consulting with and considering multiple law firms for potential representation has been characterized as the law firm "beauty contest." Beauty contests are particularly common for attorneys competing for major litigation or prized clients. While it may be an honor to be considered for such beauty contests, rainmakers beware: law firm beauty contests are replete with ethical pitfalls. By consulting with multiple law firms for potential representation, some sophisticated litigants have employed a strategy of attempting to create a conflict of interest and disqualify these law firms from representing their adversaries. Even unsophisticated or good faith prospective clients who share too much confidential information in initial interviews can effectively disqualify a law firm from representing their opposition in the same or substantially related future litigation.

While the prospective client may only meet with you once and never retain you, your firm may still be disqualified because the prospective client now qualifies as a "former client" to whom you owe fiduciary duties. Specifically, your firm may owe the now former client a duty of confidentiality that prevents your representation of adverse parties on related matters. Adding insult to injury, after losing a beauty contest attorneys may unwittingly find that the disqualification extends to a large host of potentially adverse parties. One court poignantly explained this quagmire: "[h]aving apparently failed the swimsuit competition, [law firms] do not wish to be saddled with the ethical encumbrances of an attorney/client relationship for which it never received any money." *Bridge Products, Inc. v. Quantum Chem. Corp.*, No. 88-C-10734, 1990 WL 70857 (N.D. Ill.).

In California, attorneys are prohibited from undertaking representation in a matter that is adverse to a former client when there is a "substantial relationship" between the current and former matters. This prohibition stems from an attorney's duty to maintain confidential information obtained from a former client. Business & Professions Code § 6068(e) (attorneys must "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her [current or former] client"). An initial consultation with a prospective client (that never retains you) is sufficient to create an attorney-client relationship and make the prospective client a "former client" when confidential information is disclosed.

Evidence Code § 951 broadly defines a "client" as anyone who "consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice...." With this broad definition, virtually every prospective client that consults with you (but never hires you) becomes a former client. Ergo, mere participation in a beauty contest can land the losing law firm a former client and burden the law firm with onerous fiduciary obligations for years to come. *Sullivan v. Sup. Ct.* (Spigola), 29 Cal. App. 3d 64, 69, 105 Cal. Rptr. 241 (1972). Moreover, the ability of a former client to disqualify their former attorney often yields unfair results — particularly since the passage of time does not cure the conflict.



Craig E. Holden

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River West, Inc. v. Nickel, 188 Cal. App. 3d 1297, 1301-1304 (1987) (attorney disqualified from representing new client in matter "substantially related" to water rights case handled 30 years earlier).

Identifying the Ethical Pitfalls. Unsavvy attorneys who naively enter beauty contests and receive confidential information can unwittingly be disqualified from representing parties that may not seem adverse. Consider the recent Orange County bankruptcy/securities fiasco which had Wall Street broker-dealers scrambling to interview the best securities and bankruptcy lawyers in town. An invitation to one of these beauty contests could be considered a potentially profitable blessing or a potential curse. One meeting with the wrong Wall Street firm for an initial consultation — coupled with exposure to vast amounts of their confidential information — could easily disqualify your firm from representing the many other brokerage firms that are not currently adverse, but may become adverse as the litigation matures.

In today's competitive legal market, sophisticated litigants and repeat players often consult with and consider dozens of firms for potential representation, especially in high-stakes litigation. Additionally, business clients often hire multiple firms for a single case. In the recent high-profile *MGM vs. Sony* litigation concerning the rights to the James Bond trademark, each studio hired four top Los Angeles firms for the single lawsuit. This environment of attorney-shopping and the hiring of teams of law firms creates a fertile field for potential conflicts and future disqualifications for active business developers.

Legal specialists and top-flight litigators are the primary target of the bad faith litigant whose only intention is to limit the adversary's selection of attorneys. Certainly courts recognize that "motions to disqualify are often used as a tactical device" by former clients. *Metro-Goldwyn-Mayer v. Tracinda Corporation*, 36 Cal. App. 4th 1832, 1847 (1995). Nonetheless, courts still mechanically apply the former client conflict rules, often without regard for seemingly unfair results. For instance, in *Mailer v. Mailer*, 390 Mass. 371, 390, 455 N.E. 2d 1211 (1983), the former prospective client successfully disqualified an attorney he consulted with (for approximately one hour) on only one occasion five years earlier — even though there was no evidence that any confidential information was disclosed to the disqualified attorney. Similarly, the California Supreme Court found an attorney-client relationship to exist based on a single brief consultation which resulted in no retention of the attorney. *Flatt v. Sup. Ct.* (Daniel), 9 Cal. 4th 275, 280, (1994) ("We have little quarrel [finding that the prospective client became] that of a client," after one hour-long meeting). In contrast, see *Zimmerman v. Zimmerman*, 16 Cal. App. 4th 556 (1993) (attorney's 20 minute conversation with a prospective client was insufficient to prevent the law firm from subsequently representing the other side in the exact same matter).

The inherent flaw with beauty contests is that the initial consultation — in order to be successful — almost always requires that the attorney obtain confidential information from the prospective client. Without this discussion, it is almost impossible for the attorney and prospective client to determine if, and on what terms, representation would be appropriate. *City & County of San Francisco v. Sup. Ct.*, 37 Cal. 2d 227, 235 (1951) (for adequate representation the prospective client should provide "full disclosure of the facts"). For these reasons, the prospective client's initial consultation (which results in no representation) almost invariably transforms the former prospective client into a former client for purposes of the ethical rules. The attorney who was briefly consulted and never hired is now (perhaps unfairly) bound with onerous fiduciary obligations to avoid representing potentially adverse new clients on substantially related matters.

The Governing Conflict Rules. The primary California statutes governing an attorney's fiduciary obligations to a former client are Rule 3-310(E) of the California Rules of Professional Conduct ("CRPC") and Business & Professions Code § 6068(e). CRPC 3-310(E) provides that "[a] member shall not, without the informed written consent of the...former client, accept employment adverse to the...former client where, by reason of the representation of the...former client, the member obtained confidential information material to the employment." Since "client" can be loosely defined as those who merely "consult" an attorney to consider "retaining," the strictures of the foregoing statutes can easily come into play when attorneys participate in beauty contests.

California courts apply the "substantial relationship test" to determine if a prior representation conflicts with or is adverse to a current representation. *Flatt v. Sup. Ct.* (Daniel), 9 Cal. 4th 275, 283 (1994). The California Supreme Court recently explained (in a case involving a motion to disqualify a law firm beauty contestant) the ethical rules relating to the subsequent representation of interests adverse to a former client:

"Where the potential conflict is one that arises from successive representation of clients with potentially adverse interests...the chief fiduciary value jeopardized is that of client confidentiality. Thus, where a former client seeks to have a previous attorney disqualified...the governing test requires that the client demonstrate a 'substantial relationship' between the subjects of the antecedent and current representations. The 'substantial relationship' test mediates...the interest of the former client in ensuring the permanent confidentiality of matters disclosed to the attorney in the course of the prior representation..."

Flatt, 9 Cal. 4th at 283. Once the former client demonstrates a "substantial relationship" between the two representations, there is a presumption that material confidential information relevant to the second representation was obtained from the former client, and disqualification is therefore mandatory. *Id.* Once the former client satisfies the substantial relationship test, it does not have to prove that confidential information was *actually* disclosed in the beauty contest. The attorney is automatically disqualified under the strictures of CRPC 3-310(E) and Bus. & Prof. Code § 6068(e), unless the former client waives the conflict.

In determining whether a substantial relationship exists between a prior consultation and current representation, courts will examine several factors such as: (a) the similarities between the factual and legal questions posed in the two representations; (b) the nature and extent of the attorney's involvement in the prior consultation, including the amount of time spent by the attorney at the prior consultation; and (c) the attorney's exposure to the former client's policy and strategies. Losing beauty contest participants are usually not so lucky in avoiding disqualification from a former client since a "substantial relationship" will naturally exist when a law firm is retained by the former client's adversary in the matter that was the subject of the beauty contest.

When the substantial relationship test is not satisfied, courts have still entertained motions to disqualify attorneys who switch sides after a beauty contest based on the general appearance of impropriety. *B.F. Goodrich Company v. Formosa Plastics Corporation*, 638 F. Supp. 1050 (S.D. Tex. 1986). However, "California has never had a rule requiring that attorneys avoid the appearance of impropriety, and has expressly refused to adopt such a rule." *In re Mortgage & Realty Trust*, 195 B. R. 740 (1996). See also *Gregori v. Bank of America*, 207 Cal. App. 3d 291, 305-308, (1989) (appearance of impropriety by itself does not compel disqualification, but is a factor).

Recent Court Decisions. Significant spotlight has been placed on two unrelated cases involving motions to disqualify law firms that switched sides after participating in beauty contests — par-

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ticularly since the facts in both cases were similar, but the outcomes were not. See *Bridge Products, Inc. v. Quantum Chemical Corp.*, No. 88-C-10734, 1990 WL 70857 (N.D. Ill.); and *B.F. Goodrich Company v. Formosa Plastics Corp.*, 638 F. Supp. 1050 (S.D. Tex. 1986).

In *Bridge*, plaintiff Bridge interviewed four Chicago area firms, including Sidley & Austin. Bridge disclosed confidential information to Sidley, including its trial strategy, weaknesses, and bottom-line settlement figures. Bridge ultimately hired another firm. Defendant Quantum, however, ended up hiring Sidley. The court granted Bridge's motion to disqualify Sidley, and admonished Sidley for failing to caution Bridge not to disclose confidential information during the beauty contest. The *Bridge* court said:

"...it was Sidley that was responsible for making it clear to Bridge that the initial meeting was purely preliminary and that confidences would not necessarily be protected....Sidley did not have Bridge sign a conflicts waiver...[or] indicate whether Bridge would be billed for the meeting; such knowledge would also have made Bridge more wary of making indiscriminate disclosures [of confidential information]."

Id. at 4.

In *Goodrich*, plaintiff Goodrich moved to disqualify defendant Formosa's attorney, which was one of five that Goodrich had previously consulted, but never retained for its suit against Formosa. Goodrich (like Bridge) shared its trial strategy, and the strengths and weaknesses of its case during the beauty contest. The court, however, strangely denied Goodrich's disqualification motion by finding that the substantial relationship test was not satisfied, even though Formosa's attorney had "switched sides" in the same litigation. The substantial relationship test would have created a presumption that Goodrich shared confidential information during the beauty contest interview. Having failed to satisfy the substantial relationship test, Goodrich was left with the more onerous burden of proving (which it failed to do) that Formosa's attorneys actually received confidential information. Business developers should not take too much solace in the *Goodrich* holding, however, since most commentators agree that the *Goodrich* outcome is the exception, whereas the *Bridge* holding is the rule.

Avoiding Disqualification. Notwithstanding the plethora of ethical pitfalls facing law firm beauty contestants, there are several prophylactic measures law firms can take to avoid the conflicts of interest that arise. The first line of defense for a law firm takes place before the beauty contest commences. Law firms should have in place a comprehensive conflicts check system that not only identifies present and former clients, but also identifies individuals and companies that have interviewed (but not retained) the firm for representation. Most law firms lack a conflicts system that identifies the latter. This definitely creates problems at with beauty contests at large firms, since attorneys do not know if their colleagues have ever participated in a beauty contest with the adversary of a new firm client. In other words, the firm's left hand not knowing what its right hand is doing is exacerbated at large firms — particularly those with multiple offices. Hence, having attorneys enter into a computerized conflicts system the prospective clients with whom they have consulted, helps identify potential conflicts before they arise.

Ideally, the best defense to a disqualification motion would be an iron-clad waiver agreement obtained from the prospective client before the beauty contest. Although it may seem impractical to begin your sales pitch with "Dear prospective client, please be advised that any confidential information you share may later be used against you," the most effective insurance against future disqualification is to have the prospective client waive the potential future conflicts. CRPC 3-310(E). Law firms should have boilerplate waiver agreements for prospective clients to sign *before* the beauty contest begins. While many attorneys are only focused on winning the beauty contest, the waiver agreement can act as a

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Managing Joint Clients: Protecting Everyone's Interests

There are often very good reasons for an attorney to represent more than one client in a matter. Where clients' interests are aligned — and sometimes even if they are not perfectly aligned — having one lawyer represent all of them is usually more efficient and economical. But whenever a lawyer undertakes the representation of multiple clients in a matter, the lawyer must protect each client's individual interests. In addition, the lawyer should take care to minimize the lawyer's own risks, such as exposure to claims of conflicts of interest and claims of malpractice. Rather than focusing on any one jurisdiction's ethical rules, this article takes a common sense approach and advocates a conservative course designed to maximize protection for the lawyer.

Potential Problems When Representing Multiple Clients

Each time a lawyer represents multiple clients in a matter, the lawyer should consider the following issues:

- Do all of the clients want to be kept equally informed about the matter?
- Who is supposed to give the lawyer instructions about how to proceed?
- What does the lawyer do if members of the group disagree about a particular issue?
- What if one client asks the lawyer to keep confidential some piece of information about the matter?
- What happens if an expected — or worse, unexpected — conflict of interest arises after the representation has begun?
- What if one or more of the clients decide to split off and hire separate counsel?
- What happens if the clients disagree about settlement demands (or offers) after the representation is underway?
- Who is going to pay the lawyer's fees?

Have a Written Representation and Fee Agreement

Many states require lawyers to have written representation and fee agreements, at least in certain situations. But in this litigious day and age, lawyers who represent multiple clients in a matter should, as a matter of self-protection, have a written representation and fee agreement signed by each of the clients, whether or not the law requires one. In the joint-client situation, a representation agreement can lay out the ground rules by which the lawyer and the clients will be governed, help prevent misunderstandings and serve as a "rule book" should disagreements arise. A representation agreement will also impress upon your clients the seriousness of what they are asking you to do. Ideally, the representation agreement should address each of the subjects in this article.

Establish Clear Lines of Communication

An attorney has an ethical obligation to keep a client informed about the status of the matter the attorney is handling, and to give the client sufficient explanations to permit the client to make informed decisions regarding the representation. Yet multiple clients often have differing levels of interest in the subject



Pamela Phillips

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matter of the representation. Quite often, there is a "leader" who appears to be in charge, while the rest stay in the background. Sometimes, members of a group will tell the lawyer, "Don't bother to send me all of your letters, drafts of documents, etc. I trust [Mr. X] to take care of this for me." In other circumstances, an attorney might be asked to represent a group of clients without meeting all of the members of the group.

In joint-client representations, an attorney needs to clarify lines of communications. If you receive instructions from any member of the group not to send them copies of all of your communications with the others, document that in writing. In addition, if someone else takes responsibility for keeping the group informed, memorialize that in writing. Make sure to explain the communication ground rules to everyone in the group, and do it in writing.



Phyllis A. Jaudes

Specify From Whom You Take Your Instructions

Envision yourself, six months into the representation, trying to decide a major issue and every single member of the group has a different opinion about how you should proceed. Such differences of opinion might amount

to a conflict of interest that needs to be dealt with in accordance with the rules governing conflicts. But that is not necessarily so, and if it is not, whose instructions do you follow? Wherever possible, describe this possible scenario to your group of clients at the outset, explain the difficulties that such a logjam could create and then get the group to agree upon a decisionmaking mechanism. Specify who has the power to break deadlocks and how that person or persons should do so in a fair manner. Memorialize this in writing, preferably in your representation agreement.

Explain The Rules of Privilege and Confidentiality

It is a good practice to include a paragraph in your representation agreement explaining what the attorney-client privilege is, how it works and how its protection is lost if the client does not honor it. Joint clients may not understand that their discussions with each other, outside your presence, may not be privileged. You may also want to explain the joint-client exception to the attorney-client privilege — that is, should any one of them end up in litigation against the others on the subject of the representation, then none of them will be able to claim the privilege as to their communications with you on the subject of the joint representation.

Confidentiality is another issue you should discuss up front. Most clients have a general understanding that what they tell their attorney will remain confidential. But the rule is different when there are multiple clients in a single matter — what one client tells you about the matter is normally "fair game" for disclosure to all of the other clients on that matter. (Obviously, an attorney has discretion as to what is worth disclosing and what is not, and can take individual personalities into account. For example, the attorney for multiple clients can use common sense in handling clients who "spout off," saying things that they do not really mean or later retract.)

You can use your representation agreement to help multiple clients understand the rules you will follow about confidences. Explain that you must be free, subject to the exercise of your discretion, to disclose to all of them what any one of them tells you about the matter on which you are representing all of them.

Identify and Resolve Conflicts of Interest

Identify conflicts. Lawyers are required to spot and resolve *actual* conflicts among multiple clients whenever they become apparent. But at the outset, lawyers should also explore whether there are any *potential* conflicts, and those can be harder to spot.

You can bring potential or actual problems to the surface by asking broad, open-ended questions: What are the clients' goals? What are their resources? Are they aware of any disagreements among themselves about how the matter should be handled, or about who is responsible for the situation in which they find themselves? Do any of them feel that they have claims against any of the others, or that they might have claims depending on how things develop? How and when would they like to resolve those actual or potential disputes? Are they willing to defer resolving those disputes until the current matter is resolved? Have any of them consulted with, or retained, another lawyer to advise them on the matter at hand? Do any of them have concerns about sharing a single lawyer and, if so, what are those concerns?

As you probe, listen for signs of discord, domination or reservations and then follow up as appropriate. In addition, explain the pros and cons of joint representation and the fiduciary duties that govern the lawyer's behavior — such as the duty of undivided loyalty.

Resolve conflicts. Once you have identified any actual or potential conflicts, resolve them. Do not assume that they will work out. Do not leave it to the parties to work them out and then forget to ask them what resolution they reached. Make sure that you understand what the resolution is. For example, have they agreed that there really is no dispute after all? Have they agreed that there is a dispute, but that they will solve it by an indemnification agreement, or defer its resolution until later? Are you going to have a role in the indemnification process or in the deferred-resolution process? Do the clients understand that they may, or may have to, hire other counsel to handle any disputes between them? In certain circumstances, you may want to keep your distance from the dispute and refer them to separate counsel. Case law allows your participation in such disputes with appropriate disclosures and consents, but it is advisable to spell this out in advance in writing.

Document the conflict and its resolution. Clients have amazingly short memories when it comes to conflicts. The only practical protection an attorney has is to document what has been discussed and how the conflict has been resolved. (This is especially important if you have not met with all of the clients to discuss conflicts.) Even if not required, you may want to ask the client to sign the document signifying the client's consent to go forward with the representation notwithstanding any conflicts.

Plan Ahead For Future Disagreements

Even harmonious groups of clients can break apart unexpectedly. This can happen due to a conflict of interest, a personality dispute, a disparity in resources or other reasons that could not have been anticipated. If joint clients split up two or three years into the representation, and you have not specified what will happen if this occurs, problems can arise. For example, a departing client could challenge your right to continue to represent the remainder of the group. In this situation, you could risk disqualification and the other clients could experience disruption of their representation, as well as the unanticipated expense of having to educate new counsel.

In many jurisdictions, including California, you can remain in the matter even if some of the clients fire you or you fire them, particularly if you have advance client consent. With appropriate consent, you can even be adverse to the now-former client in the same matter.

It is a good idea to specify up front, in the representation agree-

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ment, what will happen if one or more clients leave the group for any reason. The agreement can specify which of the clients will remain as clients, or can simply say "those who choose to continue the representation" may do so.

Establish Payment Responsibilities

Your representation agreement should specify who is responsible for paying your fees and costs. Is it the entire group or only some of the clients? If one agrees to pay all of the fees and costs, but fails to, do you have any remedy against the others? None of this should be left to happenstance — discuss the arrangements and spell them out clearly in the representation agreement.

If you have any fee arrangement other than one in which each client pays its own pro rata share, use your representation agreement to explain the arrangement and ask each client to consent to it. Many jurisdictions specify that the attorney must not let the paying party influence or interfere with the attorney's independent judgment in the matter or the attorney's relationship with the actual clients. The attorney is, of course, obligated to protect the clients' confidences from third-party payors who are not themselves clients.

Watch Out For Conflicts at Settlement

Even when all of your joint clients get along during most of the representation, new problems may arise when the end is in sight — at the settlement stage. Various ethical issues come into play here. First, each state has rules requiring lawyers to inform their clients about settlement demands and offers; some jurisdictions make a distinction between oral and written offers. The lawyer representing multiple clients should make certain that all of the clients are promptly informed about settlement demands and offers, whether by telling them directly or through their agreed-upon intermediary.

Second, aggregate settlement offers can pit the joint clients' interests against each other. In many states, including California, a lawyer representing multiple clients in a matter may not enter into an aggregate settlement without all of the clients' written consent. If disputes arise at that point, then the attorney may need to step back from advising the clients and, instead, recommend that the clients engage in some separate process to resolve the dispute (such as mediation or arbitration). The lawyer may also need to recommend that the clients obtain separate counsel to advise them on the settlement.

Representing multiple clients in a single matter requires a great deal of attention to issues other than the merits of the matter. But with some careful planning up front, the lawyer can steer a course around the obstacles so that joint representation works well for the clients, and for the lawyer representing them.

— Pamela Phillips and Phyllis A. Jaudes

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Cases of Note

Insurance

An insurer cannot be required to pay punitive damages after it fails to settle a case within policy limits. *PPG Industries v. Transamerica Insurance Co.* 20 Cal.4th 310 (1999). A divided state Supreme Court held on May 10, 1999 that an insurance company sued for bad faith failure to settle an auto accident case could not be forced to pay an award of \$1 million in punitive damages. The Court held that insurer's breach of the covenant of good faith and fair dealing in failing to accept a settlement offer within policy limits was not the proximate cause of the punitive damage award, which resulted from insured's own intentional misconduct in failing to follow industry safety standards in installing windshields. Consequently, punitive damages were not recoverable from insurer.

The Court concluded that three policy considerations "strongly militate against allowing the insured, the morally culpable wrongdoer in the third party lawsuit, to shift to its insurance company the obligation to pay punitive damages resulting from the insured's egregious misconduct in that lawsuit.":

First, there is the policy of not allowing liability for intentional wrongdoing to be offset or reduced by the negligence of another....

Second, the purposes of punitive damages,...are to punish the defendant and to deter future misconduct by making an example of the defendant.... If we were to allow the intentional wrongdoer, here the insured, to shift responsibility for its morally culpable behavior to the insurance company, which surely will pass to the public its higher cost of doing business, we would defeat the public policies of punishing the intentional wrongdoer for its own outrageous conduct and deterring it and others from engaging in such conduct in the future....

Third, our public policy prohibits indemnification for punitive damages.

In *Safeco Ins. Co. v. Superior Court*, 1999 Daily Journal D.A.R. 3847 (Court of Appeal April 8, 1999), Safeco Insurance Company and Mercury Casualty Company were jointly providing the defense for their insured. The insured entered into a stipulated judgment providing for payment by Mercury Casualty Company and an assignment of rights by the insured against Safeco Insurance Company. Safeco Insurance Company did not consent to the stipulated judgment. In a subsequent direct action against Safeco Insurance Company, the insurer challenged the validity of the stipulated judgment. The court of appeal held that the stipulated judgment was not binding on Safeco Insurance Company and did not qualify as a judgment for purposes of recovery under Insurance Code section 11580 because Safeco Insurance Company's consent to the judgment was not obtained.

In *Agricultural Ins. Co. v. Superior Court*, 1999 Daily Journal D.A.R. 1925 (Court of Appeal February 26, 1999), the Second Appellate District held that an insurer has no claim against its insured in tort for breach of the covenant of good faith and fair dealing.

In *Spray, Gould, & Bowers v. Associated International Ins. Co.*, 1999 Daily Journal D.A.R. 4205 (Court of Appeal May 4, 1999), the Second Appellate District held that an insurer's failure to notify its insured of the contractual limitation period contained in the insurance policy (as provided in California Administrative Code § 2695.4(a)) could provide a basis for equitable estoppel rise against the insurer's assertion of a contract limitation defense.



Vivian R. Bloomberg

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Expert Testimony

In *Bonds v. Roy*, 1999 Daily Journal D.A.R. 2947 (Cal. Supreme Court March 29, 1999), the California Supreme Court held that an expert witness may be precluded from testifying at trial on a subject which was not previously described in an expert witness declaration.

In *Kumho Tire Co., Ltd. v. Carmichael*, 1999 Daily Journal D.A.R. 2645 (U.S. Supreme Court March 23, 1999), the U.S. Supreme Court held that the general holding of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), setting forth the trial judge's general "gatekeeping" obligation, applies not only to testimony based on scientific knowledge, but also to testimony based on technical and other specialized knowledge and that the trial court has the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination.



Denise M. Parga

Removal to Federal Court

In *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 1999 Daily Journal D.A.R. 3237 (U.S. Supreme Court April 5, 1999), the U.S. Supreme Court held that a named defendant's time to remove an action to federal court under 28 U.S.S. section 1441 is triggered by formal service of the summons and complaint and not receipt of courtesy copy of complaint prior to formal service.

Civil Procedure

In *Guzman v. Visalia Community Bank*, 1999 Daily Journal D.A.R. 3273 (Court of Appeal April 5, 1999), the Fifth Circuit Court of Appeal held that general contract principles should not apply to the determination of whether a section 998 offer has been accepted or rejected. Therefore, the court held that in the absence of an unequivocal rejection of a section 998 offer, the offer may be accepted by the offer during the statutory period unless the offer has been revoked by the offeror. Accordingly, the court reversed the trial court's denial of plaintiff's motion to enforce a section 998 offer to compromise which plaintiff accepted after notice of an adverse tentative ruling on summary judgment.

— Denise M. Parga & Vivian R. Bloomberg

Letter from the President

Continued from page 1

this is your chapter, I thought you also deserved a report on how we are doing.

With the completion of the June program, we will have organized and presented twenty-five hours of education, including the Annual Seminar, since this time last year. To my knowledge this is the most we have ever done in one year. For the first time, we presented two luncheon programs on the Westside close to the Santa Monica Courthouse, and most of the judges in that courthouse attended. The twenty-fifth Annual Seminar, with its tribute to past presidents, was a very successful reminder of why this organization is different from other bar associations. ABTL Report remains one of our most attractive member benefits, and this is the third issue in volume 21. Our Courts committee provided extensive comments to the Judicial Council Committee that is

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rejected *Biljac's* rationale and created a middle-road approach. It concluded that the trial court's silence on certain objections had to be construed as an implied *overruling* of them:

Cap Cities appears to argue, contrary to the clear holding of our Supreme Court, that this court may rule on those of its objections which the trial court did not expressly sustain. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1, 863 P.2d 207.) The trial court's statement that it had considered only admissible evidence was not an implied ruling sustaining unspecified evidentiary objections. On the contrary, *Ann M.*, *supra*, teaches that we must take this statement as an implied overruling of any objection not specifically sustained. Thus we must deem the substance of paragraphs 2 through 4 of Laird's declaration, as to which the trial court did not expressly rule, admissible and may not consider Cap Cities' renewed objections thereto.

Although *Laird* seems more in line with *Ann M.* and the many other decisions cited above — and directly in conflict with *Biljac* and *Gatton* — it creates problems of its own. An "implied overruling" is a ruling nonetheless. If the trial court *should* have sustained an objection, then a party should be able to challenge the "implied overruling" on appeal. That result is not consistent with the *waiver* of the objection required by *Ann M.*

Cap Cities was lucky in *Laird* — despite the language quoted above, the Court of Appeal ultimately affirmed Cap Cities' summary judgment. But *Laird* remains an unmistakable warning to law and motion practitioners who fail to secure evidentiary rulings: They risk reversal in the later appeal when the reviewing court considers otherwise inadmissible evidence.

What Counsel Can Do

Smart evidence. The place to start avoiding this problem isn't actually with the objections, but with the evidence. If lawyers paid more attention to the rules of evidence in framing declarations, their opponents would be less tempted to object at every turn, and the whole process would become more focused and meaningful.

Smart objections. Our example above is probably not too far from the truth: A junior lawyer assembles the objections, which a senior lawyer then hurriedly reviews for the single purpose of being sure the junior lawyer covered everything. Given the junior lawyer's likely fear of leaving anything to chance, he or she has probably been extravagantly over-inclusive. But drafting intelligent objections is an art; it takes an experienced lawyer's hand, or at least close supervision, not only to make the judgment of what is worth objecting to but also to make the right objections. Shed the attitude that it can't hurt to be over-inclusive; it can be. One reason you don't object to every objectionable piece of evidence at trial is that a lot of it just doesn't matter. Don't do it in law and motion matters either.

Request a ruling. The judge may not welcome this, but if you've made smart objections you have a lot more credibility and you've made a lot less work for the judge — who is also more likely to have considered your objections already. Be sure there's a reporter, and be sure your request for a ruling gets on the record. If the judge refuses, explain your reasons and cite *Ann M.* At the very least you'll make a record that may persuade the Court of Appeal to excuse the absence of a ruling.

Don't rely on Biljac. *Biljac* can't be squared with controlling Supreme Court authority or with the summary judgment statute. The fact that several cases have followed *Biljac* doesn't mean the court of appeal will do it in your case. The correct answer to the question posed above — "I'm only going to consider admissible evidence. Is that good enough for you?" — is this: "Your honor, I'm concerned that the court of appeal may not consider that an adequate ruling." Again, you won't make the judge happy and you

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Unfair Competition

In *Cel-Tech Communications, Inc. et al. v. Los Angeles Cellular Telephone Company*, 1999 Daily Journal D.A.R. 3360 (Cal. Supreme Court, April 8, 1999), the California Supreme Court established a new definition of "unfair" competition under Business & Professions Code section 17200 — California's unfair competition statute. Section 17200 makes actionable "any unlawful, unfair or fraudulent business act or practice." Acknowledging the need "for California businesses to know, to a reasonable certainty, what conduct California law prohibits and what it permits," the Supreme Court crafted the following test when a plaintiff claims injury under section 17200 from the "unfair" act of a direct competitor: whether there is "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one



Michael K. Grace

of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." In dissent, Justice Kennard expresses doubt that this new definition will provide the desired certainty, and derides the majority's test as "antitrust lite." The Supreme Court also held, in this challenge by cellular telephone sellers to L.A. Cellular's practice of selling telephones below cost to boost its sales of cellular service, that Business & Professions Code section 17043 (prohibiting below cost sales) and section 17044 (prohibiting loss leaders) were not

violated because L.A. Cellular did not act with the purpose of injuring competitors or destroying competition in the market for cellular telephone sales.

Securities

In *In re Advanced Tissue Sciences Securities Litigation*, 1999 Daily Journal D.A.R. 2929 (S.D. Cal. March 30, 1999), the United States District Court for the Southern District of California held that the most adequate plaintiff in a class action securities suit under the Private Securities Litigation Reform Act ("PSLRA") is presumed to be the plaintiff with the largest financial interest. The PSLRA requires the court in a securities class action to appoint as lead plaintiff "the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members." The PSLRA creates a presumption that the most adequate plaintiff is the person or group who meets three requirements, including having "the largest financial interest in the relief sought by the class." Two groups were competing for appointment as the lead plaintiff, one with a collective loss of \$4,505,950, and the other with a collective loss of \$3,281,173. The group with the smaller loss argued that the difference in the two damage amounts was insignificant and urged the court to exercise its equitable powers to create co-lead plaintiffs. Finding the language of the PSLRA unambiguous, the court rejected the appointment of co-lead plaintiffs, finding that the group with the largest financial interest was presumptively the most adequate plaintiff.

Torts - Invasion of Privacy

In *Wilson v. Layne*, 1999 U.S. Lexis 3633 (U.S. Supreme Court, May 24, 1999), the Court unanimously held that a "media ride along" by a Washington Post reporter and photographer with marshals executing an arrest warrant at a suspect's home violated the residents' right of privacy. The reporter and photographer

were present in the home but had no role in executing the warrant. The photographs taken were never published.

The officers had the authority pursuant to the warrant to enter the suspect's home to execute the warrant of arrest. "But it does not necessarily follow that they were entitled to bring a newspaper reporter and a photographer with them...[as] the Fourth Amendment does require that police actions in execution of a warrant be related to the objectives of the authorized intrusion."

The respondent officers who executed the warrant argued unsuccessfully that the presence of the reporter and photographer served several legitimate law enforcement purposes: publicizing efforts to combat crime, informing the general public about the administration of criminal justice, preserving evidence, and even monitoring "quality control" over police action. The Court rejected each of these arguments, because the reporter and photographer were mere onlookers with no involvement in the apprehension of the suspect. The Court also expressly rejected the contention that officers should have "reasonable discretion" to invite members of the media where it would further the "law enforcement mission" of the officers. "We hold that it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant."



Jeffrey W. Kramer

The Court nevertheless voted eight to one to affirm the dismissal of the action against the officers on the ground that the officers were entitled to a qualified immunity, because the right violated was not clearly established at the time of the violation and "it was not unreasonable for a police officer in April 1992 to have believed that bringing media observers along during the execution of an arrest warrant (even in a home) was lawful."

In *Hanlon v. Berger*, 1999 U.S. Lexis 3634 (U.S. Supreme Court, May 24, 1999) another "media ride along" case decided at the same time, the Supreme Court vacated the Ninth Circuit decision holding that federal officers who had invited the media to record the exercise of a search warrant at the home of a suspect were not entitled to a qualified immunity.

In *Simtel Communications et al. v. National Broadcasting Company*, 1999 Daily Journal D.A.R. 4103 (Court of Appeal, April 30, 1999), the Court of Appeal for the Second Appellate District found that secretly videotaping a business meeting on the outdoor patio of a public restaurant was not an invasion of privacy. *Dateline NBC* was investigating a growing practice of charging for services on so-called "toll-free" 800 lines. As part of this investigation, NBC's producers responded to plaintiff Simtel's national advertisement and arranged to meet with Simtel representatives at a restaurant in Malibu. The lunch meeting was videotaped with hidden cameras and portions of the videotape were shown in a television broadcast. The Court of Appeal affirmed summary judgment in favor of NBC, finding there was no intrusion into a private place or matter and no objectively reasonable expectation of privacy. The court noted that the videotaped meeting took place while waiters stood at the table on a crowded patio within close proximity to other tables, the four NBC representatives were strangers to the plaintiffs, and the discussion involved business information plaintiffs admitted sharing with hundreds of other potential investors.

— Michael K. Grace and Jeffrey W. Kramer

probably won't persuade the judge to rule, but by this point you've probably done all you can at oral argument. Of course, if you've done your job well by filing narrowly focused objections and you understand the case well enough to know what really matters, another response to the judge's question could be, "Your honor, I'd like a ruling on all of our objections, but I'm most concerned that the record be clear with respect to the October 15 letter."

Follow up. If you still haven't yet gotten what you feel you need, try to have the statement of reasons, Cal. Code Civ. Proc. § 437c(g), include rulings on the objections. File objections to the form of that order if your opposing counsel refuses to include rulings. File a supplemental pleading that reminds the court to rule on the objections, or write a letter to the court (although sometimes letters like this don't get filed). There are appellate justices who faithfully apply *Ann M.* but who also believe that if counsel requests a ruling on evidentiary objections at the summary judgment hearing or in writing afterwards, the objections are preserved.

What Should Judges Do?

Trial judges universally agree that lengthy sets of evidentiary objections are rarely necessary and that the parties who file them create an impossible situation, particularly in busy law and motion courts. Experienced and dedicated judges, juggling heavy calendars while they try to find a modicum of time to be a parent or a spouse, will candidly admit that they simply do not have the time or even the strength to rule on hundreds of objections. These are the sincere expressions of many judges and they reflect a real problem.

But there are several things judges need to keep in mind.

1. Most importantly, there is no more fundamental duty than the duty to rule in an appropriate manner when litigants have submitted matters for disposition. Litigants come to a judge for a ruling; they are not looking for an opportunity to have summary judgment reversed two or three years later because of a failure to rule on objections. Code of Civil Procedure section 170 states, "A judge has a duty to decide any proceeding in which he or she is not disqualified." Similarly, canon 3(B)(1) of the California Code of Judicial Ethics states, "A judge shall...decide all matters assigned to the judge except those in which he or she is disqualified." Among the matters submitted to a judge for decision in summary judgment litigation are questions of admissibility of evidence. Cal. Code Civ. Proc. § 473c(b) & (d); Cal. R. Ct. 343-45. In the final analysis, every evidentiary objection triggers a duty premised on the judicial obligation to see that the laws of the State of California are faithfully executed. Discharging this obligation may be wearying for the trial judge, but it is nonetheless something that must be done.

The failure to rule on specific objections can end up costing the parties tens of thousands of dollars in legal expenses just to have a reversal of a summary judgment that would have been affirmed had evidentiary rulings been made. Putting the parties through such a needless exercise is antithetical to a fundamental purpose of a judicial system, which is to resolve rather than prolong disputes.

2. Many judges believe that the duty to rule does not extend to evidence that does not affect the ultimate decision. For example, if two sentences in a declaration opposing summary judgment are inadmissible but the decision to grant summary judgment is based entirely on discovery admissions, the declaration doesn't need to figure in the decision at all. So why rule? There is a simple, solid reason: The Court of Appeal may not see the case the same way. Suppose it concludes that the discovery admissions were not, in fact, sufficient to warrant summary judgment. In that case, the two apparently irrelevant sentences in the declaration

might end up becoming the turning point for the decision — and without a ruling on the objection, they could compel reversal despite their inadmissibility. This kind of situation presents issues of discretion and degree. While truly irrelevant evidence should not trigger the duty to rule on objections, the judge must have a high degree of confidence about the evidence's relevance before subjecting the parties to the risks of declining to rule.

3. Since the court can direct the prevailing party to prepare a proposed statement of grounds for the ruling under Code of Civil Procedure section 437c(g), the court can also direct that party to include appropriate evidentiary rulings. This is particularly true where the court has stated its rulings from the bench, and it is essential if there was no court reporter.

4. The waiver-of-objections rule is not holy writ. *Ann M.* correctly states the law that has developed over the last 125 years, but no historical imperative requires its continuance. Judges (and lawyers, too) can urge the Judicial Council to adopt responsible amendments to the California Rules of Court that can reduce the risk of reversals based merely on the trial judge's reliance on *Biljac* or failure to rule on objections. For example, it would make sense to amend the California Rules of Court to permit an appellate court to remand the cause for a short period, say 30 days, to allow the trial court to rule on crucial evidentiary objections; perhaps the objections could be deemed sustained (or overruled) if the trial court failed to act within that limited time. Another possible rule change would be to permit appellate review of unrulied-upon objections in the summary judgment context where the evidence would be inadmissible under any possible state of the facts. For example, if a declaration contains evidence that is so undeniably hearsay that it would be an abuse of discretion to admit it over objection, then the appellate court should be able to deem the evidence excluded even though the trial court failed to rule on the objection.

Another possibility would be to create a presumption that evidentiary objections are deemed to have been granted if there is no ruling or if the trial court follows the *Biljac* approach (*i.e.*, stating that it will only consider admissible evidence). Such a presumption might be at odds with what the trial court actually did; and, like all presumptions, it would substitute an assumption about what occurred for what actually may have been the judge's view of the evidentiary objections. But this is not really different from what *Ann M.* (and the body of law of which it is a part) does: *Ann M.* simply creates the opposite presumption, that the trial court did not exclude challenged evidence. Judicial silence in the face of objections and the application of waiver rules effectively require the Court of Appeal to presume the trial court considered the challenged evidence when it granted the summary judgment motion. But in most cases, a rule that presumed the objections were *sustained* would be more realistic, because it could avoid the a reversal based on evidence that the trial judge in fact disregarded because it was inadmissible.

Another potential solution would be to limit the number of evidentiary objections without a showing of good cause. This is not as unreasonable as it may seem at first blush. Within the past 15 years, local court rules and later the California Rules of Court set limits on the number of pages in summary judgment points and authorities. Cal. R. Ct. 313(d). Fifteen years ago, no such rules existed and the suggestion of page limits was met with considerable disdain and skepticism. Yet page limits on points and authorities are now an accepted fact of litigation life. In a similar vein, setting a limit on the number of objections will force lawyers to focus their objections on the crucial evidence, and lawyers will no longer feel obligated to object to everything. And, most crucial, law and motion judges will not be overwhelmed with an unreasonably extensive number of objections.

All of these proposals have problems and no doubt there are other sensible approaches to the inability or failure of law and

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motion judges to rule on evidentiary objections in summary judgment litigation. However, most judges and sophisticated litigators agree that the present system — which puts what some believe are impossible demands on the judiciary and creates the risk of unnecessary reversals because of inadvertent or deliberate refusals to rule on evidentiary objections — could benefit from reasonable modification by the Judicial Council. Some of the rule changes suggested in this article, particularly the concept of an appellate presumption that objections were sustained, are problematic; but they can serve as a springboard for an intelligent Judicial Council discussion aimed at making the *Ann M.* approach more helpful to the truth determination process. Likewise, both judges and lawyers can recommend that the Legislature amend Code of Civil Procedure section 437c to address this waiver problem.

One final comment is in order concerning potential changes in the law in this area. Summary judgment motions aren't the same thing as a trial. Objections at trial are usually made on the spur of the moment, and a lawyer may interpose an objection that moments later appears not to have been such a good idea. Sometimes, the argument of the non-objecting attorney or a question by the trial judge makes clear there was no merit to the objection. By contrast, evidentiary objections in the summary judgment context are almost always in writing pursuant to rule 345 of the California Rules of Court. Although many objections are not well taken, they are the result of preparation and — despite frequent appearances to the contrary — some thought. More to the point, the use of extensive evidentiary objections is a widespread practice. It is very difficult for a judge hearing motions to rule effectively on perhaps dozens of evidentiary objections, some of little consequence, in contrast to the typical single objection to a specific question during trial. Hence, it may make sense to have a different waiver rule for summary judgment litigation than for a trial. But such a salutary change must come from the Judicial Council or the Legislature. At this point, the decisional authority overwhelmingly requires waiver of an objection on appeal in the absence of a specific ruling.

Regardless of the solution to the current problem, the debate must begin now. Litigants in California courts are entitled to reasonable rules for insuring just rulings in summary judgment litigation now, not years from now.

How much does all of this matter? Our scenarios are admittedly worst-case. At least in the reported decisions, application of *Ann M.* rarely seems to have affected the outcome. But this small minority of decisions is no means a representative sample of appellate outcomes. In the vast body of unpublished decisions, *Ann M.* can and often does control the result.

This untoward result is relatively easy to avoid. If you do your job going into the motion, it's a lot more likely that the judge will do his or her job coming out.

— Hon. Paul Turner and Robin Meadow

The Ugly Side of Beauty Contests

Continued from page 5

form of insurance — particularly against malicious litigants whose only focus is to secure future disqualification.

The contents of the waiver agreement, at the very least, should advise the prospective client that: (a) the meeting is merely preliminary and the prospective client will not disclose any confidential information; (b) if the attorney is not retained, any confidential information intentionally or inadvertently disclosed will not be protected and may be used in future litigation adverse to the prospective client; and (c) if the attorney is not retained, the prospective client waives the right to disqualify the attorney from representing any adverse party in the same or similar litigation.

Undoubtedly, some attorneys who request a prospective client

to sign a waiver agreement will be at a disadvantage before the beauty contest begins. Accordingly, attorneys will have to make the waiver agreement more palatable by informing prospective clients that it is also a device designed to protect the prospective client. This can be accomplished by noting that the waiver agreement also safeguards the prospective client's confidential information by requesting that it not be disclosed unless or until the attorney is retained. While some prospective clients will reject your firm's participation in the beauty contest if you first demand a waiver agreement, the prospective client who is considering hiring you in good faith should be less likely to object to a waiver agreement. As a final good measure, the unsuccessful law firm beauty contestant who is later hired by an adversary must also disclose to the new client the firm's previous meeting with the other party. CRPC 3-310(B). Attorneys failing to make said disclosure can be exposed to both malpractice and disciplinary claims.

Attorneys uncomfortable with requesting a waiver agreement from prospective clients should at least verbally admonish the prospective clients not to share any confidential information unless and until they are retained. After the beauty contest, the attorney can send a thank you letter to the prospective client that memorializes: (a) the verbal admonishments made before the meeting; and (b) that the attorney has learned no confidential information from the prospective client. Of course, confirming letters are not as effective as a waiver agreement.

It should be noted that waiver agreements have their limitations and may be declared invalid under certain circumstances. In this regard, attorneys should remember that the most important precaution one can take in a beauty contest is to avoid ever receiving any confidential information. If an attorney *actually* receives confidential information from a prospective client, a waiver agreement will be deemed invalid. The rationale is that the waiver agreement lacks "informed consent" because the prospective client cannot consent to an actual breach of confidence. *Elliott v. McFarland Unified School Dist.*, 165 Cal. App. 3d 562, 573 (1985). Thus, a waiver agreement can only rebut the presumption that confidential information was shared during the beauty contest that bears a "substantial relationship" with the new representation. *Id.* Even if a law firm secures a valid waiver agreement, the law firm may still run afoul of the obligation not to represent a client when a "previous relationship would substantially affect the member's representation." CRPC 3-310(B)(2)(b). In this regard, an attorney's duty to a former client may interfere with the new client's right to effective representation, not to mention expose the attorney to a potential malpractice claim.

Some law firms choose to erect the proverbial Chinese Wall around the tainted attorney as an effort to cure the conflict resulting from representation of a party adverse to a former client in substantially related litigation. However, courts have not readily accepted this as sufficient means to overcome disqualification. *Henriksen v. Great American Sav. & Loan*, 11 Cal. App. 4th 109, 114, (1992) (law firm vicariously disqualified notwithstanding ethical screening wall around attorney infected with former client's confidences).

Aside from waiver agreements, seasoned business developers rely on good discretion and common sense to avoid conflicts in beauty contests. However, business developers should take particular caution when entering beauty contests involving: (a) multiple opposing parties; (b) high-stakes litigation where both sides are consulting many firms; (c) unknown or cold-call prospective clients who will not sign a waiver agreement, but nonetheless wish to volunteer confidential information; (d) a prospective client that is adverse to a prized potential client your firm wishes to represent (*e.g.*, prospective Doe vs. Fortune 100 company); or (e) a prospective client that you do not have strong chance of acquiring. When entering such contests, the primary goal (aside from winning) is to ensure that no confidential information is dis-

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Letter from the President

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drafting a judicial Deskbook on Management of Complex Civil Litigation. Membership is up from last year, and the attendance at our dinner programs is increasing. We continue to receive strong support from both the federal and the state benches, participating in our programs, attending programs, and serving on our Board. Lastly, we remain financially sound.

All of the things discussed at the joint board meeting underscored how little time I had left as ABTL President. While we have accomplished quite a bit, I cannot help but think about other things I wanted to accomplish or improvements I would have liked to make on how we do what we do. Unfortunately, those tasks remain for my successors. Fortunately, tremendous officers follow me, and the incoming board is as strong and as committed to ABTL as any I have worked with over the years.

I have too many people to thank for their help over the past year to list them individually. Besides I would probably forget someone's name and be forever embarrassed. Of course, much of what we have done this year was done by the hardworking officers, board members and executive director who are listed on the last page of ABTL Report. The editors and contributors to ABTL Report fortunately are also listed in each edition, and they have continued its tradition of excellence under their guiding hands. However, those people are only the tip of the iceberg. Many, many more participated in our programs as panelist or as planners. Others worked on our committees. Countless former presidents and board members gave advice and encouragement. As you can see, the list goes on and on.

I will step down as President at the June meeting, but the hundreds of friendships that have developed during my years in the organization will continue. Like my predecessors, I expect to be at future meetings and seminars to see old friends and make new ones, and I will be forever grateful for the opportunity to serve as ABTL President for a year. Thank you.

— Richard J. Burdge, Jr.

The Ugly Side of Beauty Contests

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closed before retention, and more important, that this understanding is reduced to writing. Applying the forgoing efforts and discretion, law firms can better balance the risks of (a) choosing to receive confidential information from prospective clients in order to put on a good show at the contest, or (b) protecting the firm from future disqualification.

Sometimes law firms make the mistake of relaxing their conflict protection measures when a beauty contest manifests itself in unexpected forms. Tellingly, business developers should keep their guard up when participating in a prospective client's Request for Proposal ("RFP") — which is merely another form of the law firm beauty contest. RFPs, like traditional beauty contests, can also be fraught with peril. The prospective client at certain phases of the RFP evaluation may disclose confidential information for your firm to consider. Moreover, unsuccessful participation in the RFP can disqualify participating attorneys from representing new clients adverse to the company that issued the RFP. Law firms should therefore consider circulating a waiver agreement before responding to the RFP.

Despite the inherent ethical and business development dangers posed by beauty contests, many attorneys still fail to undertake any precautionary measures before entering beauty contests. Perhaps these attorneys are only focused on winning the beauty contest, and not on protecting against the theoretical risk of being disqualified in the future. However, in an era of eroding client loyalty, cost conscious clients, and clients desiring legal specialists, beauty contests are becoming more common — as is the risk of future disqualification. Remember that your former

client that never hired you may: (a) disqualify you from representing the adverse parties in the same litigation; and (b) conflict you out from representing a host of future potential clients who are adverse to your short-lived former client in substantially related matters.

It might appear that the beauty contest is powerful weaponry for the prospective client or in-house counsel who wishes to disqualify the best law firms in town from representing their adversaries. This is a dangerous tactic for prospective clients to employ, however, because if the participating law firm is not disqualified, then the prospective client's case may be compromised by the adversary's attorney's knowledge of disclosed confidences. One court noted this reality: "disqualifying all the lawyers interviewed by a company for prospective employment would itself undermine the public's confidence in the judicial process." *Goodrich*, 638 F. Supp. at 1054. Consequently, it behooves both the prospective clients and the attorneys who participate in beauty contests to avoid discussing confidential information during initial consultations, and to reduce this understanding to an agreement. The attorneys who do employ scrupulous protection measures before entering beauty contests are far less likely to face the prospect of losing twice: *i.e.*, the beauty contest and the subsequent new client.

— Craig E. Holden

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