

Letter from the President

In my last letter, I noted with chagrin that the recent enormous salary increases reveal some disturbing propensities in our society and the legal profession. In addition to the negative impact salary increases are likely to have on the composition of our judiciary and government agencies, young lawyers are likely to take the increases as a message from their professional mentors that the practice of law is about making money and nothing more.

No one would dispute that the legal profession offers its members extraordinary financial security. However, these days the notable absence of questions from interviewing law students about opportunities to do pro bono work at law firms and their intense focus on salaries indicate that they have heard the "money message" loud and clear.



Robert A. Shlachter

There is another message we might like to send young lawyers, one they may have heard in a legal ethics class or in the course of studying for the Professional Responsibility Exam. That message is that while the legal profession can be highly lucrative and very rewarding, it also entails certain responsibilities to the society which it exists to serve.

Verbal communication of messages is something at which we lawyers are especially adept; after all, that is what we do for a living. But, as the old saying goes: "Actions speak louder than words." Thus it may be time for us to re-examine our position on the issue of *mandatory pro bono services*. One reason to re-direct our attention to this question is for the benefit of our young colleagues. Another reason is that, as a nation, we have recently reduced our economic commitment to all social programs, including legal aid,¹ at a time when we must all be painfully aware that the numbers of poor, disenfranchised people living on our streets is growing. One of the arguments made in favor of the de-funding of social programs was that we had, through our "New Society Mentality," taken away from people any incentive to behave charitably. If this is true, then our awareness of this state of affairs should rekindle our charitable flames.

What follows is a review of the current legal status of mandatory pro bono programs, a summary of arguments opposing and supporting such programs, and some recommendations for a workable mandatory pro bono system of which we could all be proud.

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Discovery: New Rules For the Old Game

Of the 156 amendments, additions, or changes to the Code of Civil Procedure passed in 1986, probably the most significant is the New Discovery Act ("New Act"). It replaces all of the existing discovery statutes we have become so comfortable with. So it's time to teach us old dogs some new tricks as we prepare to cope with different rules of the game.

The New Act will not be entirely foreign. It blends California case law development with selected federal practices and procedures to create a new hybrid. Moreover, recent cleanup legislation (Assembly Bill 361) has substantially reduced many of the more dramatic changes, such as the much discussed limitations on the numbers of interrogatories and requests for admissions. There are now substantial loopholes to these restrictions.



Bernard LeSage

But even with these recent moderations, the New Act bears careful reading. The unwary litigator who ignores the new discovery law may not just be embarrassed, but may find himself paying a substantial sanction to boot.

Limits on Interrogatories

One of the more controversial changes was the limitation on interrogatories to just 35 — no subparts allowed. But new CCP Section 2030 has its loopholes. First, even the original New Act allowed an unlimited use of the Judicial Council's interrogatories form. (CCP Section 2030 (c).)

But the cleanup legislation allowed even a bigger way to evade the 35 cap. You can now still fire off those larger sets if you are prepared to attach to your interrogatories a declaration stating that the greater number of interrogatories are needed because, *inter alia*, "the complexity or the quantity of the existing and potential issues in the particular case..." (CCP Section 2030 (c)(2)(A).)

But don't get too cavalier. The New Act warns that the burden is on the declarant to establish the need for more than 35 if a motion to compel or if a protective order is sought. (CCP § 2030 subd. (c).)

To give further teeth to the interrogatory limitation provision, the court is required to impose sanctions against both the offending party and the attorney in the event of abuse. (CCP § 2030 subds. (e), (k), (l) and (m).)

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The ABA Code of Professional Responsibility ("ABA Code") adopted by the ABA in 1969 and subsequently adopted by almost all the states (not including California, which has its own Code of Professional Responsibility) sets forth, in Canon 2, a lawyer's obligation to assist the legal profession in fulfilling its duty to make legal counsel available.

Ethical Consideration 2-25 recognizes the need of the financially disadvantaged for legal services and provides that "[e]very lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged." Similarly, Canon 8 pronounces a lawyer's obligation to assist in improving the legal system. Ethical Consideration 8-3 provides that "[t]he fair administration of justice requires the availability of competent lawyers.

"Members of the public should be educated to recognize the existence of legal problems and the resultant need for legal services, and should be provided methods of intelligent selection of counsel. Those persons unable to pay for legal services should be provided needed services." Refusal to comply with this ethical consideration, however, does not subject the recalcitrant attorney to discipline.

In the late 1970's, the ten-member Kutak Commission of the ABA included in its draft of the Model Rules of Professional Conduct a mandatory pro bono requirement for all lawyers. However, the proposal met with such heated opposition that the Kutak Commission retreated from the mandatory language and included, instead, the more relaxed standard we now find in the Model Rules.

The ABA adopted the Model Rules in 1983. As of mid-1986, 15 states had adopted the Model Rules with some changes. The preamble of the Model Rules admonishes lawyers "to be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest."

Rule 6.1, "Pro Bono Publico Service," also expresses the policy explained in the preamble, although the comment notes that the Rule is not intended to be enforced through disciplinary process. The Rule simply provides that:

A lawyer should render public interest legal service.

A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

In 1976, legislation proposed by former Assemblyman John Knox here in California required lawyers to give 40 hours a year in pro bono services. This proposal met with no greater success than its Kutak counterpart. The State Bar essentially lobbied it to defeat. In fact, the ABTL probably constituted part of this lobby. In 1976, the ABTL created a committee to investigate and report on the issue of the duty of attorneys to give pro bono services. The committee opposed any mandatory pro bono program and suggested that the ABTL make this position known to the Governor, the Legislature and the State Bar Board of Governors.

The ABTL committee did, however, recommend that the ABTL establish a permanent pro bono committee which would interface with any organizations directly involved with

pro bono programs. It also recommended that the ABTL continue its efforts to reform the legal system by "de-lawyering" the process of dispute resolution and improving the methods of delivery of legal services."

The California Rules of Professional Conduct "encourage" but do not require lawyers to provide pro bono services (See Rule 2-102, Legal Services Programs). The Business & Professional Code, however, comes close to mandating pro bono services: "It is the duty of an attorney to do all of the following: Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed." B&P Code §6068(h).

Despite its clear language, Section 6068(h) has not resulted in mandatory pro bono services. See *Yarbrough v. Superior Court*, 39 Cal.3d 197, 216 Cal.Rptr. 425, 702 P.2d 583 (1985); *Cunningham v. Superior Court*, 177 Cal.App.3d 336, 222 Cal.Rptr. 854 (1986).

In *Yarbrough*, the California Supreme Court avoided, by deferring to the legislature, interpreting the scope of section 6068(h) and the resolution of three important issues raised by the case, placing them, instead, on the "judicial backburner" (*Id.* at 207). Those issues were: "The power of the trial court to appoint an unwilling attorney to represent an incarcerated civil defendant, as well as its power and duty to provide funds for counsel's services and costs and, of course, the source of such funds." *Id.* at 207.

Less than a year later, in *Cunningham*, an appellate court found itself in the kitchen with these issues boiling over. In *Cunningham*, a personal injury attorney discovered that he had been appointed by a Ventura County court to provide free legal services for an indigent man against whom the County of Ventura had filed a paternity action. The trial court held the attorney in contempt for refusing to represent the man over his argument that such forced representation denied him of his right to equal protection of the law.

In vacating both the order appointing the attorney counsel and the order holding him in contempt, the court of appeal sojourned back through English and American history and found that the "deeply rooted" and "ancient" tradition [of attorneys providing pro bono services as part of their commitment to public service] reveal[ed] a custom more honored in its breach than its observance." *Id.* at 343.

The court then observed that the traditional reasons supporting courts' imposition of pro bono duties upon lawyers have been eradicated by the exigencies of modern legal practice.

Lawyers no longer occupy the privileged position they did when Alexis de Tocqueville noted that American aristocracy is found "not among the rich, who have no common link uniting them. It is at the bar or the bench that the American Aristocracy is found." *Id.* at 346, citing *Democracy in America* (1975 Ed.), p. 267. Furthermore, the court believed that the legal system has been made more accessible to laypersons through simplified form pleadings, increased jurisdiction of small claims courts, and the increased use of alternative dispute resolution. *Id.* at 346. Finally, high overhead costs associated with running a law office mandate that every second of an attorney's time be compensated.

Having reviewed the historical progression of the legal profession's duty to provide pro bono services and having revealed its evident distaste at any imposition of such a duty, the court merely held that the attorney's constitutional right to equal protection of the law had been violated by requiring him, a member of a particular class of persons (lawyers), to pay for the cost of representing an indigent defendant in a state initiated paternity suit.

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The 'Legal Workbench': Lawyers as Information Processors

There is no doubt left that the computer is a lawyer's tool. After all, lawyers are basically information processors and so is the machine. As an example, a trial lawyer gathers raw facts, processes them into a cohesive presentation, and displays them to a trier of fact to obtain a judgment. That is information processing.

Imagine a tool that would do the following:

1. Provide instant access by a Lexis-like full text search to an archive containing all the work product your law firm has ever created;
2. Bring that work product to the computer screen in full and complete text, ready to be edited, reused, or transferred in whole or in part to a draft in process;
3. Provide instant access to research through Lexis, Westlaw, and perhaps fifteen hundred other databases;
4. Provide an electronic spreadsheet for calculation of damages, settlement figures and other mathematical needs;
5. Provide a drafting machine with typing to computer screen for document production;
6. Allow everything obtained, whether from the law firm archives or from outside research databases, to be transferred electronically into documents being created on screen, and then allow the transferred material to be reused or edited without retyping;
7. Provide electronic "shells" so that documents are automatically configured for Superior Court, Federal Court, etc., and appropriate captions are automatically created;
8. Allow transfer of any draft created to a secretary's word processor for final revisions and document printing;
9. Allow an attorney to print a final draft in an emergency, e.g., a weekend or late nighter.

This "dream" machine does, in fact, exist and is on lawyers' desks at my law firm. It was designed and built by us in conjunction with a client, a Big Eight accounting firm. The result, a *legal workbench*, took approximately eighteen months to develop and build. It is a stand-alone microcomputer that costs under \$5,000.00 fully configured with hardware and software.

The architecture of the Legal Workbench consists of an IBM-AT with a 30mb hard disc, a 1.2mb floppy disc, a 360kb floppy disc, an enhanced graphics monitor, and a dot-matrix

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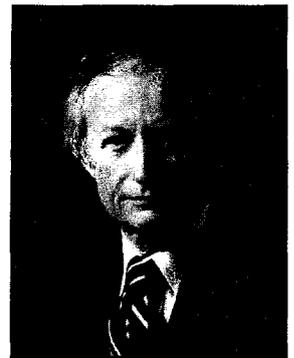
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printer. The manner of archiving the work product, the implementation of the full text search of the work product, and the transfer of information directly into a current draft is proprietary.

The search of the work product is accomplished in an almost identical fashion to a Lexis search. That is, a search phrase is entered, such as "statute of limitations," and the entire database is searched for that phrase. Any pleadings, legal opinions or legal memoranda containing that phrase will then be registered as "hits". These "hit" documents can then be called up in full text to the screen with the "hit" words highlighted. As an alternative, if there were too many "hits," then the search may be redefined in a more restrictive manner. After the document or documents which the lawyer desires to reuse are located, by the entry of a simple instruction, either a paragraph, a selected group of paragraphs, or the entire document, can be transferred directly into the draft which the lawyer is preparing. The lawyer can then immediately switch back to word processing and electronically edit the new material as a part of his or her draft.

"Never trust a computer you can't lift," Steve Jobs, founder of Apple Computer, supposedly said. A more rational aphorism for lawyers might be: "Never trust a computer you can't afford." Any office automation program should be carefully structured in advance because the equipment is expensive and its integration into the firm is time consuming, particularly in the area of training. As a medium size firm (now approximately 100 attorneys) our strategy



had to be to minimize cost. This meant no mainframes and computerizing only in areas where effective results could be obtained with minimal power in the machines.

Our results were reached by analyzing what the machines could do well and comparing that to what lawyers do regularly. For every minute that a lawyer spends billing clients or sorting documents, he or she probably spends one hour in research and writing. From the beginning we had visualized this as the "highest" application for the computer in the practice of law. Although we had first automated accounting and then litigation support, because the proper software was available, we were not able to develop our "highest" application until micro hardware and software reached the optimum power. When that occurred, we set out to design a research and writing system with the accounting firm.

The paybacks we anticipated were better client service, better work product and more productive and efficient lawyers. We have not been disappointed. We also expected and are beginning to realize an additional dividend: the building of competence and confidence in this new technology among our professional staff.

And if you do not believe the computer revolution is coming for lawyers, reflect on your own children. My youngest, in the seventh grade, has had five years of computer training already. Her classmates will have had seventeen years on a computer by the time they graduate from law school — in just twelve years. Sometime between now and then, all incoming lawyers will be completely computer literate and will be demanding computers in their practice.

Although the Legal Workbench has been in use for just a short time, the results are promising. We have produced, literally overnight, all the documents necessary for a Temporary

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The court conceded that "requiring lawyers to devote a reasonable amount of time to represent indigent defendants in paternity cases as a condition of licensing might not offend constitutional principles if all lawyers were to bear the burden evenly." *Id.* at 349. But then the court prophesied a fairly bleak future for any constitutionally acceptable attorney selection scheme: "It therefore appears that insuperable obstacles stand in the way of *any* attempt to allocate pro bono work in paternity cases so as not to offend equal protection principles." *Id.* at 350 (emphasis added).

Regardless whether the legal system is becoming more accessible to laypersons, there still exists a dire need for free legal services. Perhaps ideally, this need, like other societal needs, should be met by the *entire* community.

We provide free legal counsel for criminal defendants through our criminal defense program. We could, through our legislature, provide, as the legislature did in England in 1949, funds for legal counsel appointed to represent the poor in civil matters. Such funding in this country, however, continues to decrease.

Though public supported legal services is a desired solution to the problem of how to provide legal services to those who cannot afford them, it really begs the question of whether attorneys have any obligation to provide some form of free public service using their own legal skills.

Pro and Cons of Mandatory Pro Bono

The issue of mandatory pro bono services has divided attorneys into different camps. Echoing some of the concerns raised in *Cunningham*, opponents to *mandatory* pro bono services argue:

(1) Mandatory pro bono activity acts much like an unfair conscription tax (an argument made against the draft) and violates a lawyer's right to earn a living. Opponents argue that this contravenes our system of free enterprise in which lawyers should be able to compete;

(2) That the state grants lawyers a monopoly in the form of a license does not justify the imposition of mandatory pro bono service because other licensed businesses and professions are not forced to give away their goods and services;

(3) Any mandatory aspect of pro bono services would spoil the moral significance of the gift;

(4) Mandatory pro bono services would lead inevitably to poor quality legal services because lawyers would not zealously represent clients they did not want, and because lawyers would be forced to represent clients whose needs they are unqualified to represent;

(5) Mandatory pro bono services would serve to increase the litigious trend in the country, creating, as one commentator suggested, an iatrogenic illness — an illness induced in a patient by a doctor's words or actions;

(6) Mandatory pro bono services would require a costly bureaucracy, both to police compliance, and to administer the program;

(7) Mandatory pro bono services would inevitably reduce public funding of legal services; and

(8) Mandatory pro bono services impose insupportable burdens on certain classes of lawyers — those with small practices or those "paying their dues" at the associate level.

In the other camp, proponents of mandatory pro bono service vigorously argue:

(1) Lawyers are part of a profession whose duty it is to serve the public interest;

(2) Our society is funding fewer social services with less money; therefore, lawyers can no longer discharge their duty to provide pro bono services by pointing to public funding;

(3) Our state-granted monopoly to practice law benefits the lawyer and creates in the lawyer a duty to pay back the people who comprise the state for the use of the American legal system. That other licensed businesses and professions are not required to provide free goods and services is inconsequential to the correctness of imposing such a requirement on lawyers for three reasons.

First, the state, through its legislatures and courts, creates the very "product" which the lawyer must use to make a living: the law.

Second, the "product" does not come packaged with directions for its use. Laws and court opinions must be interpreted and we accept the idea that an advanced education, which not everyone can pursue, is required to effect any interpretation.

Finally, because of the structure of our legal system, our laws are dynamic and malleable and consequently are changed by the work lawyers do, and because our system is adversarial, the interests of those who cannot afford to fight are often damaged by those who can. Also, to the extent that our legal system is premised upon the notion that justice can only be done, and truth can only emerge, when two worthy opponents meet, under-representation of certain groups threatens to undermine the pursuit of justice and truth;

(4) Lawyers should eagerly regulate themselves before the courts or the legislatures do it for them; and,

(5) The public's generally abysmal perception of lawyers would be aided by our voluntary acceptance of a pro bono services requirement.

Mandatory Pro Bono: A Practical Approach

Perhaps the most creative response to some of the practical objections raised by opponents of mandatory pro bono service comes from David Luban, a professor of philosophy.² He proposed that the bar establish a "Pro Bono Office" which would keep a list of participating attorneys, a schedule of hours for standard categories of typical cases and a supply of "coupons", the currency with which lawyers would discharge their obligation to perform 40 hours of legal services per year.

Lawyers would obtain these coupons for their work on behalf of poor clients who would be matched with competent attorneys from the Pro Bono Office's lists, for their work on certain kinds of public interest cases, for their work in law reform activities, and educational activities. The educational activities would permit the lawyers either to train or be trained in areas of the law they might encounter when discharging their pro bono obligation but at which they might lack competence.

Under the Luban proposal, the 40 hour per year time requirement would be flexible and graduated. A lawyer who would suffer severe financial or health problems if forced to give pro bono services could be excused. Young lawyers in big firms and new lawyers in small firms could be wholly or partially excused until their situations stabilized.

A lawyer who, lacking an acceptable reason, failed to provide 40 hours of services could "buy-out" his or her shortfall at the going rate for similarly situated lawyers. Finally, lawyers who discovered that more than 40 hours of work would be required on a case could either earn future year's credit for continuing, or, with the client's consent, transfer the case to another lawyer, or receive some marginal compensation from the fund created by the "buy-outs".

Luban persuasively argues that: (1) the flexibility of the hours and ability to use different activities to fulfill the requirement avoids the problem that a small class of lawyers would be unduly burdened; (2) the educational activities avoid the problem of incompetence; (3) the Pro Bono Office would not have to evolve into a huge bureaucracy as its major administrative tasks would involve matching clients to lawyers, reviewing the number of hours an attorney worked on a matter to see if they were within an acceptable range, and some scrutiny of requests for additional coupons and petitions to substitute one kind of pro bono work for another or to be excused from pro bono work because of hardship.

In addition to allowing lawyers to choose among direct representation of poor clients, public interest work, legal reform, or education devoted to teaching or learning areas of the law which would be useful in the representation of unpopular or needy cases, other activities could also be included in a mandatory pro bono program.

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Lawyers could receive pro bono credit for the representation of charitable organizations, or for supervising a law student in his or her direct representation of a needy client.

Exclusive Pro Bono Work

Large law firms could discharge the pro bono obligations of their members by creating an entire group of lawyers who would pursue exclusively pro bono work.

Finally, we can continue to pass legislation like the 1981 mandatory Legal Services Trust Fund Program. This legislation requires lawyers to place interest from client trust deposits — so short in duration or so small in amount that interest on a single client's deposit cannot be credited to the client as a practical matter — into special interest-bearing accounts where they are pooled together. The interest earned on the pooled funds is then forwarded by banking institutions to the State Bar for distribution to legal services programs throughout California. There are many ways we can satisfy a pro bono service obligation. The only real barrier we must overcome is our belief that somehow such a requirement is immoral.

Blacks Law Dictionary defines pro bono publico: "For the public good; for the welfare of the whole." By donating our legal skills, we obviously benefit those who receive them, but we also benefit the whole society which in our role as lawyers we serve and change. Thus, our society reflects, in part, the quality of the job we do as lawyers. Our acceptance of a society in which ailing interests are ignored or unrepresented and in which making money is the most laudable goal to which a lawyer can aspire reflects very badly on us indeed.

—Robert A. Shlachter

I would like to thank Victoria L. Goldfarb for her assistance in the preparation of this letter.

1 The Legal Services Corporation, a federal agency created by Act of Congress in the middle 1960's (45 USC §1600, et seq.) distributes funds to local legal service programs. It received \$321,300,000 in 1981, \$241,000,000 in 1983 and \$305,000,000 in 1985. These figures are not adjusted for inflation.

2 Luban, *Mandatory Pro Bono: A Workable (And Moral) Plan*, — Michigan Bar Journal 283 (March 1985).

The 'Legal Workbench'

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Restraining Order and Preliminary Injunction; induced a national discount operation to cease selling our clients' goods (obtained on the "gray market") within 24 hours after the client walked in the door, largely through the use of "inside" information obtained from a publicly available database; and obtained major computer software litigation from a new client by demonstrating our expertise in our own software systems. There have been many other examples of successful use of the Legal Workbench, and we expect the list to grow as more lawyers become proficient in its use and new applications are developed.

For a law firm to handle such changes in working procedure is not easy. An untrained person cannot use a computer — any computer — without some learning curve. In particular, keyboard skill (typing) is necessary. Law firms cannot distribute computers to their lawyers without having the ability to provide training (teachers), support (experts who help novices out of trouble) and maintenance (trained personnel who can repair the machines). Building such a cadre takes time, and it can only be done in the context of computers actually in use.

Will all of this help to make better lawyers? I believe so. Eliminating some of the drudgery and tediousness of research and writing will give lawyers more time to think about what they are doing. One might even predict that it will move the practice of law away from being a craft and toward being an art.

—Thomas J. McDermott, Jr.

Discovery: New Rules For the Old Game _____ *Continued from Page 1*

Although the number limitation is a hybrid of the federal practice, the New Act does not make the interrogatories "continuing." Instead, the drafters handled the "after required information" problem by giving a party the right to file a "supplemental" set of interrogatories which does not count against the 35 interrogatory limitation. (CCP § 2030 subd. (c)(8).) Consequently, the state practice of sending out a pre-trial set of interrogatories 90 days before trial will continue.

Originally the New Act prohibited the old practice of combining interrogatories with requests for admissions. But the more recent cleanup legislation eliminated that ban and the old practice will survive the New Act.

Since requests for admissions are not particularly burdensome to answer, it is strange that the drafters of the New Act also limited requests for admissions to 35 unless the attorney files a declaration that more are required. (CCP § 2030 subd. (c).) Fortunately, the drafters recognized that many cases involve more than 35 documents, and therefore did not limit the number of requests for admission related to the genuineness of a document. (CCP § 2030 subd. (c)(b).) However, this exception is meaningless since an admission of the genuineness of a document is relatively unimportant for general discovery purposes.

Under our former practice, requests for admissions were deemed admitted if a party failed to respond within the statutory time if the proponent had given the appropriate warning.

Under the New Act, there will be no automatic admission by a late response. Instead, you waive all objections by a late response and the propounding party will have the burden of bringing a motion to deem the facts admitted. (CCP § 2030 subd. (k).) Since the New Act permits the court to impose sanctions or to deem the requests admitted against a late filing party, it may become common to file such a motion just to get sanctions.

A party may amend or withdraw an admission only on leave of court. (CCP § 2033 subd. (m).) However, the grounds for changing an admission are limited to mistake or inadvertance and the court is empowered to shift any costs to the party requesting the amendment or withdrawal. (CCP § 2033 subd. (m).)

Deposition Practice

The drafters of the New Act made a concerted effort to make the deposition the most effective discovery tool, despite the fact that depositions are probably the most expensive weapon. The basic rights and procedures are the same as part practice, however there are some important exceptions.

A major change is the one deposition rule under CCP Section 2020 (t). Beginning July 1, once the deposition is completed, *all* parties are precluded from reviewing the deposition absent leave of court.

Discovery disputes at deposition will also change. Under present practice, the party objecting to the notice of a deposition would simply show up, state the objection and refuse to testify. This procedure necessitated the resetting of the deposition after a motion to compel, an obvious waste of time.

Consequently, the New Act will require any objection to the notice of deposition to be made in writing three days before the deposition or the objection is waived. (CCP § 2025 subd. (g).) A party objecting to the deposition may also bring a motion to quash. (CCP § 2025 subd. (g).) However, such a

motion must be accompanied by a declaration of "reasonable and good faith attempts" to resolve the dispute informally. (CCP § 2025 subd. (g).) The last requirement tends to force the parties to resolve their objections before the deposition and before resorting to court. This codifies the current requirement under California Rule of Court 339.

The New Act will also streamline the taking of electronically recorded depositions by permitting video or tape recorded depositions simply by complying with the prescribed notice provisions. (CCP § 2025 subd. (k)(2).)

All business trial lawyers have struggled with trying to coordinate a busy expert witness' schedule with the trial court's calendar. It is not uncommon for parties to move to postpone trials or agree to take witnesses out of order just to accommodate the expert's schedule.

The New Act addresses this problem by making a video tape deposition of an expert admissible at trial, provided proper notice has been given before the deposition. (CCP § 2025 subd. (u)(4).) This procedure should substantially reduce the cost of using expert witnesses at trial. Further, since an expert witness' demeanor is less important than a percipient witness or party, the video deposition alternative should be acceptable in most cases from a trial tactics perspective.

The New Act also makes it easier to depose a witness and enforce compliance. Under the New Act, a party may depose either a party or non-party witness within 75 miles from the witness' residence, or, at the option of the deposing party, in the county where the action is pending at a location within 150 miles of deponent's residence. (CCP § 2025 subd. (e).)

The drafters of the New Act also adopted the federal practice of requiring the payment of a witness fee regardless of whether the fee is requested by the witness. (CCP § 2020 subd. (f).) In the event the witness refuses to answer one of your concise questions, the New Act also eliminates the artificial time limit on citing a deponent for his or her failure to answer a question. (CCP § 2025 subd. (n).)

The main time restriction to calendaring is that a motion to compel a witness to answer a question or produce documents must be filed within 60 days of the completion of the transcripts. As with all motions to compel, the parties must meet and confer before resorting to court. (CCP § 2025 subd. (o).)

In past practice, a party could insist upon the deponent travelling to the court reporter's office to review and sign the deposition transcript. Former Code of Civil Procedure Section 2019 was repealed and the custody of the original transcript will be placed with the deposing party's counsel. (CCP § 2025 subd. (5)(1).) He or she will have the obligation to protect the original and produce it at the time of trial.

Document Production

Production of documents from non-parties is easier under the New Act.

The old requirement of an affidavit showing good cause has finally been dispensed with. (CCP § 2020 (d)(1).) But the time for requiring production of documents pursuant to that subpoena duces tecum has been formalized at 20 days.

But the New Act creates another new profession in California legal practice — the "professional photocopier." Not just anyone can push that old print button on the copying machine. No. It must be someone licensed under the Business and Professions Code. (CCP § 2020 (d)(3).)

The purpose of this change is important, however. It creates a way to protect the integrity of business records produced in response to a subpoena duces tecum. That's good. But creating additional litigation costs for the "professional copier" — that's bad.

Changes In Scope Of Discovery

The drafters insist they did not intend to make fundamental changes in the nature and extent in the kinds of information that is discoverable. In fact, the emergency cleanup legislation closes some of the open questions which appeared to expand the scope of discovery. However, some of the new language still leaves this issue open for debate.

For example, the New Act permits the discovery of the identity of persons having knowledge of any "discoverable matter." (CCP § 2017 subd. (a).) Under former practice, a party was entitled to discover only witnesses "having knowledge of relevant facts." It could be argued that the new standard is broader and includes the obligation to identify not only those witnesses having knowledge of "relevant" facts, but also any witness with information which "may lead to discoverable evidence." You should watch case law development concerning this language.

As any law and discovery judge will attest, there are repeated motions relating to the discovery of the existence and extent of insurance coverage. The New Act attacks this problem and requires that information relating to the existence and extent of coverage is discoverable. (CCP § 2017 subd. (b).)

However, a party is still not entitled to discover the nature of any coverage disputes between the carrier and its insured.

The drafters also attempted to codify the type of documents which fall within the work product privilege. They initially used language which appeared to expand the privilege in several ways. However, after an uproar from the bar and countless hours of back room negotiations, the legislators finally agreed to maintain the old language of CCP § 2018, and to specifically provide that the New Act is merely a restatement of existing law and not intended to expand the scope of the work product privilege. (AB 361, § 2018.)

As promised, the so-called emergency cleanup legislation also removed other troublesome exceptions to the work product privilege which would have eliminated the privilege where fraud was alleged and in actions brought against insurance carriers.

Discovery Cut Off

Under past practice, when your trial or arbitration date was continued for more than 30 days, it was uncertain whether discovery could resume. The New Act provides there will be no discovery after the trial date or arbitration date cutoffs without a court order. (CCP § 2024 subd. (a).) Consequently,

Dinner Meeting Highlights New Discovery Act

The New Discovery Act, which takes effect July 1, will be the subject of ABTL's June 9 meeting at the downtown Hyatt Regency Hotel.

How will courts handle the New Discovery Act? Three Los Angeles Superior Court judges will reveal their interpretations of the new rules.

The judges: Hon. Warren Deering, Supervising Judge, Law and Motion Departments; Hon. Norman Epstein, co-author, New Discovery Act; Hon. Miriam A. Vogel, Law and Motion Department 82.

David J. Pasternak, of Tyre, Kamins, Katz & Granof, will moderate the program. Written materials will be available to attendees.

Reception is at 6:00 PM, dinner at 7:00. Contact Monika McCarthy for reservations at (818) 894-2671.

we can no longer count on a crowded court calendar and a motion to continue trial as a tactic to complete unfinished discovery.

Expert Witness Procedure

The essential procedural concepts relating to the discovery of expert witnesses were included in the New Act. The demand for exchange of expert witness information must be made 90 days before the date of trial in counties like Los Angeles where there is more than 120 days notice of the trial. (CCP § 2034 subd. (b).) In counties where there is less than 120 days notice of trial, lesser periods are required. (CCP § 2034 subd. (b).)

The request for identification is binding on all parties and requires full disclosure of the qualifications and substance of the expert's testimony. (CCP § 2034.)

Absent exceptional hardship, you must depose the expert within 75 miles of the courthouse and pay the expert witness' fees in advance. (CCP § 2034.) As in the past, undisclosed expert witnesses may testify in rebuttal but you must seek court permission to submit a tardy list of experts acquired after the exchange date. (CCP § 2034.)

However, in addition to the disclosure requirements, the attorney must sign a declaration which includes (1) the expert's qualifications, (2) essence of the expert's testimony, (3) a statement that the expert will testify at trial, and (4) a promise under oath that the expert will be sufficiently prepared to testify at his deposition. This declaration will cut down the "unprepared" expert witness trick that has cost all our clients more than we care to admit.

Sanctions And Motions To Compel

The new drafters did away with former CCP Section § 2034 and instead included the appropriate sanctions as part of each of the substantive sections dealing with the major vehicles of discovery, i.e., depositions, interrogatories, requests for admission, and requests for production of documents. (See CCP §§ 2016 et seq.)

In essence, the drafters attempted to make sanctions mandatory where there is a finding of failure to comply with the New Act. The burden of proof is now on the losing party to show "substantial justification" to avoid sanctions. That's the reverse of the current law.

Generally, sanctions may be imposed against both the attorney and the client. All discovery motions regardless of their nature are subject to the meet and confer requirement formerly required only by California Rule of Court 339, so as to encourage the parties to resort to court only in the last instance.

Changes Relating To Juries And Jury Instructions

Discovery rules were not the only major changes this past year to the Code of Civil Procedure. Several important changes also were incorporated with respect to juries and jury trials. Code of Civil Procedure § 612.5 was amended to require a judge to send written jury instructions to the jury upon request.

Traditionally, it was within the trial court's discretion to allow the jury to take the written jury instructions to the deliberating room. That discretion is now gone and the jury's right to see the written instructions is mandatory.

Consequently, you should make sure that your proposed jury instructions are in a form that can be sent to a jury. Hand written instructions or instructions with citations and extraneous notes can be later found to be prejudicial.

In past practice, a party would be deemed to have waived a jury trial by failing to deposit jury fees at least fourteen

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Discovery: New Rules For the Old Game

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days before trial. Code of Civil Procedure § 631.01 was amended to provide that a jury trial may be waived by failure to deposit the jury fees twenty-five days before the date set for trial.

It was sometimes a cute practice to demand a jury trial and if your opponent failed to make his jury demand, you had the option to waive your right to a jury trial shortly before trial and thereby technically preclude your opponent from a jury trial. The wrong person must have been stuck with a court trial because the law now provides that a party shall now have five days to demand a jury trial and post the necessary fees after another party waives trial by jury.

Motion Practice Changes

In a provision which has already caught many trial lawyers napping, Code of Civil Procedure § 1005 was amended to require the filing of opposition papers five *court* days before the hearing. Consequently, a judge now has the option of not reading late filed papers submitted under the old rules. Also, some courts have passed local rules requiring reply papers to be filed at least two *court* days before the hearing.

Attorneys' Fees

There are over 230 state statutory exceptions to the so-called American rule which provides that a prevailing party is not entitled to attorneys' fees in a civil action unless a written contract so provides. The legislature took another chip out of the rule by passage of Code of Civil Procedure § 1029.9. This section provides that attorneys' fees are recoverable in any action for damages to personal or real property resulting from trespass on farm lands. Night avocado and lemon bandits beware.

General Provisions

If you have any litigation involving a fraudulent transfer, be aware that the California Fraudulent Conveyance Act was completely re-written and is now called the Uniform Fraudulent Transfer Act. Although the general concepts and remedies are the same, there are a few hidden changes. For example, if there is a fraudulent transfer which includes real property, a party may be entitled to file a lis pendence even though not technically entitled to such pre-trial relief under the Code of Civil Procedure.

For those who get involved with landlord-tenant disputes, there were many changes which include modifying municipal court jurisdiction limits, an expedited procedure for including essential parties unknown at the time the unlawful detainer was filed, and establishing who is the prevailing party for award of attorneys' fees in certain situations.

But of all the changes in the Code of Civil Procedure, the most dramatic remains the New Discovery Act and the greatest confusion after the original passage of the New Act was the overlap. How will courts handle discovery conducted before the New Act or in progress when the law goes into effect on July 1? Do you apply the new discovery standards or the old?

Thankfully the cleanup legislation resolved the debate. Any discovery initiated before July 1, 1987 is governed by the old law.

But beginning this summer, the old ways will be gone. The unwary or the unprepared will find themselves surprised by

the changes. Every litigator — from seasoned veteran to wide-eyed young associate — will be carefully reading and rereading California's New Discovery Act as we play by a brand new set of rules.

—Bernard LeSage

Board of Governors Nominations Disclosed

The installation of new officers and the election of new governors to replace those whose terms have expired will take place at the June 9 meeting that also features a panel discussion of the New Discovery Act.

Scheduled to assume their new offices are: President, H.O. (Pat) Boltz; Vice President, Peter I. Ostroff; and Secretary, Robert H. Fairbank.

The following have been nominated for election as governors:

Valerie Baker, Judge of the Superior Court
Alan D. Bersin, Munger, Tolles & Olson
James Goldman, Kadison Pfaelzer, Woodard, Quinn & Rossi
Richard R. Mainland, Mitchell, Silberberg & Knupp
Molly Munger, Munger & Meyer
Thomas Mustin, Latham & Watkins
Mark A. Neubauer, Stern & Miller
Herman Palarz, Tyre, Kamins, Katz & Granof
Dennis Perluss, Hufstedler, Miller, Carlson & Beardsley
Additionally, Harvey I. Saperstein, of Irell & Manella, has been nominated as Treasurer.

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