ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

ORANGE COUNTY

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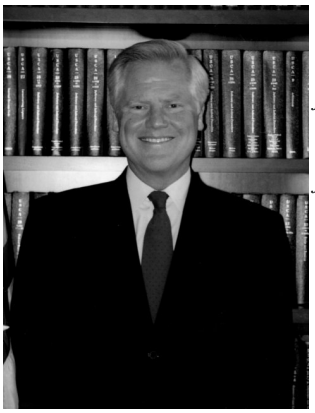
Q&A with the Hon. Andrew Guilford

By Lester J. Savit



[Editor's Note: Lester Savit met with newly appointed United States District Judge Andrew Guilford for this judicial interview. Judge Guilford's nomination for United States District Judge, Central District of California, Santa Ana Division, was unanimously confirmed by the United States Senate on June 22, 2006. Prior to his appointment to the federal bench, Judge Guilford was a partner in the Costa Mesa office of Sheppard, Mullin, Richter and Hampton, where he had practiced since 1975.]

Q: Thank you for meeting with me. You were a founding officer of the ABTL of Orange County. You also have held a leadership role in almost every other law related organization in the county and state including serving as president of the county and state bar associations and, most recently, the Public Law Center. Given this unique perspective, what is your current view of where the priorities should be placed for improving the practice of law?

A: There are a lot of areas where improvements can

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The FEHA and Federal Anti-Discrimination Law: False Friends?

By J. Matthew Saunders

A. Introduction

In linguistics, the term "false friends" is used to refer to two words in different languages that look the same but have different meanings. They often cause problems for foreign language learners, especially when the divergent meanings are semantically at odds. For instance, the German word *Gift* actually means "poison," while in Czech, *host* means "guest." Perhaps the most notorious example, however, involves the Spanish word *embarazada*. While it looks a great deal like the English word *embarrassed*, in reality, it means "pregnant."

A popular story centers on the Parker Pen Company's attempt to expand into Mexico. The Spanish-language slogan that Parker Pen used in its ads was supposed to say, "It won't leak in your pocket and embarrass you." What the slogan actually said was "It won't leak in your pocket and make you pregnant."

This story, likely apocryphal, is used to educate companies on the pitfalls of doing business internationally, but it contains a lesson for attorneys as well, and not just attorneys who have international practices. California attorneys who litigate employment discrimination cases have a number of state and federal anti-discrimination statutes at their disposal. These statutes all have a similar purpose, to eliminate discrimination in the workplace, and the provisions of each statute are often similar as well. It is common practice to cite pertinent

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The ABTL 33rd Annual Seminar - "When Things Go Wrong"

By Linda A. Sampson

This year's program was entitled "When Things Go Wrong." Mother Nature helped set the stage for this program when some earlier travelers were confronted with a 6.6 earthquake and road-flooding thunderstorms. One thing that didn't go wrong, however: the Annual Meeting. This year we returned to the Grand Wailea Resort. The program included not only top-notch presentations regarding the trials and tribulations that might arise in a jury trial, but also plenty of "fun in the sun" and on the hotel's water slides. The attendance reached an all-time high.

The program began with an ocean-front welcome reception. Attendees and their guests were able to renew acquaintances and socialize with other business litigators and state and federal judges from up and down the state.

On Thursday morning, the program itself began. The program featured a host of panelists unselfishly describing some of the major (and unexpected) problems that they had encountered during jury trials. While learning all the things that could go wrong to the State's top trial lawyers was enlightening (and no doubt a source of some relief that these problems had happened to someone else), the bulk of the program's discussions highlighted solutions to consider if problems arise and ways to avoid problems in the first place. And isn't that the best way to learn: from someone else's mistakes?

The first panel, which featured, among others, our own Joe Chairez, discussed problems that arose in pretrial preparation (including forum shopping foibles, discovery disasters, the previously botched case and a list of nine ways to lose a trial before it even begins). Thereafter, Kathleen Peterson, along with others from the other chapters, pointed out the problems relating with potential conflicts of interest. Later that morning, Orange County Superior Court Judges, the Honorable David McEachen and the Honorable Carla Singer, spoke of the problems that might arise relating to jury selection and misconduct. All panelists agreed that the single most important aspect of a jury trial is the audi-

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By Using Statistics To Establish An "Inappropriate Comparator" Defense

By John A. Vogt

Obtaining summary judgment in defense of a discrimination claim is difficult, to say the least. Often times, numerous fact issues exist that prevent summary disposition before trial. Over the past two decades, however, there has emerged a body of case law that has established some statistical parameters to guide practitioners seeking to obtain summary judgment on a discrimination claim -- creating what has come to be called an "inappropriate comparator" defense. [1]

At its core, proponents of the "inappropriate comparator" defense argue that at a certain point, the degree of race or gender integration, for example, in a higher-paid class of workers to which the lower-paid plaintiffs' class compare themselves is so advanced that plaintiffs have chosen an "inappropriate comparator," and a de-

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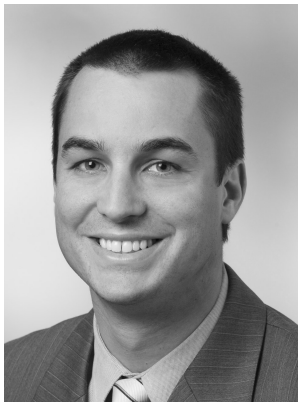
1. See *Strag v. Board of Trustees*, 55 F.3d 943, 950 (4th Cir. 1995) (in affirming trial court's summary judgment against plaintiff female instructor's discrimination claims, the court explained that plaintiff "did not put forth a sufficient *prima facie* case under the Equal Pay Act because she failed to identify an appropriate comparator in her own department against whom her starting salary could be properly compared"); *Soble v. Univ. of Maryland*, 778 F.2d 164, 167 (4th Cir. 1985) (a plaintiff must show that the comparison she is making is an appropriate one, as mere salary differences are not themselves actionable as discrimination).

2. Although called a "defense," courts typically do not evaluate an "inappropriate comparator" argument as an affirmative defense; rather, most courts have held that the failure to select an appropriate comparator is tantamount to a failure to state a *prima facie* case of discrimination. See *Hofmister v. Mississippi State Dept. of Health*, 53 F. Supp. 2d 884, 890-92 (S.D. Miss. 1999) ("*Hofmister*") ("In order to establish a *prima facie* claim [under the EPA], the plaintiffs must show that they were paid lower wages than a male comparator for equal work, and the male job comparator must be properly selected."); *Arthur v. College of St. Benedict*, 174 F. Supp. 2d 968, 975-76 (D.Minn. 2001) ("*Arthur*") (same); *Schulte v. State of New York*, 533 F. Supp. 31, 38-39 (E.D.N.Y. 1981) ("*Schulte*") (same); but see *Peters v. City of Shreveport*, 818 F.2d 1148, 1164-65 (5th Cir. 1987) ("*Peters*") (recognizing that, under the EPA, "[i]n some instances the degree of integration between the classes compared may be so advanced that, when viewed against the other facts of the case, summary judgment may be appropriate[,]" but as a "factor other than sex" affirmative defense, rather than as a failure to state a *prima facie* case of discrimination).

Hueston From Houston: Lessons Learned From the Enron Trial

By Bryan E. Smith



Orange County's very own, John Hueston, recently returned from Houston, Texas, but not until he had helped secure criminal convictions in the most significant white collar case of its era. Mr. Hueston served as co-lead prosecutor in the criminal trial against Enron's Kenneth Lay and Jeffrey Skilling. He made a presentation to the ABTL on September 13, 2006, entitled "My Time with Ken Lay, Andrew Fastow and Sherron Watkins: Trial Strategies and Lessons Learned from the Enron Trial."

Mr. Hueston used a power point presentation, valuable insight, humor, and anecdotes from trial to articulate lessons that business litigators could learn from the Enron case. Despite Mr. Hueston's many successful attempts at humor, it was his wife -- although not present -- who elicited the audience's largest laugh of the evening. After ABTL President Gary Waldron introduced Mr. Hueston by describing the great sacrifice he made in leaving his family in Orange County for over two years to travel to Texas to prosecute the case, Mr. Hueston then took the podium and shared his wife's immediate comments upon his return to the family after two long years away: "Thank goodness you didn't suck." That's one way of putting it.

Much of Mr. Hueston's presentation touched on the single most important facet of any trial: the jury. Indeed, in a white collar document case such as the one against Lay and Skilling, the challenge is to make the jury somehow care. Mr. Hueston opined that the best way to make a jury care is by introducing it to the real victims of the case. As such, Mr. Hueston advised the trial lawyers present to "think in terms of what kind of clear lines you can draw for the jury; what is wrong and what is right." In his much-anticipated opening statement at trial, Mr. Hueston told the jury that the case against Lay and Skilling was not an accounting case, but rather a case about "lies and choices." He explained that getting the jury to think in terms of "right and wrong" is vital because the jury's outcome in any case

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A WORD FROM OUR SPONSOR
Fair Market Value and Investment Value as Used in the Court's and by Business Appraisers
By Jaime C. Holmes

What is the standard value to be applied in a civil case, is it "fair market value," "investment value," or "fair value?" Do the California Appellate Courts define these terms the same way as business appraisers or the treatises they rely upon? This article analyzes the source for the definition and use of these terms, whether by California case law, California statutes or business appraisal treatises, and more importantly, whether the Courts and business appraisers are speaking the same language.

Business Appraisal Treatise

This section of the article will primarily analyze the evolution of the terms in business appraisal treatises.

- Standard of Value

The terms *fair market value* and *investment value* are known as standards of value. In the business appraisal treatise entitled "Valuing a Business," standard of value is "a definition of the type of value being sought." This treatise further states that "the standard of value defines or specifies the parties to the actual or hypothetical transaction." ("Valuing a Business: The Analysis and Appraisal of Closely Held Companies, 3rd Edition," Pratt, Reilly, Schweihs (A Times Mirror Higher Education Group, Inc.) 1996.)

- Fair Market Value

The American Society of Appraisers defines fair market value as "the amount at which property would change hands between a willing seller and a willing buyer when neither is acting under compulsion and when both have reasonable knowledge of the relevant facts." ("Valuing Small Businesses and Professional Practices," Pratt, Reilly and Schweihs (McGraw-Hill Publisher) 1986; American Society of Appraisers - Business Valuation Standards - Definitions.) This definition is consistent with a United States Treasury Ruling 59-60 which was issued in 1959. (Rev. Rul. 59-60, 1959-1 C.B. 23.)

The fair market value standard involves a hypotheti-

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be made. Access to justice certainly should be one of the priorities. Practitioners should be thinking about how legal services can best be delivered and expenses reduced. We need to think about whether lawyers act as oil or sand in the machinery of business. We should focus on professionalism and service to our clients.

Q: So access to the courts should be a high priority whether the client is indigent or a company seeking to resolve a business dispute?

A: My concern about access to justice applies to both situations.

Q: Now that you are leaving the practice of law, what message would you leave behind to trial lawyers still laboring in the trenches?

A: Litigators should focus on the trial, not disputes of litigation. Write interrogatories with a view to reading them to a jury. Take depositions with a view to reading the transcript to a jury. When lawyers focus on their role as advocates seeking a resolution of disputes less effort is wasted.

Q: Why is it so difficult for lawyers to do that?

A: One of the great challenges for a lawyer is to take a complex set of facts and make it simple, to see what is important, and what is not. Weaving a cohesive story from thousands of facts that might be present in a given case requires creativity. When you ultimately think about the presentation that is going to be made to the jury, it forces you to focus.

Q: You had a very successful litigation practice while at the same time being very active in volunteer organizations. If you have a secret source of time and energy, please share it with us.

A: I think it comes from enjoying what you are doing and wanting to live life to the fullest. If you are excited about what you do, it is energizing. I used to value associates who were brilliant, or affable. But the older I get, the more I value the people who are energetic and enthusiastic, and who work to get the job done.

Q: Has your past experience as a volunteer with professional associations been helpful to you as judge?

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A: It has helped me to understand how the system works, the ins and outs of the system, the background of why a statute was passed, the political ramifications of a law, and why judges think a certain way.

Q: The Orange County Register described you in 1999, when you became president of the state bar, as "possessing a passion for the law." Where does the passion come from?

A: Just considering the role that the third branch plays in our society. It is the branch with responsibility for balancing the power among the three branches of government, and it also protects the people against government action. I also like what lawyers do, standing in front of twelve or six people and trying to convince them of something. Marshalling facts, bringing order out of chaos. I like lawyers, they are interesting people.

Q: Any early influences leading to a career in law?

A: No, I was the first lawyer in my family. I stumbled into it not really knowing what a lawyer does until later.

Q: Unlike many federal district court judges, you came straight from private practice. Can you identify any challenges presented to a lawyer stepping up to the federal bench without prior judicial experience?

A: For thirty years, I argued for a client's position to be accepted as correct. I never had to determine an objective truth. My role now is to determine the right answer.

Q: Can you identify any advantage to coming directly from private practice?

A: I have an immediate understanding of the challenges facing the practicing lawyer. The challenge of the billable hour, the challenge of meeting the client's expectations, the challenge of the business of law.

Q: Is there a particular case management practice that you brought from private practice to the bench that you think will help you to perform efficiently as a judge?

A: As a practitioner I learned to maintain focus toward coming to a decision about a strategy or argument. Clients don't pay hundreds of dollars per hour to identify all the issues, they pay those fees to solve a problem. Here, the country is paying me to come to a decision. So what I brought from private practice is the need to keep your eye on the ultimate goal of arriving at a decision.

Q: Are there any practices in place in your courtroom that lawyers should know about?

A: I am trying to keep my rules simple, and consistent with the federal rules and the local rules. So in return I ask the lawyers out there to trust me that there are good reasons for those rules, and please try to follow them. I will do my best to keep my rules simple as time goes on.

Q: I heard you speak at a Federal Bar Association luncheon in which you indicated that you had filled out 10,000 time sheets as a lawyer in practice – the suggestion was that you would not miss that particular task. Is there a part of your day as a practicing lawyer that you find yourself missing?

A: The opportunity to argue a point, to try to convince people that my point was the correct one. Now there is no need to convince the parties, I just need to rule on the issues presented. Also, I miss the high energy and adrenalin of being an advocate in a jury trial, and the satisfaction of getting a good result for a client. I imagine there will be quiet satisfaction in the future when I am affirmed by a court of appeals, but it won't be quite the same as having a jury verdict read in my client's favor.

Q: Given all that you have accomplished so far, what goals remain?

A: I just want to be the best judge I can be. My goal is to get it right and to have a reputation of being fair.

Q: It has been reported that you are a fan of Winston Churchill. Will there be a portrait of Churchill in your chambers?

A: From my desk I can see more than one portrait and two statuettes.

Q: What will it be like to appear before Judge Guilford? You are following the current procedure in the district of hearing motions on Mondays. Will you hold a hearing on all motions?

A: I value the hearings and appreciate the exchange

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of ideas. I am holding hearings on most matters. Some motions are resolved without a hearing.

Q: Will all discovery motions in all cases be referred to the magistrate judges?

A: So far yes. Perhaps I will hear some discovery-related issues such as protective orders in patent cases.

Q: Will you issue tentative rulings?

A: I have been issuing them.

Q: Will they be posted on the Internet?

A: I will be posting some. To post a tentative on a Friday gives the lawyers the whole weekend to think about it. The more lead time the advocates have, the greater their ability to help me to get it right. I hope to emulate Judge Taylor's wonderful ability to have a discussion about issues raised in the tentative, rather than a contentious argument.

Q: Do you have a set of your own rules yet?

A: Yes.

Q: Are they posted on the Internet?

A: They are handed out at the scheduling conference. The final versions are about ready to be posted on the Internet.

Q: After a tentative has been issued, how do you proceed with oral argument? Should counsel for the losing party expect to be asked to speak first?

A: Not necessarily. In some motions there are key issues that might be more appropriately addressed by the prevailing party. In each of my oral arguments I put together a sheet summarizing the parties' positions and counterpoints. I might address the responding party who won the tentative on a point worthy of consideration. Most of the time I will ask the party who lost the tentative to explain.

Q: Are there things you wish lawyers in your courtroom would not do? Let's get the word out now – Judge Guilford's pet peeves.

A: Too much stridency. Lawyers should think of oral argument as a mutual pursuit of the truth rather than an opportunity to tell the judge why the other side is bad. A kinder, gentler approach.

Q: Anything else?

A: Try to reduce the number of adjectives and euphemisms. When a lawyer says, "clearly," the position usually is not clear. When a lawyer says "certainly," it usually is not very certain. Don't say that your opponent is disingenuous or acting out of desperation. Most of the time those types of arguments are unproductive.

Q: Give us a thumbnail sketch as to what you like to see in a written motion. What are the hallmarks of a good brief?

A: Brevity and succinctness in writing and oral advocacy. Simple words expressing grand thoughts. So many communication problems can be solved by simple words, short sentences, frequent paragraphs, the active voice, and graceful transitions. That's about it.

Q: What are the indications of a poorly drafted paper?

A: The opposite of a well written brief. For example, lawyers use "prior to" instead of "before." Why use "in accordance with" when "under" works. Lawyers should not encumber their writing. It is a beautiful language, make it come alive.

Q: As a judge you will undoubtedly be seeing out-of-town counsel who you will not know. What factors will you rely upon to determine whether a lawyer is believable?

A: Don't get caught in a misstatement. A lawyer before me may be asked a question at oral argument to test the truth of a statement in a brief. If so, it is best to come clean at the hearing - just say, "that was perhaps an overstatement, I apologize."

Q: Because you came from a big firm practice, the conventional wisdom may be that your experience as a lawyer was for the most part representing defendants.

A: Wrong. I have represented plaintiffs in lots of cases. I was lucky to have a diverse practice and represented plaintiffs about as often as defendants. And I represented plaintiffs in *pro bono* cases. I think I can

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see both sides' perspectives.

Q: What is your feeling about the use of high-technology in presentations in your courtroom?

A: It can be very helpful. It is the 21st century after all. The books in my chambers won't be here very much longer. The books and filings are all going to be on-line. My pre-trial order states, "unless an electronic alternative is approved by the court, counsel shall prepare the binders of exhibits…." If a lawyer wants to distribute an electronic disk instead of paper copies of exhibits, it should be allowed.

Q: Have there been occasions in your courtroom when the method of presentation detracted from rather than enhanced the presentation?

A: I accept your premise that sometimes it can be overdone. Sometimes it is more persuasive to use beat-up old butcher paper rather than fancy bells and whistles.

Q: Do you intend to be involved with settlement of your cases?

A: As a lawyer I did not like the idea of judge involvement. It is my policy now that I will not do it.

Q: Is there a way that you will encourage parties to settle their disputes?

A: My order says that I expect the parties to meet with a third-party mediator. It is something I always encourage. Sometimes lawyers are reluctant to raise the topic of settlement with opposing counsel. The order will give them an excuse to approach each other.

Q: Is there any aspect of being a judge that has surprised you?

A: The sophistication of the technology available to the judges. I have to commend the Central District for providing incredible electronic resources. I also have been happily surprised about the very high level of collegiality among all court personnel and their interest in doing the best job they can in a public-minded way.

Q: Before we finish, I want to ask you about your clerks. Did you bring any lawyers over from your firm?

A: No, I did not hire any clerks from my firm, but I brought my judicial assistant/secretary. I am very pleased to have Pam Wiebel here, it has helped the transition tremendously.

Q: How did you find your clerks?

A: That is another thing that surprised me when I came to the courthouse. The quality of the applicants for clerkship positions is phenomenal. Really outstanding.

Q: How many clerks did you hire?

A: I have two great clerks spending a year with me, plus some externs at different times. When the President nominated me in January, I immediately lined up Ben Rubin from Chapman Law School and UCSB. After Senate confirmation and taking the oath, I hired Limor Raline, who was finishing her first year at Latham in San Diego after attending Columbia and Yale. I look forward to working with them over the next year as we do the important work of the Court.

Thank you Judge Guilford for your time today.

▪ *Lester J. Savit is a partner at Jones Day and heads the intellectual property practice in Jones Day's Irvine Office.*

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ence to which one presents his or her case. The morning concluded with a movie illustrating potential witness fiascos and ways to survive them. Indeed, the programs themselves were more than talking heads as there were a number of video performances showcasing the acting talents of many.

The next day provided some more lively discussions relating to potential technical problems, evidentiary issues and strong judges. Orange County panelists included Melissa McCormick and the Honorable Andrew Banks. Thereafter, the attendees met in small breakout sessions with members of the bench leading these groups. Our Orange County judges were well represented again, as the Honorable Gail Andler, the Honorable Andrew Banks, the Honorable Carla Singer, the Honorable Nancy Stock, the Honorable Sheila Fell, the Honorable Kathleen O'Leary and the Honorable Stuart Waldrip (Ret.) were among these esteemed group leaders. Friday evening, we enjoyed a memorable (and hu-

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federal authority in cases brought under state law. However, while state and federal anti-discrimination laws look a lot alike, they may be "false friends." The same words can have different meanings in different statutes. Conversely, the same concept can be defined using different words. Even small differences, if overlooked, can lead to costly mistakes.

B. State and Federal Anti-discrimination Statutes

California's Fair Housing and Employment Act ("FEHA," Cal. Gov. Code § 12900 *et seq.*) makes it unlawful for an employer to discriminate against a person because of "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation." (Cal. Gov. Code § 12940(a).) Similarly, Title VII of the Civil Rights Act of 1964 ("Title VII," 42 U.S.C. § 2000e *et seq.*) prohibits an employer from discriminating against an employee on the basis of "race, color, religion, sex, or national origin." (42 U.S. C. § 2000e - 2(a)(1).) In addition, the Americans with Disabilities Act ("ADA," 42 U.S.C. § 12101 *et seq.*) prevents employers from discriminating against employees with disabilities. (42 U.S.C. § 12112(a).) Because these statutes are all aimed at eliminating discrimination in the workplace, California courts often look to federal precedent in order to interpret provisions of the FEHA analogous to provisions in the federal statutes. (*Los Angeles County Dept. of Parks & Recreation v. Civil Service Comm'n* (1992) 8 Cal.App.4th 273, 280; *Jensen v. Wells Fargo Bank* (2000) Cal.App.4th 245, 260.)

C. The FEHA and Title VII

Of course, the FEHA differs from Title VII and the ADA in some significant ways. For example, the FEHA expressly prohibits discrimination on the basis of a person's sexual orientation, while courts have held that Title VII does not. (*Hamner v. St. Vincent Hosp. & Health Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000); *Bibby v. Philadelphia Coca-Cola Bottling Co.*, 260 F.3d 257, 264 (3rd Cir. 2001).) Other differences, however, are much more subtle and can catch an unwary attorney off-guard, especially because many of them are relatively recent developments in the law.

For example, under both federal and state law, an employee must, in order to present a prima facie case of unlawful retaliation, show that he or she has suffered an "adverse employment action." (42 U.S.C. § 20003-3(a); Cal.Gov. Code § 12940(h).) Over the years, courts, both state and federal, have struggled with the definition of "adverse employment action," but in June of this year, the United Sates Supreme Court decided *Burlington Northern Rwy. Co. v. White*. The case involved a plaintiff, Sheila White, who was employed by Burlington Northern as a track laborer. (*Burlington Northern Rwy. Co. v. White*, 126 S.Ct. 2405, 2409 (2006).) After she complained about her supervisor's sexual harassment, she was reassigned to different duties, charged with insubordination, and later suspended without pay, though she was eventually reinstated by the company and given full back pay. (*Id.*) Despite the fact that she had not been discharged or demoted or permanently deprived of any compensation, she sued Burlington Northern under Title VII, claiming that she had been retaliated against for making a complaint of sexual harassment. (*Id.* at 2410.)

The court agreed with her and ruled that for the purposes of the anti-retaliation provisions of Title VII, an "adverse employment action" is not limited to an action that "materially affects the terms and conditions of employment," as it is in the anti-discrimination provisions of Title VII, *e.g.* firing, demoting, or denying compensation. (*Id.* at 2411-12.) Rather it is one that is "materially adverse," a definition which encompasses any action that could dissuade "a reasonable worker from making or supporting a charge of discrimination." (*Id.* at 2415.)

The anti-retaliation provisions of Title VII and the FEHA are virtually identical. However, the definition for "adverse employment action" provided by the court in *Burlington* differs from the one that the California Supreme Court endorsed a year earlier in *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1050, a case interpreting the FEHA's anti-retaliation provisions. In *Yanowitz*, the plaintiff, who worked as a sales representative for the defendant, alleged that she was retaliated against for refusing to fire a female sales associate whom her supervisors regarded as not physically attractive enough. (*Id.* at 1035.) The Court, while ruling in favor of the plaintiff, nevertheless limited what was considered an "adverse employment action" to actions that "materially affects the terms and conditions of employment." (*Id.* at 1050.) An attorney dealing with a case of possible unlawful retaliation against an employee under the FEHA should therefore be wary of citing federal case law, now that the meaning of the phrase "adverse employment action" in the two courts has diverged.

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Another example involves the 2003 case *State Dept. of Health Services v. Superior Court*. The original plaintiff in the case, Theresa McGinnis, alleged that her supervisor sexually harassed her for more than a year before she made a formal complaint. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1035.) When the Department of Health Services became aware of the harassment, it immediately instituted disciplinary proceedings against the supervisor, but McGinnis brought suit against the Department anyway. (*Id.*) In defending itself, the Department cited two federal cases, *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*. Together, these cases establish a defense to Title VII sexual harassment claims where there is no "tangible employment action" (discharge, demotion, refusal to hire), and the employer can show that "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." (*Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 542 U.S. 775, 807 (1998).)

Despite the Department's argument, the court held that federal case law should be given "little weight" in sexual harassment claims under the FEHA. (*State Dept. of Health Services,* 31 Cal.4th at 1040.) The court based its reasoning on the fact that Title VII does not specifically address harassment whereas the FEHA does. (*Id.*; *See,* Cal. Gov. Code § 12940(j)(1).) While this difference is certainly significant, the Department's use of *Ellerth* and *Faragher* is understandable, given the large body of federal case law covering sexual harassment in the workplace. Many cases are landmark cases that are cited repeatedly by California courts. (*See, e.g., Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998); *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).) The court in *State Dept. of Health Services*, however, felt it necessary to fashion its own defense for cases in which there is no tangible employment action, one very similar to the *Ellerth/Faragher* defense, but one tailored to the language of the FEHA. Ultimately the court enumerated three elements: "(1) the employer took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered." (*State Dept. of Health Services,* 31 Cal.4th at 1044.)

Because the FEHA and Title VII have the same goals, it is often easy to forget that they are different, and it is tempting to borrow doctrines from federal case law, especially when they are well-reasoned and practical. *State Dept. of Health Services* serves as a reminder that no matter how well-reasoned or practical a doctrine from the federal courts may be, California courts hearing cases brought under the FEHA are interpreting the FEHA. Where the FEHA and Title VII differ, California courts are free to borrow ideas and doctrines from their federal counterparts, but they are not obligated to do so.

Granted, in each of these cases the courts may very well have created a distinction without a difference. In *Yanowitz*, despite the narrower definition of "adverse employment action," the California Supreme Court defined what "materially affects the terms and conditions of employment" broadly enough to include not only discharging or demoting an employee but also creating a hostile work environment. (*Yanowitz,* 36 Cal.4th at 1053.) If the U.S. Supreme Court had applied the *Yanowitz* rule in *Burlington*, a trier-of-fact could have reasonably found that what happened to the plaintiff fits the definition of an adverse employment action and arrived at the same conclusion. In *State Dept. of Health Services*, the court, after rejecting the federal precedent for the defendant's argument, did arrive at the same conclusion, though in a slightly more roundabout fashion. (*State Dept. of Health Services,* 31 Cal.4th at 1043-44.) Still, the relative recency of these cases means that the courts have not had an opportunity to explore the boundaries of their holdings. Future courts may find a real difference between the FEHA and Title VII in both of these areas.

D. The FEHA and the ADA

Another area in which courts have struggled with competing definitions under state and federal laws is disability discrimination. In fact, the courts have been so bedeviled by the incorrect application of federal law to state FEHA claims that the California Legislature was forced to step in and clarify California law.

The confusion can be traced to one line of dicta in one case. While the ADA was enacted in 1990, after

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the FEHA, portions of the FEHA were significantly revised in 1992 to conform to provisions of the ADA. (*Diaz v. Fed. Express Corp.*, 373 F.Supp.2d 1034, 1053, (2005).) As a result, courts have felt free to rely upon decisions interpreting the ADA to "guide construction and application of the FEHA." (*Hastings v. Dep't of Corrections* (2003) 110 Cal.App.4th 963, 973.) However, under the 1992 revisions, a disability is defined as an impairment that "limits a major life activity." (Cal. Gov. Code § 12926(i)(1).) This definition does not conform to the language of the ADA, which states that the impairment must "*substantially* limit" the major life activity. (Cal. Gov. Code § 12926(i)(1).) Despite the difference in language, the court in *Cassista v. Community Foods, Inc.*, stated that the FEHA required an impairment "*substantially limiting* one or more major life activities" (italics added), even though this conclusion was unnecessary to the disposition of the case. (*Cassista v. Community Foods, Inc.* (1993) 5 Cal.4th 1050, 1060.)

For years, the error perpetuated itself across decisions until the California Legislature clarified the FEHA's scope in 2000 by adding Cal. Gov. Code § 12926.1. This section states, "[T]he Legislature has determined that the definitions of 'physical disability' and 'mental disability' under the law of this state require a 'limitation' upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this state than under that federal act." Subsequently, the court decided *Colmenares v. Braemar Country Club, Inc.,* which expressly disapproved several cases to the extent that they suggested that the ADA's substantial limitation test applies to disability claims under FEHA. (*Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1030-1031, n. 6.)

The enactment of Cal. Gov. Code § 12926.1 did not clear up all of the confusion, however. In *Brundage v. Hahn*, the court promulgated another error in the application of federal law to FEHA claims. The plaintiff in *Brundage* brought claims of disability discrimination under both the FEHA and the ADA. (*Brundage v. Hahn*, 57 Cal.App.4th 228, 235.) The court, applying federal authority to both claims because of the similarities between the two statutes, stated that to present a prima facie case of disability discrimination, a plaintiff must show not only that he or she suffers a disability, but that he or she is a "qualified individual," one who can perform the essential functions of his or her job, with or without reasonable accommodation. (*Id.* at 235-36.) The court's statement is consistent with the language of the ADA, but the FEHA contains no reference to the term "qualified individual." (42 U.S.C. §§ 12111 (8), 12112(a); Cal. Gov. Code § 12940(a).) It refers only to "an applicant or employee." (Cal. Gov. Code § 12940(m).) Yet, a number of California cases have picked up on the language of *Brundage* and quoted it as the proper legal standard. (*See, e.g., Hastings v. Department of Corrections* (2003) 110 Cal.App.4th 963, 971; *Finegan v. County of Los Angeles* (2001) 91 Cal. App.4th 1, 7; *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 254; *Quinn v. City of Los Angeles* (2000) 84 Cal.App.4th 472, 480; *Deschene v. Pinole Point Steel Co*. (1999) 76 Cal.App.4th 33, 44.) The error was not corrected until 2005 when the court decided *Green v. State of California*. In *Green*, the court finally clarified that an employee is not required to show that he or she is a "qualified individual" in order to prevail in a disability discrimination claim under the FEHA. Rather, a showing that the employee *cannot* perform the essential functions of his or her job is a defense in which the employer bears the burden of proof. (*Green v. State of California* (2005) 132 Cal.App.4th 97, 108-109.)

Even after *Green,* there is still a danger of injecting bad law into otherwise valid arguments under the FEHA. Several of the cases that incorrectly apply federal authority to FEHA claims are still good law on other points. For example, *Jensen v. Wells Fargo Bank* refers to the incorrect "qualified individual" requirement, but it is often cited for its discussion of the mandatory good-faith "interactive process" in which an employer and a disabled employee must engage in order to determine a reasonable accommodation. (*Jensen*, 85 Cal.App.4th at 254, 266.) *Deschene v. Pinole Point Steel Co*. also contains an erroneous reference to the "qualified individual" requirement, but in the next sentence the court stated correctly the rule that once an employee has established a prima facie case of discrimination, the burden shifts to the employer to show a non-discriminatory, legitimate business reason for the employment action taken against the employee. (*Deschene*, 76 Cal.App.4th at 44.) As a result, it takes careful parsing of the language in these cases to avoid citing bad law.

E. Conclusion

State and federal anti-discrimination statutes have the same laudable goal, eliminating discrimination in

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the workplace, but they are not interchangeable. Subtle differences in wording can lead to major differences in the dispositions of cases. Remembering this lesson can keep an attorney from being *embarrassed*.

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rests on a credibility determination between the two sides.

Mr. Hueston also stressed the importance of keeping jurors awake by taking them on a journey so that they get excited about the case. Toward that end, Mr. Hueston advised business litigators to identify key themes and repeat them to the jury through various mediums over and over again. And, these themes should be built around what Mr. Hueston labeled the "stubborn facts" of a case, because the stubborn facts do not change and remain in the jurors' minds.

Mr. Hueston likewise expressed that a jury in any case needs five or six "decision moments," or moments to remember when making its decision. Kenneth Lay gave the jury a crucial "decision moment" when he responded to a question by Mr. Hueston about Enron's code of ethics while on the witness stand: "Rules were important, but you should not be a slave to rules, either." Needless to say, Lay's comment about rules became one of the key "decision moments" that Mr. Hueston reemphasized in closing argument.

As evidenced by the standing ovation that Mr. Hueston received after his presentation to the ABTL, the Orange County legal community could not be more proud of one of its own. Welcome back.

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cal transaction, involving the universe of buyers and sellers.

- Investment Value

The treatise "Valuing Small Businesses and Professional Practices" was published in 1986 and states "Many terms are used to define value… Only a few of these terms have some definition. Others have the definition which the parties choose to place upon them." (*Id*.) Later this same treatise states with respect to investment value. Most valuation terms, other than fair market value are not, unfortunately, defined with unanimous agreement by various writers and appraisers. (*Id*.)

The treatise entitled "Understanding Business Valuation" defines investment value as the "value to a particular buyer, as compared with the population of willing buyers, as is the case in fair market value." ("Understanding Business Valuation: A Practical Guide to Valuing Small to Medium-Sized Businesses," 2nd Edition, Trugman (American Institute of Certified Public Accountants), 2002.) This treatise was published in 2002 and this definition is consistent with "Valuing a Business," the 3rd Edition which was published in 1996.

"The Guide to Business Valuation" states that "investment value is the value of an asset or business to a specific owner or prospective owner. Accordingly, this type of value considers the owner's or prospective owner's knowledge, abilities, expectations of risks and earning potential, and other factors." ("Guide to Business Valuations," Fishman, Pratt, Griffith and Wilson (Practitioners Publishing Company) 1999.)

The publishing dates are important because the case law on the topic of "investment value" began in the early 80's and it is important to analyze whether the Court's use of the term "investment value" is consistent with the current definition of investment value.

California Statues

Corporations Code section 2000 states that, in a voluntary or involuntary corporate dissolution, the dissolution may be avoided by the purchase of shares at their "fair value."

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fense judgment must follow as a matter of law. [2] Stated differently, the essence of the "inappropriate comparator" defense is that the statistical composition of a protected group within a higher-paid class of workers is such that, as a matter of law, the pay disparity between the higher-paid and lower-paid classes must be based upon non-discriminatory factors.

Although, under the case law, this defense has arisen most often in claims brought under the Equal Pay Act (29 U.S.C. §§ 201 *et seq.)*, it also has application in claims brought under Title VII,[3] as well as claims brought under state anti-discrimination statutes (such as, for example, the California Equal Pay Act and the California Fair Employment & Housing Act).[4]

This article examines the contours of the "inappropriate comparator" defense, and provides a survey of the statistical benchmarks that have arisen under the case law to establish this defense.

A. Discrimination Claim Requires the Selection of Appropriate Comparator

In order to prevail on a claim of discrimination, a plaintiff must choose an appropriate comparator. See *Hofmister*, *supra*, 53 F. Supp. 2d at 891-92; *Arthur*, *supra*, 174 F. Supp. 2d at 975-76; *Schulte*, *supra*, 533 F. Supp. at 38-39; see also *Peters*, *supra*, 818 F.2d at 1164-65. Under the Equal Pay Act, for example, both the legislative history [5] and case law interpreting the EPA hold that "differences in pay between groups or categories of employees that contain both men and women within each group or category are not covered by the EPA." *Hofmister*, *supra*, 53 F. Supp. 2d at 891, fn. 13, citing Congressional Record, Vol. 109, Part 7 (88th Congress, 1st Session); see also *Schulte*, *supra*, 533 F. Supp. at 39; *Arthur*, *supra*, 174 F. Supp. 2d at 976. Even where two groups of employees perform identical work, courts have held that the EPA "was not intended to extend to claims by one group of employees that they are paid less than another group when each group includes significant numbers from each sex, and there is no claim that members of either sex are treated differently within each classification." *Schulte*, *supra*, 533 F. Supp. at 39; see also *Arthur*, *supra*, 174 F. Supp. 2d at 976 (same).

The same is true under Title VII. Under that statutory scheme, courts also have held that it is not proper for plaintiffs to compare themselves to another group of employees that contain a significant percentage of the minority group alleging discrimination. See *Beall*, *supra*, 603 F. Supp. at 1581; *Schulte*, *supra*, 533 F. Supp. at 39.

B. Statistical Benchmarks

A number of cases have begun to establish certain statistical benchmarks that other courts now follow for purposes of determining whether summary judgment on a discrimination claim on "inappropriate comparator" grounds is appropriate. Although the minority composition of the plaintiffs' class is a factor in evaluating the propriety of this defense, courts appear to be principally focused upon the minority composition of the higher-paid class of workers to which the plaintiffs seek to

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3. See *Beall v. Curtis*, 603 F. Supp. 1563, 1581 (M.D.Ga. 1985) ("*Beall*") (rejecting gender discrimination pay claim by lower paid group that was 97% female because comparator group was almost one-third female).

4. The California EPA "is nearly identical to the federal Equal Pay Act of 1963." *Green v. Par Pools Inc.*, 111 Cal. App. 4th 620, 623 (2003). Accordingly, "it is appropriate to rely on federal authorities construing the federal statute: 'Although state and federal antidiscrimination laws' differ in some particulars, their objectives are identical, and California courts have relied upon federal law to interpret analogous provisions of the state statute." *Id*., citing *Muzquiz v. City of Emeryville*, 79 Cal. App. 4th 1106, 1116 (2000).

5. 109 Cong.Rec. 9209 (1963) (statement before the full House):

> Mr. GOODELL. Mr. Chairman, here are examples and general guidelines as to the intent of Congress in enacting H.R.6060, the equal-pay-for-women bill:
>
> First. Differences in pay that exist between women alone are not covered by this act.
>
> Second. Differences in pay that exist between men alone are not covered by this act.
>
> Third. Differences in pay between groups or categories of employees that contain both men and women within the group or category are not covered by this act.
>
> Fourth. Only those jobs that are the same and normally related shall be compared.

See also *Hofmister*, *supra*, 53 F. Supp. 2d at 891, fn. 13

6. For example, some courts have held that a defense judgment was appropriate on inappropriate comparator grounds where, notwithstanding the fact that the plaintiffs' class was approximately 97% minority, the higher-paid class was nearly one-third minority such that the pay differential was based upon factors other than plaintiffs' minority status. See *Beall*, *supra*, 603 F. Supp. at 1581.

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compare themselves. [6]

1. *Hofmister v. v. Mississippi State Dept. of Health*

In *Hofmister*, female "records administrators" sued the Mississippi State Department of Health for gender discrimination. The plaintiffs claimed that "records administrators," a predominantly female group of employees, performed the same work as "registered nurses," a predominately male group of employees, but that "record administrators" were paid less.

The district court entered judgment in favor of the employer defendant, noting that "after a certain indefinable point, the integration within each of the classes compared becomes such that any wage differential is clearly based on a factor other than sex." *Hofmister*, *supra*, 53 F. Supp. 2d at 892. The "indefinable point" in *Hofmister* was reached based upon the following statistical breakdowns: (i) Lower-Paid Group: 90% female / 10% male; (ii) Higher-Paid Group: 47% female / 53% male. *Id*., at 887.

2. *Arthur v. College of St. Benedict*

Arthur reached the same result as *Hofmister*. In *Arthur*, female faculty members of a private college (College of St. Benedict), which merged faculty with another private university (St. John's University), brought an action claiming that both universities engaged in gender discrimination.

The issue in *Arthur* was whether the schools discriminated by offering enhanced "traveling tuition remission" benefits to male St. John's faculty over female St. Benedict's faculty. *Arthur*, *supra*, 174 F. Supp. 2d at 971-74. After the merger, St. John's and St. Benedict's both preserved their own separate premerger benefits plans for their existing faculty, but St. John's plan was more lucrative than St. Benedict's. *Id*. Once merged, the two schools employed 179 faculty members, and "62% of the combined colleges' male faculty (or 68 out of 110) received the traveling tuition remission benefit, while only 30% of the combined female faculty of the colleges (or 21 out of 69 females) received the benefit." *Id*., at 974.

In granting the defendants' motion for summary judgment based upon plaintiffs' failure to establish a *prima facie* case of discrimination, the *Arthur* court explained that, even though both groups of faculty performed "approximately equivalent work . . . [t]he EPA does not require perfect diversity between the compari son classes, but at a certain point, when the challenged policy effects both male and female employees equally, there can be no EPA violation."

> [Plaintiffs] want the Court to compare the St. John's faculty (76% male and 24% female during the relevant time period) to the St. Ben's faculty (47% male and 53% female during the relevant time period). But the Court finds these two classes were sufficiently integrated at the time of the amalgamation of the colleges, which consequently undermines any suggestion that the difference in benefits was based on sex.

Id., at 976. The court emphasized that "[p]laintiffs cannot make a comparison of one classification composed of males and females with another classification of employees also composed of males and females." *Id*., at 976, citing *Hofmister*, *supra*, 53 F. Supp. 2d at 890. Summary judgment in *Arthur* was reached based upon the following statistical breakdowns: (i) Lower-Paid Group: 53% female / 47% male; (ii) Higher-Paid Group: 24% female / 76% male. *Arthur*, *supra*, 174 F. Supp. 2d at 974, 976.

3. *Schulte v. State of New York*

Schulte reached the same result as *Hofmister* and *Arthur* under both the EPA and Title VII. In granting summary judgment to the employer, *Schulte* held that the employer's decision to pay social workers (who were 71% female) lower wages than psychologists (who were 69% male) did not establish discrimination as a matter of law, even if the two groups of employees performed identical work:

> [E]ven if plaintiffs were to succeed on their claim that psychologists and social workers performed equal work for the New York State Office of Mental Health, the fact that wage differentials exist between the two classifications is not evidence of sex discrimination for purposes of Title VII or the EPA. While it may be that the state is unwise in having two different job classifications if there is only one task to be performed (a proposition hotly contested by defendants), this decision cannot be attributed to sex discrimination when each job classification includes substantial numbers of each sex, and there is no claim that members of each sex are not treated

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equally within each job classification.

Schulte, supra, 533 F. Supp. at 39. Summary judgment in *Schulte* was reached based upon the following statistical breakdowns: (i) Lower-Paid Group: 71% female / 29% male; (ii) Higher-Paid Group: 31% female / 69% male. *Id*., at 38.

4. *Beall v. Curtis*

Beall reached the same result as *Schulte* on a discrimination claim brought under Title VII. In *Beall*, the plaintiffs (a group of female nurse practitioners) brought a gender discrimination claim because they received lower wages than a predominantly male group of physician's assistants.

In directing a verdict for the defendants, the court concluded that the plaintiffs did not choose a valid comparator for purposes of proving discrimination because, although the job classification of nurse practitioners was approximately 97% female, almost one-third of the physician's assistants were female as well. *Beall*, *supra*, 603 F. Supp. at 1581. Because women and men were treated the same within the separate occupations, the female plaintiffs in the lower-paid group could not establish a *prima facie* case of intentional discrimination by artificially comparing themselves to men in the higher-paid group. *Id*.

C. Summary

The following chart illustrates the statistical breakdowns of the lower-paid and higher-paid groups in cases where the defendants obtained judgment in their favor as a matter of law based upon "inappropriate comparator" grounds:

Case	Lower-Paid Group	Higher-Paid Group
Hofmister	90% female / 10% male	47% female / 53% male
Arthur	53% female / 47% male	24% female / 76% male
Schulte	71% female / 29% male	31% female / 69% male
Beall	97% female / 3% male	33% female / 67% male

D. Conclusion

Although it is often times difficult to obtain summary judgment on a discrimination claim brought under the EPA, Title VII or state anti-discrimination laws, the "inappropriate comparator" defense has emerged as means to dispose of such claims before trial. Practitioners should pay careful attention to the statistical compositions of the plaintiffs' class and the higher-paid class of workers to which the plaintiffs compare themselves because, depending upon those statistics, "inappropriate comparator" may be a viable defense.

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California Code of Civil Procedure section 1263.310 states that, in eminent domain proceedings, market value means the "fair market value" of the property taken.

Evidence Code section 811 states that the value of property means "market value."

The California statutes are silent as to the standard of value to be used in valuing a business except in corporate dissolutions and eminent domain proceedings. The Evidence Code refers to the value of real and personal property but not the business goodwill.

California Case Law

In 1983 a case entitled *Marriage of Hewitson* was decided. (142 Cal. App. 3d 874.) This case involves valuation of a closely held business for purposes of dividing the community property as part of an action for the dissolution of marriage. The court held that "the Family Law Act … is satisfied when the investment value of closely held shares is determined rather than their market value." (*Id.*) It should be noted that *Hewitson* is an oft cited case for the proposition that the value of a business not involved in a corporate dissolution or in an eminent domain proceeding should be determined based on "investment value."

The question which arises is whether the Court's definition of "investment value" comports with the definition currently in use in business appraisal treatises. Remember, that at the time of *Hewitson* a major treatise on the topic indicated that in the valuation community the term "investment value" was not defined with uni-

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versal agreement. This is not the case currently. As shown above, at lease since 1996 the appraisal community appears to have consistently defined "investment value." The question remains whether the definition in *Hewitson* fits with this modern definition of business appraisers or is it more closely aligned with the definition of "fair market value."

- Analysis of *Hewitson*

The court in *Hewitson* identifies two standards of value in appraising closely held businesses, "investment value" and "market value." In the determination of "market value" the court stated that two methods are used. "One method is through the use of recent sales of the unlisted stock, which were made in good faith and at arm's length, within a reasonable period either before or after the valuation date… The other method is the price-earnings ratio approach." (*Id.*)

The court found that wife's expert used the price-earnings ratio approach but that this approach was not applied properly. (*Id.*) Neither of the "market value" methods above is rejected by the court, only application of the method by wife's expert is criticized. In addition, both of the "market value" methods mentioned by the *Hewitson* court would be based on a stated or implied premise that the transactions be arm's length. Arm's length transactions are one of the bases for a "fair market value" determination. ("Black's Law Dictionary," (West Group) 1999.)

The Court held that there are three methods determining "investment value" of a closely held business. These methods are "commonly termed (1) capitalization of earning approach (see *Worthen v. United States,192 F. Supp. 727*), (2) divided paying capacity (see *Estate of Goar v. Comm'r., 9 T.C.M. 854*), and (3) book value or net asset value (see *Estate of Rowell, 132 Cal.App. 421*)." It should be noted that theses approaches are also commonly identified by business appraisal treatises as methods to compute "fair market value."

When reviewing the three cases the *Hewitson* court relies upon (*Worthen*, *Goar* and *Rowell*) it is interesting to note that the courts in these cases held that the methodology was used to define "fair market value."

The *Hewitson* court cites all three of these cases for its holding that the methodologies employed lead to "investment value." The three cases relied upon by the *Hewitson* court refer to fair market value, but this same terminology is not used by the *Hewitson* court.

Also, in describing these three methods the *Hewitson* court failed to mention what modern business appraisal treatises consider a primary attribute associated with "investment value." This attribute is the application of these methods to a particular buyer and an identification of that buyer.

Conclusion

The *Hewitson* court relies on three cases to define the various methods used to derive "investment value." The underlying cases relied upon by the *Hewitson* court refer to these methodologies as deriving "fair market value. Also, these same three methods mentioned by the *Hewitson* court are used today by business appraisers applying a "fair market value" standard. Finally, the *Hewitson* "investment value" methods did not specify that part of the methodology was dependent on the identification of a particular buyer. Such characteristics are the hallmark of the modern day definition of "investment value" as defined in business appraisal treatises.

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morous) address by the Honorable Carol A. Corrigan, Associate Justice of the California Supreme Court (following an entertaining introduction by Justice Kathleen O'Leary).

Saturday's session included a discussion of criminal issues in civil cases -- with insight from John Hueston, among others -- as well as discussions regarding coverage issues and post-trial messes and ways to handle and repair such situations.

The conference ended Sunday with a wrap-up session from the "Masters of Disaster," including our own Wylie Aitken and Tom Malcolm, among others. At the end of the program session, the attendees left with a realistic understanding that the best trial attorneys are the ones that are flexible and able to react on a moment's

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notice to the most unexpected events.

Of course, no ABTL Annual Seminar consists of just CLE. During our five days, we had plenty of free time to enjoy golf, snorkeling, sightseeing, or just relaxing on the tropical beach. On one evening, the Orange County Chapter hosted an intimate reception for all of the Orange County attendees. Another evening offered a delicious sit-down dinner and yet another evening offered a presentation on killer asteroids (with telescopes provided by which to view the stars and planets), followed by a wonderful luau.

For many, Sunday also was time to return to the mainland. Mahalo to the entire committee that organized this fabulous event, including, among others, Executive Director Becky Cien, and Orange County Chapter representatives, president Gary Waldron, Jim Bohm, Darren Aitken, the Honorable Peter Polos and the Honorable David McEachen.

Needless to say, the Annual Seminar was stimulating, exciting, and fun. We hope to see each of you at next year's meeting at the beautiful Silverado Resort in Napa Valley, California.

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