

Q&A with the Hon. Robert J. Moss

By Linda A. Sampson



[Editor's Note: We caught up with Judge Robert J. Moss for this judicial interview. Judge Moss was appointed by Governor Gray Davis in 2002. Prior to joining the bench, Judge Moss was in private practice specializing in civil litigation, including personal injury, insurance bad faith, construction defect, professional malpractice, governmental entity and business tort litigation. Judge Moss is also a member of the ABTL Judicial Advisory Board.]

Q: *Why did you decide to become a Judge?*

A: I actually never really thought I would end up becoming a judge. I really loved being a lawyer. But in late 2001, the law firm I founded was going through some changes and I was faced with the realization that I, too, was going to have to make some changes. I considered revamping my firm or joining another's practice. That's when I started thinking maybe it was a

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Opposing Fee Motions—Finding the “Reason” In Reasonable

By Sherry S. Bragg

Let's face it, sometimes even the best of us may lose a case at some point in our legal career. So, what do you say to a judge to dissuade him or her from awarding opposing counsel the maximum amount of attorney's fees after you have tried, and lost, a case involving a statutory or contractual right to such fees? Thankfully, I have been on the asking side of that motion more than on the defending side. However, I was recently put to the task of opposing a fee motion, and was struck by the challenge that this task presented in light of what I perceive to be the rather wide discretion provided the trial courts in this area. In the rare event that you find yourself in the position of having to defend against a fee motion, this article may provide you with some initial guidance.

The first thing to remember is that the assignment of determining “reasonable” fees is a delicate one, and the responsibility of giving the judge ample ammunition to reduce the ultimate award falls squarely on the attorney opposing the fee request. “The rule with respect to attorney's fees is that [the] amount to be awarded as attorney's fees is left to the sound discretion of the trial court. The trial judge is in the best position to evaluate the services rendered by an attorney in his courtroom; his judgment will not be disturbed on review unless it is clearly wrong.” [Citation]” (*Vella v. Hudgins* (1984) 151 Cal.App.3d 515, 522.) Thus, in light of the broad discretion that the trial



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The President's Message

By James G. Bohm



One of the things that impresses me most about being active in the ABTL is the generosity and service of its board members. There is a strong sense amongst the board members of giving back to the community.

This manifests itself in many ways from volunteering for the various education endeavors we promote, to giving both their time and

money to bettering the community. Since we have all benefited from the practice of law, I think there is nothing more fitting than assisting those less fortunate in obtaining access to greatly needed legal services. On June 6, 2007, the Orange County Chapter of the ABTL held its annual Public Law Center wine tasting fundraiser to do just that.

Even though the event occurred on the same night as the Duck's Stanley Cup championship, the program was well attended by both the bench and bar. I am pleased to report that we raised over \$20,000 for the PLC -- the most we have ever raised for the PLC to date. There are a couple people who went above and beyond the call of duty to make this event a success and I want to single them out. First, Kathleen Peterson headed the committee and put in an extraordinary amount of time in making the event a success from dealing with corporate sponsors to soliciting raffle items and everything in between. The other person who was a substantial factor in the event's success was Sean O'Connor. Sean arranged for the wine to be provided at cost, convinced the Westin to waive the normal corkage charge as well as give a weekend at the hotel for the raffle, and was involved in virtually every aspect of the planning. Finally, I want to acknowledge our executive director, Adrienne King, for all she did in organizing and setting up the dinner. Thank you Kathleen, Sean and Adrienne for helping to make this event a success.

We have been told that the ABTL OC Chapter is the PLC's single largest donor. We are very proud to be a major sponsor of such a worthy cause. We are

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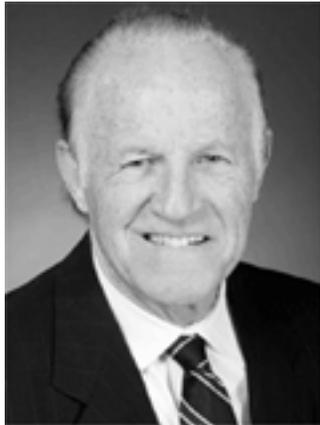
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1999: It Was a Very Good Year

By Tom Malcolm

As the second president of the ABTL in the O.C. (long before the Fox Network had made our county known to 18-30 year olds worldwide), the current editor of the ABTL Report, Linda Sampson, of Morrison & Foerster has asked that I submit this article in commemoration of ABTL's 10-year anniversary.



Coincidentally, during my term as president, I asked Dean Zipser, also of Morrison & Foerster, if he would be willing to be the first editor of the ABTL Report. Dean, working in conjunction with Justice William Rylaarsdam, spent countless hours organizing ABTL's first editorial board and he was personally responsible for the publication of its inaugural issue Volume I, No. 1 in March of 1999 (by comparison this article is scheduled to appear this summer in Volume IX, No. 2). Not enough praise can be heaped upon Dean for ABTL's success during the past 10 years, and I thank him for all of his efforts.

In order to write this article, I needed to refresh my memory. As many of you know, I cannot remember what happened last week, not to mention eight years ago. My first thought was to contact ABTL's current secretary, Sean O'Connor, of Sheppard Mullin, for the 1999 minutes of the ABTL's Board of Directors' meetings. To our mutual dismay, however, the minutes have mysteriously vanished.

Left with a blank slate for a memory, I was next tempted to contact Justice William Bedsworth to ask him to be my ghost-writer. Since I knew the article would be short on substance, I hoped the Justice could at least make it funny. But then, I remembered I still owed Justice Bedsworth a lunch, so I decided it would be more fiscally prudent to proceed on my own.

After long hours of reflection, I recall that when I took over in 1999, the ABTL was coming off a very successful 1998. Afraid of failure, I decided the key was to mimic the formula developed by ABTL's first

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ABTL Gives Back: Our Annual PLC Fundraiser

By Robert E. Palmer

"We make a living by what we get; we make a life by what we give." -- Winston Churchill

From day one, the Founding Faithful of the Orange County ABTL sought to create something special:

*To find a vehicle to more meaningfully bring together the bench and bar in Orange County, including creating a dialogue between a "best of show" Board of Directors from the bench and bar;

*To provide the finest law-related programs and speakers, including an upgraded base of talent (from around the County and Country), enhanced facilities and audio visual presentations, and programs that would provide value to both the senior litigator and young associate alike; and

*To become a vital part of and draw from the assets of an already established and successful state-wide ABTL group.

Built on these foundations and the leadership of Past Presidents Don Morrow and Tom Malcolm and a dedicated ABTL Board, in only three years our rag tag fleet had grown from 0 to 500 members and was regularly putting on top notch programs many times a year. Upon this backdrop, I and our fellow Board members sought to not only be the top provider of law-related programs in Orange County, but we sought to do more -- namely, to give something back to our community and utilize our group to raise funds for a worthwhile charity and one that all of our members could support. But how to do this? Our plan was quite simple.

First, we wanted to select a law-related charity that not only had broad support in our legal community, but was not affiliated with any particular political party, cause, or belief system. We also hoped that such a charity would be one



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The Motion to Strike Class Allegations: A Useful Defense Strategy in California State and Federal Class Actions

By Melinda Evans

Imagine that you are counsel for a national corporation hit with a potentially devastating class action suit filed in California. During the first year after the suit is filed, the parties exchange some documents and written discovery responses. Depositions are also taken of the named plaintiffs and of the corporation's persons most knowledgeable. However, the plaintiffs' discovery efforts gradually slow down the next year until plaintiffs are doing little if anything to move the case forward. During the next year, the court occasionally holds a status conference at which plaintiffs' counsel buys time by proposing certain discovery or settlement strategies that subsequently are not pursued. Four years after the filing of the complaint, the litigation has basically stalled, and there is still no class certification motion in sight.

In the meantime, your client wrestles with the awkward uncertainty of trying to conduct business while a multimillion-dollar class action suit hangs over its head. At the same time, your internal investigation reveals that, regardless of whether the individual claims of the named plaintiffs have merit, those claims are based on highly individualized and isolated facts that would likely prevent the putative class from being certified. The early deposition testimony and document production support your defenses to class certification, as do the numerous written witness statements you have been able to gather from members of the putative class you have located and interviewed. Procedurally, how can you get this key evidence in front of

the court to resolve the class claims, when there is no sign that plaintiffs will seek class certification anytime soon?

One procedural mechanism is a motion to strike the class allegations. Such a motion has been successfully employed in both state and federal actions in Cali-

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In Search of a Silver Lining in *Murphy v. Kenneth Cole Productions*

By Mark D. Kemple



On April 16, 2007, the California Supreme Court issued its much-anticipated decision in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094. At issue was whether the additional hour's pay mandated for a missed 30-minute meal break or denied 10-minute rest break by Labor Code § 226.7, is "wage" or a "penalty." The conse-

quence of this seemingly trivial distinction was, and is, enormous. Contrary to the holdings of the clear majority of courts to have previously addressed the issue, and contrary to the position taken by the California Division of Labor Standards and Enforcement ("DLSE") in its opinion letter on the issue, the California Supreme Court found the payment to be a wage. As discussed below, "ouch."

Without question, the ruling is a blow to California employers, and surely will spawn the filing of more wage/hour class actions. Still, employers may find safe harbor in the Court's acknowledgment of the difficulty in resolving the distinction presented, and may even argue that the Court's statutory analysis of the wage/penalty question suggests that the Labor Code creates no direct private right of action for compensation for missed breaks (a more fundamental question, not before the Court in *Murphy*).

Consequences of the Distinction

Meal and rest breaks have long been a part of California's employment landscape. Generally, employers are prohibited from employing non-exempt employees for a work period of more than 5 hours without providing a meal period of not less than 30 minutes. They also generally are prohibited from employing such persons for a work period of more than 10 hours without providing a second meal period of not less than 30 minutes. In addition, employers generally are required to "authorize and permit" these employees to take a

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Brown Bag Lunch with the Honorable Andrew J. Guilford of the United States District Court, Central District of CA
By Darren J. Campbell

On Wednesday, March 21, 2007, I had the privilege of having lunch with the Honorable Andrew J. Guilford of the United States District Court, Central District of California, along with over a dozen other attorneys from Orange County. Judge Guilford joined the federal bench in 2006. Before embarking on his judicial career, Judge Guilford was in private practice at Sheppard, Mullin, Richter & Hampton LLP for over 30 years, where he represented clients in complex civil litigation matters. The lunch was an ABTL sponsored event that provided everyone in attendance the opportunity to meet Judge Guilford, and enjoy an engaging and informative conversation with him.

The topics of conversation were wide ranging, as those in attendance inquired about Judge Guilford's opinions and experience on multiple subjects. The judge told us that he prepares tentative rulings to help focus the litigants. He gave us great insight into how to approach an argument when the tentative ruling is not in your favor, and to articulate your position in a positive fashion and avoid statements such as "with all due respect." He also advised us to be succinct when the tentative ruling is in your favor, and to highlight the salient points of your argument.

Judge Guilford also provided all in attendance with an insider's view of his court. He discussed everything from how he decided to arrange counsel's tables to stressing the importance of being courteous to opposing counsel and his own clerk. His clerk, Lisa Bredahl, also gave us a list of "do's and don'ts" when contacting the court.



Judge Guilford then took us back into his chambers and discussed his process in preparing rulings. He emphasized to the group the importance of persuasive writing. We ended the day with a tour of his personal office.

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Hall v. County of Los Angeles: The First California "Proper Comparator" Case
By John A. Vogt



Hall v. County of Los Angeles (2007) 148 Cal. App. 4th 318, is a landmark decision because it is the first California case to recognize that, in order for a plaintiff to state a *prima facie* case of discrimination under the California Equal Pay Act (EPA) and the Fair Employment & Housing Act (FEHA), a plaintiff must select a "proper comparator."

Hall was a class action brought by a group of over 250 workers, employed by a third-party contractor, who sought to have anti-discrimination statutes (specifically, the EPA and the FEHA) apply to the contract employees' claims. In the trial court, the County was granted summary judgment, including an award of attorneys' fees and costs as the prevailing party. In a published opinion from Division 1 of the Second Appellate District, that judgment was affirmed in full on appeal.

As the *Hall* opinion reflects, over the past three decades, there had emerged a body of case law that has established statistical parameters to guide practitioners seeking to obtain summary judgment on an EPA and/or FEHA discrimination claim.¹ As these federal cases (and now *Hall*) collectively hold, at a certain point, the degree of gender or race integration in a higher-paid class of workers to which the lower-paid plaintiffs' class compare themselves is so advanced that plaintiffs have not chosen a "proper comparator," and a defense judgment must follow as a matter of law.

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1. See *Schulte v. State of New York* (E.D.N.Y. 1981) 533 F.Supp. 31, 37-39 ("*Schulte*"); *Beall v. Curtis* (M.D.Ga. 1985) 603 F.Supp. 1563, 1581 ("*Beall*"); *Soble v. Univ. of Maryland* (4th Cir. 1985) 778 F.2d 164, 167 ("*Soble*"); *Strag v. Board of Trustees* (4th Cir. 1995) 55 F.3d 943, 950 ("*Strag*"); *Hofmister v. Mississippi State Dept. of Health* (S.D.Miss. 1999) 53 F.Supp.2d 884, 891 ("*Hofmister*"); *Arthur v. College of St. Benedict* (D.Minn. 2001) 174 F.Supp.2d 968, 976 ("*Arthur*").

A WORD FROM OUR SPONSOR: Hiding Assets: Tax Havens and Other Techniques

By Stephen M. Zamucen

This article will explore a few examples of how individuals might hide misappropriated funds. It will also discuss the use of "havens." The purpose of this article is simply to help the reader understand the basic concepts of how individuals handle misappropriated funds. Outlined below are a few methods individuals use to hide and invest misappropriated funds.

Cashier's Checks and Travelers Checks

Generally, the use of cashier's and traveler's checks is a simple and common tool for hiding misappropriated funds. Moreover, they reduce the amount of currency to be carried. Lastly, cashier's checks or traveler's checks in denominations of less than \$10,000 are negotiable financial instruments that can be exchanged almost any place in the world.

Non-Bank Money Transfers

An example includes the selling of money orders or traveler's checks.

Safe Deposit Boxes

The safe deposit box may provide a secure location to place one's belongings. The general advantage to the safe deposit box is that authorities require either the permission of the person who owns the box or, absent that permission, a court order to view its contents.

Havens

Individuals may make use of foreign investment entities to hide assets. Historically used foreign countries include the Cayman Islands, the Bahamas, Switzerland, Panama, and the Netherlands Antilles.

These countries are generally isolated from the international market. Their geographical isolation denies them the ability to immerse themselves into a significant import or export business. In addition, they are limited in the ability to produce an adequate domestic

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good time to look into possibly becoming a judge. So, I applied. Little did I know that nine months later I would get that much-anticipated and hoped for call from the Governor's office. The whole thing was a blur. Fortunately, I think it was meant to be. I love being a judge. I cannot think of a better job.

Also, I am very fortunate to be on the Orange County Superior Court. We have an amazing group of judges here. My colleagues are active in the community. They are smart and exceptional people. Furthermore, we all seem to enjoy each other's company. There really is very little conflict among the judges here in Orange County. I don't think that is true up and down the state.

Q: Do you have any regrets about leaving the practice of law and becoming a judge?

A: None. And that's saying a lot, because I truly loved being a lawyer and practicing law.

Q: What do you like about being a judge?

A: I have always had an academic interest in the law. It fascinates me. As a judge, I am able to participate in this aspect without the hassles associated with managing a practice. There are a lot of pressures that go along with being a lawyer and running a law firm that having nothing to do with the practice of law, including, for example, personnel issues and client responsibilities. Being a judge, there is also a very satisfying sense of doing something that is really important. I think judges play a very important role in our society and it gives me a sense of fulfillment being a part of that process. I also think I look pretty good in black.

Q: Have you developed any particular preference for matters and arguments before you?

A: I really enjoy being on the Civil Panel. It was funny. When I decided to try to become a judge, since my entire law practice had been in civil litigation, I had visions of simply being a civil panel judge. When I first came in to meet the presiding judge after my appointment he told me I would be assigned to the Central Panel doing misdemeanor trials, small claims tri-

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als, traffic trials, and felony pre-lims -- all things with which I had absolutely no experience. I thought to myself "what have I gotten myself into?" I soon learned that with the consolidation of the old Municipal Courts all new judges start in that type of assignment these days. Anyway, I jumped in and really enjoyed the experience. I even did a stint doing misdemeanor arraignments, which is an experience unto itself. I must admit, however, I did feel like I came back home when I finally got to my present assignment. I don't pretend to know it all, but at least I feel like I can speak the language.

Q: Are there certain types of trial advocacy that you find particularly effective from your perspective on the bench?

A: Personally, the trial lawyers that I think are most effective are ones who try his/her case in a low-key, very professional, and business-like manner. Attorneys who insert a lot of drama into their cases, I think, can look phony, like they are trying too hard to sell their case. Now, of course, some cases have natural drama. That's ok. Actually, that really adds something. But forced drama really detracts from the case.

Also, I think that lawyers underestimate the importance of being polite to opposing counsel, both in and out of court. Juries really do notice and rudeness by one attorney to another reduces that attorney's credibility and, naturally, the credibility of the case.

Q: Do you have any advice for young lawyers?

A: Well, of course, it is important to learn your trade. I think younger lawyers (and even more experienced ones for that matter) should try cases from both the plaintiff and defense side. In larger practices, this may involve seeking out some pro bono cases. This broader background can really help a lawyer perfect his/her game. For instance, when I was in practice, I definitely had more cases where I represented the defense, but that is just the way things came out. When I had the chance, I represented plaintiffs. In fact, I never turned away a decent plaintiff's case. I really think it enabled me to better understand the issues on both sides of the counsel table and the pressures faced by both sides.

Furthermore, I want to advise young lawyers that reputation is everything. Of course we have all heard it said that the legal community in Orange County is very small, but the longer an individual practices here, the more that statement rings true. Paths cross again and again and, although the details of a case may be forgotten, opposing counsel may never forget if you went back on your word or were otherwise devious or untrustworthy. Practicing law is a lot of work without adding the extra stresses of a volatile relationship with the opposing side.

Q: Have you learned anything as a judge that you wish you had known as a lawyer?

A: Yes. I wish that I had realized that less is more. It is very easy to get caught up in the minutiae and it rarely helps one's case. Look at the big picture and then find the quickest and most effective way to get to the finish line. Keep the questioning during voir dire, opening and closing statements, and direct and cross examination short and concise. What good is a terrific detail if none of the jurors are paying attention because you lost them in the expansive (and often unimportant) details?

Q: I understand that you are the Chair of the Court Technology Committee. How did that come about?

A: Well, shortly after I was appointed to the bench, I was made a member of the Tech Committee. Judge Kim Dunning was the former chair and when she became more involved in other duties (ultimately becoming Assistant Presiding Judge) she nominated me to take her place and the then-Presiding Judge Fred Horn appointed me to that role.

Q: And what new exciting things are happening on the technology front?

A: So much. When I took over as chair, I had two main things on my agenda that I wanted to accomplish. First, I wanted to ensure public access on-line to court documents and pleadings. Not just the register of actions, but actual documents. I am happy to say that by the end of 2007, this goal should be met. Right now you can go to the court's public website and see the register of actions and we should have actual pleadings available by the end of the year. I want to add that this

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is not something that I take credit for single handedly - we were pointed in this direction before I came on board -- but I did what I could to move this project along with some priority.

The second goal on my agenda was to improve the presentation of evidence capability in the jury trial courtrooms. Indeed, the courts have been high-tech "below ground" in our courthouses for quite sometime. But "above ground," in the courtrooms themselves, we were more than a little behind the times. Now that is changing! Again by the end of this year, the jury trial courtrooms (for civil cases) will have ceiling-mounted drop-down video screens, ceiling-mounted projectors and a wired podium where you can plug in your laptop with one easy connection or just plug your flash drive into the built in processor for easy display of your PowerPoint presentation, photographic evidence or other electronically stored graphics. There will also be a built in Elmo type device to display hard copy material through the projector. On the witness stands there will be a separate monitor with touch-screen functionality so that a witness can actually draw on a photograph or diagram with his or her finger to illustrate a point. The felony panel will have a slightly different set-up -- but also improved evidence presentation systems available.

In addition to accomplishing the two items on my personal agenda, we have also made additional technological strides. In fact, Orange County is one of the first counties to roll out a brand new statewide Case Management Program, known as CCMS V3. This program is currently being utilized in the small claims arena and will soon be used in all civil matters. Eventually the entire state will be using one case management system for the first time in history. This will help ensure consistency and enable better record keeping and statistics gathering. It will also lead us into a less paper intensive environment, like most modern businesses.

Q: You seem to really have your hands full. Besides ABTL and the Technology Committee, do you have time for any other committees?

A: Actually I am very active in a lot of organizations and on a lot of committees. I am Vice President and a

Board Member for the California Judges Association (CJA). This organization represents most of the judges and commissioners in California. Through CJA we monitor legislation, lobby the Assembly and Senate on issues related to the court system and do lots of other things to advance the interests of the judges and the court system.

In addition, I am an elected member of our Court's Executive Committee, a member of the Rules and Forms Committee, and the Community Focus Committee, which tries to promote reaching out to the community to make our court system more accessible to the public. I am Vice President of the Orange County Public Law Library Board of Trustees, I teach technology courses to my fellow judges for continuing judicial education, I serve on the panel of judges that conducts juror orientation in the morning before they are sent upstairs to trial courtrooms, and I am a judge in the Constitutional Rights Foundations' Peer Court and high school mock trial programs. (Prior to becoming a judge, I coached Newport Harbor High School's team for about 3 years.)

Q: What do you enjoy doing when you are not working?

A: I hate to golf, but I play almost every weekend. Golfers will know what I mean. I'm really terrible, but I can't bring myself to quit. I love to travel. My wife and I just returned from two weeks in Ireland. It was great. One of the places we stayed was the Dro-moland Castle, which is an 11th century castle and original home to the O'Brien clan of which I am a descendant (on my mother's side). I love to snow ski. Finally, I enjoy racing sail boats. In 2005, I was privileged to crew on the Transpac, from L.A. to Honolulu. We were 8 ½ days at sea, racing 24/7. It was really fun. Not relaxing, but really fun.

Q: If you could choose any job in the world other than a judge, what job would you choose?

A: Without a doubt, I would start practicing law again. I really have had the best two jobs in the world.

Thank you Judge Moss for your time.

▪ *Linda A. Sampson is Of Counsel in the litigation department in the Orange County office of Morrison & Foerster LLP.*

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judge has on this issue, an opposition must be specific and supported by credible evidence in order to be successful.

From the court's perspective, the "starting point" for every fee award is the determination of the "lodestar" amount. The lodestar method is based on the objective evaluation of hours reasonably spent multiplied by the prevailing market rate per hour for private attorneys. (*Serrano v. Priest (Serrano III)* (1977) 20 Cal.3d 25, 48 n.23.) "The starting point of every fee award, once it is recognized that the court's role in equity is to provide just compensation for the attorney, must be a calculation of the attorney's services in terms of the time he has expended on the case. Anchoring the analysis to this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts." [Citation]" (*Id.*) After making the lodestar calculation, the court can then consider other factors that may augment or diminish the lodestar figure. (*Id.*) The factors most often discussed include "the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096.) The court expresses these factors as a number and the lodestar is multiplied by that number. Thus, the number is referred to as the "multiplier."

In opposing a fee motion, the first line of attack should involve an analysis of the hours claimed. An attorney is only entitled to be compensated for the hours reasonably spent, and the court may disallow claimed hours to which the opposing party objects. (*Coalition for Los Angeles County Planning v. Board of Supervisors* (1977) 76 Cal.App.3d 241, 251.) "Under the lodestar method, a party who qualifies for a fee should recover for all hours reasonably spent unless special circumstances would render an award unjust." (*Vo v. Las Virgenes Mun. Water Dist.* (2000) 79 Cal.App.4th 440, 446, [citing *Serrano v. Unruh (Serrano IV)* (1982) 32 Cal.3d 621 at 632-633].) The California Supreme Court has noted that an excessive claim may constitute such special circumstances justifying reduction of the fee award. (*Serrano IV, supra*, 32 Cal.3d at 635.) Other courts have also opined that

time billed "in the form of inefficient or duplicative efforts is not subject to compensation" (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132); that duplicative action that contributes virtually nothing to the ultimate result cannot justify an award of counsel fees (*Thayer v. Wells Fargo* (2001) 92 Cal.App.4th 819, 844); and that the lodestar may be reduced due to the inefficient use of multiple counsel, where the demands of the case do not warrant hiring more than one attorney. (*Id.*; see also, *In re Vitamins Cases* (2003) 110 Cal.App.4th 1041 [following *Thayer v. Wells Fargo*].)

Questions to ask in scrutinizing opposing counsel's billing statements are whether the attorney's efforts were disorganized or duplicative; whether the case was staffed by less experienced associates whose hours reflect unnecessary hours, both by the associate and by the partner who is supervising the associate's work; whether the work was clerical in nature; whether services rendered by multiple attorneys in the firm were inefficient and unnecessarily redundant; whether the hours spent on specific law and motion and/or discovery tasks were productive and reasonable under the circumstances of the case; whether time was billed for work done on unsuccessful claims; whether time was spent against parties from whom no relief was obtained; and whether time was billed for non-covered claims. Since the opposing party bears the burden of providing specific evidence to challenge the accuracy and reasonableness of the hours charged, this analysis must be presented in a detailed and exacting manner. (*Avikian v. WTC Fin. Corp* (2002) 98 Cal.App.4th 1108, 1119.) A chart or table attached to the brief or included in a supporting declaration identifying the hours objected to and the basis of the objections will satisfy the opposing counsel's burden and will help to focus the judge's attention on the particular items in dispute.

Another area that attorneys have challenged in the past when questioning hours billed is the adequacy of the time-keeping records. Specifically, some lawyers have tried to argue that attorneys who submit block billing statements, as opposed to detailed billing descriptions, should be denied an award of any fee. However, California courts have not been persuaded by this argument. Rather, the courts that have addressed this issue have generally required less documentation than federal courts and have given more dis-

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cretion to the trial court judges to award fees based on their view of the numbers of hours reasonably spent. For example, in *Nightingale v. Hyundai Motor Am.* (1994) 31 Cal.App.4th 99, 103, the court held that block billings are acceptable when the court can determine that the hours claimed were reasonable for the tasks described. In *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255, the court confirmed that “California case law permits fee awards in the absence of detailed time sheets.” (See also, *Weber v. Langholz* (1995) 398 Cal.App.4th 1578, 1587 [upholding a fee award based on counsel’s declaration, even though time records and billing statements were not provided].) Thus, although California courts prefer fee claims to be carefully documented, that concern seems to be outweighed by the policy that attorneys must be fully compensated for all services reasonably rendered. (See, *Horsford v. Board of Trustees* (2005) 132 Cal.App.4th 359, 394.) Accordingly, challenging the adequacy of an asking attorney’s billing records may not be an effective means to substantially reduce the ultimate fee award.

The next step in opposing a fee motion should be to consider the hourly rate requested. Is it overtly excessive, questionable, or within the realm of reason? The prevailing party has the initial burden of establishing that the rate sought is appropriate as measured in the market place. (*Blum v. Stenson* (1984) 465 U.S. 886, 895 n. 11; 104 S.Ct. 1541.) This burden can be met in several ways: by counsel’s own declaration (*Davis v. City of San Diego* (2003) 106 Cal.App.4th 893, 903); by declarations from local counsel (*U.S. v. City and County of San Francisco* (N.D. Cal 1990) 748 F.Supp. 1416, 1431 [aff’d in relevant part sub nom *Davis v. City and County of San Francisco* (9th Cir. 1992) 976 F.2d 1536, 1547, modified on other grounds (9th Cir. 1993) 984 F.2d 345]); by expert testimony from persons with specialized knowledge of billing rates (*Children’s Hosp. & Med. Ctr. v. Bonta* (2002) 97 Cal.App.4th 740, 783); by counsel’s own billing rates, which carry a presumption of reasonableness (*Mandel v. Lackner* (1979) 753 F.2d 629, 633); or by surveys of billing rates (*Berberena v. Coler* (7th Cir. 1985) 753 F.2d 629, 633). The reasonableness of fees is not necessarily limited by the amount normally charged by the attorney, nor are they restricted by any contingency agreement entered into between the client and the at-

torney. (See, *International Longshoremen’s and Warehousemen’s union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287, 302 [holding that an asking attorney is not limited to the hourly rate actually charged to the client, but may request reasonable fees based on market rates]; *Vella v. Hudgins, supra*, 151 Cal.App.3d at 519-520 [holding that the trial court is not bound by the terms of the contingent fee contract in determining an award of reasonable attorney’s fees for successful litigation.]

Once the party claiming fees presents evidence supporting the claimed rate, the burden shifts to the party opposing fees to present equally credible and specific evidence to rebut the hourly rate requested. (*Gates v. Deukmejian* (9th Cir. 1992) 987 F.2d 1392, 1405; *Davis v. City and County of San Francisco, supra*, 976 F.2d at 1546.) Whether there is value in expending effort to object to the hourly rate will depend upon how excessive the rate is actually perceived to be. In those cases where the requested rate is beyond the realm of all reasonableness, it would make sense to obtain a declaration from a well qualified expert with specialized knowledge of billing rates, such as a local fee arbitrator, to counter the moving party’s rates. If there is any doubt at all as to the reasonableness of the requested rate, the opposing party should always present some evidence to oppose the rate, even if the evidence comes in the form of a declaration from a local attorney or from the attorney opposing the motion. If the opposing party fails to submit evidence to contradict evidence of the moving party’s rates, they are presumed reasonable. (*Davis v. City of San Diego, supra*, 106 Cal.App.4th at 904; *Children’s Hosp. & Ed. Ctr. v. Bonta, supra*, 97 Cal.App.4th at 783.)

The task of culling through opposing counsel’s hours and of obtaining evidence to contest the requested hourly rate should not be minimized, because it can reduce the number that will be multiplied by the court in its final analysis. Thus, it can have a significant impact on the fee award ultimately rendered.

After calculating the lodestar amount, the court will next consider an appropriate multiplier to either increase or decrease that amount. (*Ketchum v. Moses, supra*, 24 Cal.4th at 1122.) It should be noted that this fee enhancement analysis is not limited to just public interest and contingency cases. Enhancements have

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been considered in inverse condemnation cases (e.g., *City of Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78, 82-83; *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 952-958), in cases awarding fees in a contract action pursuant to Civil Code section 1717 (*Sternwest Corp. v. Ash* (1986) 183 Cal.App.3d 74), in cases brought under the Political Reform Act of 1974 (Gov. Code § 81000, et seq; *Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983, 993-996), and in actions brought under the FEHA (*Crommie v. State of Cal., Public Utilities Com'n.* (N.D. Ca. 1994) 840 F. Supp. 719, 724 [aff'd in *Man-gold v. California Public Utilities Com'n* (9th Cir. 1995) 67 F.3d 1470].)

The court has considerable discretion in determining the size of the multiplier, as long as it considers the proper factors. (See, *Greene v. Dillingham Constr. N.A., Inc.* (2002) 101 Cal.App.4th 418, 422; *City of Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78, 85.) These factors have been identified by the courts in *Serrano III*, and in subsequent cases, and include the following: the novelty and complexity of the issues; the difficulty of the case; the skill displayed in presenting the case; the results obtained; the contingent risk; the preclusion of other employment; the undesirability of the case; the delay in payment; and the public service element. However, enhancements are not required in every case. “Of course, the trial court is not *required* to include a fee enhancement to the basic lodestar figure . . . , although it retains discretion to do so in the appropriate case; moreover, the party seeking a fee enhancement bears the burden of proof.” (*Ketchum v. Moses, supra*, 24 Cal.4th at 1138 (emphasis in original).) An opposing party’s attack on these factors will necessarily be fact intensive and should be supported by a declaration from the lead attorney. A declaration from an attorney who has extensive experience in the particular type of lawsuit may also be helpful in contradicting the requesting party’s claims as to the complexity, novelty, and quality of service provided. [Note that this same testimony could also be used to establish that the hours requested by the attorney are excessive and unreasonable.]

Another argument to consider in opposition to a multiplier is that the court cannot and should not dou-

ble count the enhancement factors in its fee analysis. As the Supreme Court cautioned in *Ketchum v. Moses, supra*, 24 Cal.4th at 1138: “We emphasize that when determining the appropriate enhancement, a trial court should not consider these factors to the extent they are already encompassed within the lodestar. The factor of extraordinary skill, in particular, appears susceptible to improper double counting. For the most part, the difficulty of a legal question and the quality of representation are already encompassed in the lodestar. A more difficult legal question typically require more attorney hours, and a more skillful and experienced attorney will command a higher hourly rate. [Citations.] Indeed, the reasonable hourly rate [used to calculate the lodestar] is the product of a multiplicity of factors . . . , the level of skill necessary, time limitations, the amount to be obtained in the litigation, the attorney’s reputation, and the undesirability of the case.’ [Citations] Thus, a trial court should award a multiplier for exceptional representation only when the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation. Otherwise, the award will result in unfair double counting and be unreasonable. “ Thus, an argument should be made that, to the extent that the court has already given value to the novelty and complexity of the case and the attorneys’ skill level in connection with the number of hours and hourly rate awarded, it should not consider these factors a second time as a basis to increase the lodestar figure.

Where the ultimate result obtained is nominal or de minimus, a party opposing a fee motion may also assert that this fact should serve to decrease the multiplier. Many cases have held that a lodestar enhancement is appropriate when “an exceptional effort produces an exceptional benefit.” (*Thayer v. Wells Fargo, supra*, 92 Cal.App.4th 819, 838; *Edgerton v. State Personnel Bd.* (2003) 83 Cal.App.4th 1350; *Graham v. DailerChrysler Corp.* (2004) 34 Cal.4th 553, 582.) Conversely, it could be argued that a decrease in the multiplier is appropriate where an attorney’s efforts produce a meager result. This argument is consistent with the cases that have held that partial success is an appropriate factor to consider in reducing the multiplier. (See, *Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.4th 1407, 1418; *Krumme v. Mercury Ins. Co.*

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(2004) 123 Cal.App.4th 924, 947 [wherein the appellate court assumed that the trial court accounted from the failure to obtain all relief sought by reducing the multiplier from 2.0 to 1.5.]

Finally, an opposing party might do well to remind the court that the goal of using the lodestar adjustment method is to arrive at a reasonable attorney's fee award that takes into consideration all of the facts presented by the case. The fee-shifting statutes "were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client." (*Pennsylvania v. Delaware Valley Citizens' Council* (1986) 478 U.S. 546, 565-566, 106 S.Ct. 3088, 3098.) "Nor should a fee enhancement be imposed for the purpose of punishing the losing." (*Ketchum v. Moses, supra*, 24 Cal.4th at 1138.) Rather, "[t]he purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services." (*Id.* at 1132.) In the end, the resulting fee award must always "bear some reasonable relationship to the lodestar figure" and to the purpose of the fee-shifting statute. (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.App.3d 311, 324.) It is the opposing attorney's responsibility in defending against a fee motion to focus the trial court's attention on all of the specific reasons why it should reduce the requested fee award to a reasonable amount in light of the overall procedural and factual history of the case.

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very appreciative of the hard work that Ken Babcock, the PLC's executive director, does on a daily basis to assure that the legal needs of the community are met. So often we take for granted our successes. Ken reminds us that there are others in need and he tirelessly works toward assuring that there are both the financial and human resources necessary to provide legal ser-

vices to indigent members of our community. We also want to encourage attorneys in the community to donate not only their money, but also their time. The PLC can always use more volunteer attorneys to take on pro bono cases. You can obtain information on how to volunteer at www.publiclawcenter.org.

With a view toward the future, we want to report that the date for our 10th Anniversary Celebration has been set. The committee, headed by Darren Aitken, has been hard at work. They have selected the date of Sunday, September 16, 2007, at 6:00 p.m. for the event. We will be combining our September program with the event so there will be no separate program in September. The dinner will occur at the Mission San Juan Capistrano and guests will be welcome. The committee is keeping the entertainment a secret, but it promises to be an exciting and entertaining evening in a beautiful setting. Please mark your calendars now and we will look forward to seeing you all in September.

We also want to remind everyone about the Annual Seminar that will occur from October 5-7, 2007 in Northern California. This year's 34th Annual Seminar is entitled "Security & Privacy Actions: The Changing Landscape for Business Litigators." The location for the seminar is the beautiful Silverado Resort in Napa, California. Unfortunately for those of you who have not yet booked rooms, we are told that Silverado has sold out. The planning committee has made alternate arraignments at The Meritage Resort in Napa, which we are told is just as nice as Silverado. Special room rates have been negotiated. Sandra Day O'Connor will be the key note speaker and that promises to be fascinating. Everyone is encouraged to register early. Ron Oines and Jeff Reeves are the Orange County representatives on the planning committee and we want to thank them for all their hard work.

Again, thank you all for helping to make the PLC fundraiser a success and I look forward to seeing you all at the 10th Anniversary celebration and at the Annual Seminar!

▪ *James G. Bohm is a partner at Bohm, Matsen, Kegel & Aguilera.*

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president, Don Morrow, of Paul Hastings. First, plan an outstanding program. Don's program chair was Jeffrey Shields who organized some wonderful seminars. I had the good fortune to name Michael Yoder of O'Melveny as my program chair. The quality of the programs arranged by Mike maintained the standard of excellence. These seminars included USC professor Charles Whitebread's entertaining program on the U.S. Supreme Court and other programs on "cross-examination styles and techniques," "detecting the hi-tech case," and "representing the unsympathetic client."

Dean Zipser came up with the brilliant idea of listing in the Report the names of all of the judges who attended ABTL meetings. This served as a magnet to attract an even greater enrollment and attendance by both attorneys and judges at these programs and dinner meetings skyrocketed.

ABTL had its Annual Meeting in Phoenix in 1999. Although I do not remember the unforgettable substance of the program, I do recall bumping into Rick and Cathy Derevan, of Snell & Wilmer, in the lobby at the Ritz Carlton as they were checking in with their two poodles. (I also remember some evenings at the hotel bar, but what happens in Phoenix stays in Phoenix.)

Looking back these 10 years, it is apparent to all of us who were part of the founding of the ABTL, that the ABTL filled a void created in the 1990's. Due to the increasing size of our Bar Association, we were losing the close relationships that we historically enjoyed between the bench and the bar. No longer could a bar of this size continue to host meetings at the Elks Club in Santa Ana. The enormous increase in Orange County lawyers and corresponding growth in the number of judges lessened the ability of attorneys to network. Those of us who practiced together for many years were losing contact with one another unless we happened to be working on the same case. The establishment of the ABTL reversed these problems overnight. ABTL affords the opportunity to replicate the "good old days." The organization also affords a ready-made opportunity for new attorneys to assimilate into our professional community and to get to know our local bench.

One particular key of the ABTL's success, which is much appreciated by early risers like me, is its religious adherence to the 9:00 p.m. curfew. I wish other bar related organizations would adopt the same protocol as it would, in my view, increase both their attendance and membership.

I now pass the baton to Bob Palmer, of Gibson Dunn whose article also appears in this issue. Hopefully, Bob will have a better memory of his term in office or at least a more creative way to make his article more interesting than mine. (Perhaps I should have bought Justice Bedsworth that free lunch after all.)

▪ *Tom Malcolm is a litigation partner in Jones Day's Irvine office and the ABTL's second President.*

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that provided legal assistance to those in need. We soon decided that The Public Law Center ("PLC") was the perfect fit.

Second, we needed some type of event that would not only fit in well with our existing programs, but one that would hopefully be fun for all of our members to attend and support. We settled upon the idea of a charity wine tasting event that would be held just before one of our normal meetings -- and one that would take the place of our traditional "meet and confer" cocktail hour.

Third, we needed to determine when to hold the event. The timing seemed perfect for our June meeting -- summer being a more relaxed time of year and a time when most firms would have a number of Summer Associates to take to the event. A summer event would thus provide firms with a good event for their lawyers and Summer Associates where they could not only attend a first rate program, but a part of a great mixer for lawyers, both young and old, to socialize with their "cross-town rivals." Further, the event would hopefully also get the Summer Associates excited about the firms they planned to join and the legal community in Orange County, in general, and the importance of supporting our local charities, in particular.

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With this new idea now in place, we only had one remaining hurdle: How do we pull off such an event with virtually no budget, no paid staff, and with little planning time? Simple, I ran to Hi-Time Wine Cellars a few hours before the event (after running out of a longer than expected court hearing), purchased a dozen or so cases of wine on my credit card, called and begged a few associates and assistants to come help out, and we somehow loaded in the wine into an empty ball room, got a number of tables set up, had our volunteers pour the wine and collect tickets for the same, and somehow pulled off a very fun, well attended, and successful first-ever PLC fundraiser -- and one that managed to raise thousands of dollars for the PLC. Indeed, our donation proved to be one of the largest donations to the PLC that year, all with the help of a few hundred ABTL members and guests who came out in force on a June evening to support our request for their help in raising some money for those who could not otherwise afford their own counsel.

Over the years the event somehow took hold and it is now our annual fundraising event. Each year our President and Board somehow find a way to not only carry on the tradition, but improve it. Our last event on June 6th had a fantastic program, great attendance, and once again raised thousands of dollars for the PLC.

I am greatly honored to have been a part of this now annual Orange County ABTL tradition and for the support of our members for the fundraiser each year. To all of you who support the ABTL, and in particular our annual PLC Fundraiser, I thank you for helping make the ABTL something truly special.

Cheers!

▪ *Robert E. Palmer is a litigation partner at Gibson, Dunn & Crutcher and the ABTL's third president.*

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fornia, and has commonly been utilized in other jurisdictions. As many courts have noted, a motion to strike class allegations can be a useful tool in the efficient management of class action suits.

Procedural Rules Authorize Motions to Strike Class Allegations

Rule 23(d)(4) of the Federal Rules of Civil Procedure provide that in the conduct of class actions, "the court may make appropriate orders . . . requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly." This rule is commonly cited as the basis for a federal court order striking class allegations. *See, e.g., Talley v. ARINC, Inc.*, 222 F.R.D. 260, 271 (D.Md. 2004).

The California Rules of Court likewise include a provision that virtually mirrors Rule 23(d)(4) of the Federal Rules of Civil Procedure. Rule 3.767 (formerly Rule 1857) of the California Rules of Court states in subsection (a)(3) that in a class action, the court may "Require that the pleadings be amended to eliminate allegations as to representation of absent persons, and that the action proceed accordingly." Cal. Rules of Court, Rule 3.767(a)(3).

There is a dearth of published California opinions construing this provision of Rule 3.767. However, California state courts are authorized to look to the Federal Rules of Civil Procedure governing class actions for guidance in managing state class actions, and to the federal cases construing the federal rules. *Lockheed Martin Corp. v. Superior Court*, 29 Cal.4th 1096, 1121 (2003); *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 239-240 (2001). Thus, to understand how Rule 3.767(a)(3) of the California Rules of Court should be applied, state courts may properly look to cases applying the virtually identical language of Rule 23(d)(4) of the Federal Rules of Civil Procedure.

Motions To Strike Class Allegations In Early Stages of Class Action

There are numerous examples of courts entertaining motions to strike class allegations prior to a plaintiff's motion to certify the class. Certainly, motions to strike are entertained at the primary stages of a class action, when the complaint itself makes clear that the alleged class is not viable. As explained in *Stubbs v. McDonald's Corp.*, 224 F.R.D. 668, 674 (D.Kan. 2004), "Federal courts have used motions to strike to test the viability of a class at the earliest pleading stage of the litigation." For example, in *Barabin v. Aramark Corp.*,

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210 F.R.D. 152, 156 (E.D.Pa.2002), the plaintiff moved to strike the class allegations “on the grounds that it is apparent from the face of the complaint that the class action status cannot be maintained.”

Similarly, California courts have entertained motions to strike class allegations on demurrer where defendants contend that the alleged class is not viable. *See, e.g., Reich v. Club Universe*, 125 Cal.App.3d 965, 968 (1981); *Bozaich v. State of California*, 32 Cal.App.3d 688, 692, 694 (1973).

Motions To Strike Class Allegations After Discovery Has Commenced

However, a motion to strike class allegations is not limited to only the early pleading stage of the class suit. *See, e.g., Bennett v. Nucor Corp.*, 2005 WL 1773948, *2 n.1 (E.D.Ark. 2005)(expressly rejecting the argument that a motion to strike class allegations must be brought early, in response to the complaint). Indeed, the motion to strike class allegations is perhaps most useful later in the litigation, when discovery makes clear that the alleged class cannot be maintained.

For example, in *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985), the Ninth Circuit affirmed the granting of a motion to strike class allegations filed midway through discovery, where it was clear that individual inquiries would be required to determine whether each individual would qualify for the putative class. *Id.* at 1420, 1425. Similarly, in *Talley v. ARINC, Inc.*, 222 F.R.D. 260 (D.Md. 2004), the defendant’s motion to strike the class allegations was heard and granted 18 months into the litigation, after the parties had conducted initial discovery. *Id.* at 263. The court in *Talley* conducted a full analysis of the class action requirements, taking into account the declarations, documents, and other statistical evidence submitted by the parties. *Id.* at 266.

There are numerous examples of courts entertaining motions to strike class allegations based on evidence obtained through discovery and investigation of claims asserted in the pleadings. For instance, in *Thomas v. Moore USA, Inc.*, 194 F.R.D. 595 (S.D.Ohio 1999), when defendants raised the class certification issue

through a preemptive motion to strike class allegations, the court considered the deposition testimony and affidavits that each side had compiled and submitted. *Id.* at 598-599.

Affidavits also played a strong role in *Thompson v. Merck & Co.*, 2004 WL 62710 (E.D.Pa. 2004), in which the court granted the defendant’s motion to strike class allegations after considering affidavits that emphasized each class member’s individual circumstances. Similarly, discovery responses persuaded the court in *Lumpkin v. E.I. DuPont de Nemours & Co.*, 161 F.R.D. 480 (M.D.Ga. 1995), that the alleged class claims could not be maintained because the plaintiff could not prove numerosity, commonality, and typicality requirements. *Id.* at 481.

Thus, courts all over the country have entertained motions to strike class allegations based not only on the pleadings but also on evidence submitted in support of the motions.

Motions To Strike Class Allegations Are Not Premature Simply Because The Plaintiff Has Not Yet Filed A Motion To Certify The Class

In entertaining motions to strike class allegations, courts have expressly rejected the frequently-raised argument that such motions are premature if brought before the plaintiff has filed its own motion for class certification. For instance, in *Thompson v. Merck & Co.*, 2004 WL 62710 (E.D.Pa. 2004), the court noted at the outset of its ruling that the plaintiffs disputed the court’s authority to rule on the motion to strike until after the plaintiffs should file a motion for class certification. *Id.* at *2. The court pointedly disagreed, pointing to three key facts: first, that Rule 23 of the Federal Rules of Civil Procedure direct the court to determine whether a class action is maintainable “as soon as practicable”; second, that even though the related actions had been pending quite some time, the plaintiffs had never moved to certify a class in any of the actions; and third, that the affidavits submitted made clear that plaintiffs would not be able to satisfy the requirements for class action, and no amount of additional class discovery would alter that conclusion. *Id.*

The court in *Bennett v. Nucor Corp.*, 2005 WL 1773948 (E.D.Ark. 2005), likewise rejected the argu-

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ment that the motion to strike class allegations was premature, pointing to Rule 23 and the court's finding that "further discovery regarding the class certification issue would be futile." *Id.* at *2, n.1.

In California state court actions, courts have pointed to *City of San Jose v. Superior Court*, 12 Cal.3d 447, 453-454 (1974), to confirm that a motion to strike class allegations is properly before the court and within the court's authority to adjudicate, even before the plaintiff seeks certification of the class. As stated in *City of San Jose*, class certification issues may be determined at any time during the litigation, and the issue may be raised by any party—or on the motion of the court itself. *Id.* Furthermore, as a general matter, California state courts are "afforded great discretion in granting or denying certification" because they are "ideally situated to evaluate the efficiencies and practicalities of permitting group action." *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 435 (2000).

The Plaintiff Retains The Burden Of Establishing That The Class Is Viable

Even though a motion to strike the class allegations is brought by the defendant, the burden of establishing that the class is viable remains with the plaintiff. *Mantolote v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985); *Talley v. ARINC, Inc.*, 222 F.R.D. 260, 266 (D.Md. 2004); *Lumpkin v. E.I. DuPont de Nemours & Co.*, 161 F.R.D. 480, 481 (M.D.Ga. 1995).

Accordingly, when discovery makes clear that the alleged class cannot be maintained, a motion to strike class allegations is an efficient means of resolving class certification issues without altering the responsibilities of the named plaintiffs to prove the viability of the alleged class. A motion to strike can save the time and resources of the court and parties by ensuring that class certification issues are resolved as soon as is practicable.

Thus, while rarely used in California jurisdictions, a motion to strike class allegations can be an important tool for defendants when evidence indicates that the class cannot be maintained.

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10-minute paid rest break for every 4 hours worked.

Until 2001, however, this requirement was enforced only through injunctive relief actions brought by the DLSE. Effective January 1, 2001, the Legislature enacted Labor Code § 226.7. It provides that: "[i]f an employer fails to provide an employee with a meal period or rest period . . . , the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal break or rest break period is not provided." The statute fails to specify whether this additional hour's pay for having been denied a 10-minute break or missing a 30-minute unpaid meal period is a "wage" to the worker or a "penalty" to the employer. The distinction is critical.

First, by deeming this hour's pay a wage rather than a penalty, the Supreme Court effectively set the limitations period on actions to recover for missed meal periods or denied rest breaks at three years (C.C.P § 338 (a)), rather than the one year period generally applicable to penalties (C.C.P § 340(a)). In effect, the consequent limitations period triples an employer's liability under § 226.7. Moreover, a plaintiff arguably can sue in equity for restitution of such unpaid wages under California's Unfair Competition Law (Bus. & Prof. Code § 17200, *et seq.*), and get the benefit of a four-year limitations period -- a fourfold increase -- though without right to jury trial, and without recovery of attorney's fees.

Second, and in addition, because the Court deemed this hour's pay to be a wage rather than a penalty, former employees now may seek "waiting time" penalties of an amount equal to up to 30 days at their regular rates of pay for failure by the employer to pay them this one-hour "wage" for each missed meal period or denied rest break at the conclusion of their employment. This penalty of 30-day's pay is due even if the employee missed just one meal period or was denied just one rest break months or years earlier. Labor Code § 203 provides, in part, that an employee's wages shall continue for up to 30 days upon termination of the employment relationship "[i]f the employer willfully fails to pay, without abatement or reduction . . . any wages" due at the time of termination of the rela-

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tionship. To illustrate, an employer's failure to pay an hour's wage of \$8.00 at termination for a single 10-minute rest break denied years earlier could result in an obligation to pay an additional \$1,920 in waiting time penalties (\$8 x 8 hours x 30 days). Significantly, the limitations period to seek recovery of these waiting time penalties is expressly expanded from the one year for penalties generally (C.C.P § 340(a)), to the limitations period "for the wages from which the penalties arise" -- in this case, three years. Labor Code § 203. As such, the Court's ruling not only establishes the limitations period to seek recovery under § 226.7 at three years, its also establishes the limitations period for waiting time penalties for failure to make such "wage" payments at the time of the employee's departure at three years.

Third, because the Court deemed this hour's pay to be a wage rather than a penalty, employees may now be able to state a claim for inaccurate wage statements pursuant to Labor Code § 226 for failures to itemize payment of these past "wages" when they are due. Labor Code § 226 requires employers to issue with an employee's paycheck "an accurate itemized statement setting forth, among other things, the "gross wages earned" and "net wages earned." A "knowing and intentional" failure to do so entitles an employee to the greater of his or her actual damages or "fifty dollars (\$50) for the first pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent period," up to \$4,000. Significantly, an employee also may recover attorney's fees if he or she is successful in pursuing such claims. Labor Code § 226(g).

Fourth, because the Court deemed this hour's pay to be a wage rather than a penalty, an employer may now be liable under Labor Code § 1174 for failure to maintain accurate records for these "wages," failure to maintain such records at a central location, and/or failure to make such records available for inspection. Labor Code § 1174 requires employers to maintain "at a central location ... payroll records showing hours worked and wages paid to" its employees, and to permit its employees to inspect those records. An employer who engages in a "willful" failure to maintain these wage records is "subject to a civil penalty of five hundred dollars (\$500)," and is guilty of a misde-

meanor. Labor Code §§ 1174, 1174.5.

Last, but certainly not least, a failure to pay earned "wages" (distinct from penalties) might subject an employer to tort liability for conversion of property including, potentially, punitive damages. Needless to say, this can greatly increase an employer's overall exposure. California courts frequently rely on the ratio of compensatory damages to punitive damages in determining the reasonableness of an award of punitive damages. *See e.g. Hobbs v. Bateman Eichler* (1985) 164 Cal.App.3d 174, 196 (2.3 ratio of punitive damages to compensatory damages is not disproportionate. In fact, the ratio is comparatively low"); *Glovatorium, Inc. v. NCR Corp.* (9th Cir. 1982) 684 F.2d 658, 663 (punitive damages 9.1 times the compensatory damages found reasonable).

The Supreme Court's Basis For Its Resolution

The Court began its discussion by articulating its overarching (and expressly goal-driven) basis for analysis: "statutes governing conditions of employment are to be construed broadly in favor of protecting employees." 40 Cal.4th at 1103. The Court then turned its focus to the word "pay." It concluded that the common meaning of this word is something given for something done and, as such, suggests a wage. The Court further noted that "pay" and "wage" appear to be used interchangeably by other provisions of the Labor Code. The Court dismissed the argument that an employee who works through a meal break is in fact paid already for that half hour (whereas one who *takes* the meal period is *not* paid), noting that, "[w]hile the employee is paid for the 30-minutes of work, the employee has been deprived of the right to be free of the employer's control during the meal period." *Id.* at 1104. The Court's reasoning seems to be that freedom from an employer's control is a form of a wage, even if that same employee already was compensated through a wage for the time worked. Thereafter, however, the Court conceded that § 226.7's language is "also reasonably susceptible to an interpretation that the hour of pay is a penalty intended to punish the employer for denying employees their meal and rest periods." *Id.* at 1104-05.

The Court then turned to the administrative and legislative history of meal and rest breaks, starting with
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the period well-before the adoption of § 226.7. First, it concluded that meal and rest periods had long been considered a part of the “remedial worker protection framework.” *Id.* at 1105. Put another way, the Court found that the ability *not* to work had been considered a part of “remediation” to an employee *for* work.

The Court also cited various articles suggesting that rested workers are less likely to be subject to job or commute-related injuries. *Id.* at 1113. Again, the lesson that the Court draws from this is that mandated payments by employers to deter such injuries are a form of “remediation” to the employee -- a wage -- for the risk of injury. This conclusion too seems questionable, however, given that an injured worker is not paid (*e.g.*, remediated) more under the statute than non-injured workers -- yet the deterrence payment owed by the employer is the same regardless of injury or non-injury (seemingly, a classic penalty). Moreover, the Court cites no evidence that the Legislature actually had such risks in mind, or an intent to “remediate” for such risks, when it established the requirement for one hour’s pay.

The Court also rejected a related argument advanced by the employer that a statutory recovery is deemed a penalty for purposes of fixing a limitations period where “an individual is allowed to recover against a wrong-doer, as a satisfaction for the wrong or injury suffered, and without reference to the actual damage sustained...” *County of Los Angeles v. Ballerino* (1893) 99 Cal. 593, 596. The employer argued that the payment called for by § 226.7 -- one hour’s pay -- is not proportionate to the injury sustained (10 minutes of work with pay, or denial of 30 minutes rest without pay). Regardless whether the additional hour’s pay is the consequence of a 10-minute period of work by the employee with pay for the 10 minutes, or denial of 30-minutes rest without pay, the same amount must be paid, and either way, the amount paid is not commensurate with the time and rate of pay at issue. Accordingly, the employer argued, it is a penalty.

In rejecting this assertion, the Court noted that other wages under the Labor Code may be disproportionate to the additional hours worked and the standard rate of pay. Overtime, for example, may be paid as a multiple

of 1.5 or 2.0, depending on various factors. Likewise, when an employee is scheduled for a “split-shift” (two nonconsecutive shifts in a single day), he or she is entitled to an hour’s pay at the minimum wage. 40 Cal.4th at 1111-13. It is worth noting that neither of those scenarios cited by the Court, however, involve a wage increase of up to sevenfold (payment for the 10 minutes worked through a rest break, plus another 60 minutes of pay, equals 70 minutes pay for 10 minutes work), let alone a fixed payment regardless of whether the violation pertains to working 10 minutes through a rest break, or working 30 minutes through a meal period.

Perhaps more convincingly, the Court noted that the original bill that ultimately became § 226.7 contained both remediation to the employee tied to his or her wage, and a fixed amount to be paid by the employer. The fixed amount, however, was removed from the final bill. From there, the Court concluded that a “penalty” had been removed from the bill, and the “wage” remained. It reasoned that “[t]he rejection of a specific provision contained in an act as originally introduced is ‘most persuasive’ that the act should not be interpreted to include what was left out.” *Id.* at 1107 (*quoting Wilson v. City of Laguna Beach* (1992) 6 Cal.App.4th 543, 555). Finally, the Court declined to give any weight to the views expressed in the DLSE’s opinion, having concluded that the decision was issued only after the issue had been “politicized.” 40 Cal.4th at 1106 n. 7.

Can Employers Find A Silver Lining?

Can employers find a silver lining in the Court’s decision? Perhaps. First, liability for failure to pay a missed rest or meal break “wage” under the various ancillary wage statutes discussed above – waiting time penalties for failure to pay wages at termination pursuant to Labor Code § 203; inaccurate wage statement penalties pursuant to Labor Code § 226; penalties for failure to maintain and make available accurate wage records pursuant to Labor Code § 1174 – requires “willful” or “knowing and intentional” failures to comply. The Court’s finding that “[t]he language [of § 226.7] is also reasonably susceptible of an interpretation that the hour of pay is a penalty intended to punish the employer for denying employees their meal and rest periods,” may go a long way toward avoiding such liability – at least for pre-*Murphy* violations. *See*

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Barnhill v. Robert Saunders & Co. (1981) 125 Cal.App.3d 1, 8-9 (holding that there can be no willful violation of Labor Code § 203 where “at the time the state of the law in that regard was not clear”); *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 325 (“A good faith belief in a legal defense will preclude a finding of willfulness.”).

Second, the Court’s statutory analysis of the wage/penalty distinction may provide ammunition to argue that there is simply no direct private right of action for missed meal and rest breaks created by § 226.7, and that an employer must rely on some other mechanism to enforce its provisions (often with unfavorable limitations on any recovery, or difficult exhaustion requirements).

The Court was not presented with this question and did not decide it. The scope of the Supreme Court’s review in *Murphy* was deliberate and narrow. It granted review only as to two discrete questions:

(1) Is a claim under Labor Code § 226.7 for the required payment of “one additional hour of pay at the employee’s regular rate of compensation” for each day that an employer fails to provide mandatory meal or rest periods to an employee governed by the three-year statute of limitations for a claim for payment of a wage (Code Civ. Proc., § 338) or the one-year statute of limitations for a claim for payment of a penalty (Code of Civ. Proc., § 340)?

(2) When an employee obtains an award on such a wage claim in an administrative proceeding and the employee seek de novo review in superior court, can the employee pursue additional wage claims not presented in the administrative proceeding?

Murphy v. Kenneth Cole Productions (Cal. Sup. Ct. 2006) 130 P.2d 519, 40 Cal.Rptr.3d 750 (granting certiorari). The Court did not review -- and the parties did not litigate -- the separate issue of whether § 226.7 creates a direct, private cause of action. Significantly, that issue has been expressly flagged by other, prior courts weighing in on the wage/penalty issue. See e.g., *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 386 n. 20 (“Neither plaintiffs nor Caliber addressed whether a private action [under §

226.7] exists”). In this regard, “[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.” *Webster v. Fall* (1925) 266 U.S. 507, 511.

Section 226.7 does not contain any language indicating that the Legislature intended to create a direct private right of action to enforce it. Under California law a private right of action to enforce a statute will exist only if the statute’s language clearly evinces the Legislature’s intent to create such a private enforcement action. E.g., *Vikco Ins. Servs., Inc. v. Ohio Indem. Co.* (1999) 70 Cal.App.4th 55, 62 (“[A] private right of action exists only if the language of the statute or its legislative history clearly indicates the Legislature intended to create such a right to sue for damages. If the Legislature intends to create a private cause of action, we generally assume it will do so ‘directly, in clear, ... understandable, unmistakable terms...’”); *Schaefer v. Williams* (1993) 15 Cal.App.4th 1243, 1248 (“Surely if the Legislature had intended to create ... a private right of action, it would have done so by clear and direct language”); Cal. Code Civ. Proc. § 1858 (in construing a statute, a court is “not to insert what has been omitted”). In *Murphy*, the Court expressly relied on this proposition in construing this very statute. As the Court held there: “It is well settled that we must first look to the words of the statute, because they generally provide the most reliable indicator of legislative intent.” 40 Cal.4th at 1103. Significantly, the absence of any language in § 226.7 providing for a direct private right of action stands in contrast to other wage and hour statutes in the Labor Code. See, e.g., Labor Code § 203 (providing for waiting time penalties and stating that “suit may be filed for these penalties”), Labor Code § 226 (requiring employers to provide itemized wage statements and stating that employees proving a violation may recover “an award of costs and attorneys fees”), Labor Code § 1194 (stating that an employee who is not paid the minimum wage or the proper overtime premium “is entitled to recover [said wages] in a civil action”), and § 1194.2 (providing that an employee can recover liquidated damages for an employer’s failure to pay the minimum wage).

Moreover, even if the statute contained language that rendered it ambiguous, the legislative history of § 226.7, and the *Murphy* Court’s analysis of the wage/

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penalty distinction in connection with this statute, suggest that § 226.7 creates no direct private right of action. Similar to the wage/penalty modifications, the Legislature initially considered including language providing employees with a private right of action to enforce § 226.7, but ultimately decided against it and removed this language. *E.g.*, Senate Floor Analysis of August 25, 2000 (“Failure to provide such meal and rest periods would subject an employer to paying the worker one hour of wages for each work day when rest periods were not offered. The option of filing a right of private action is deleted.”) As the Court in *Murphy* held in connection with its analysis of the deletion of a fixed penalty provision from § 226.7: “The rejection of a specific provision contained in an act as originally introduced is ‘most persuasive’ that the act should not be interpreted to include what was left out.” 40 Cal.4th at 1107.

To be clear, aside from the fact that the Court was not presented with the question of whether § 226.7 creates a direct private right of action, a conclusion that it does not would not render moot the Court’s analysis of the wage/penalty distinction. Labor Code § 96.7, for example, authorizes the Labor Commissioner to institute an action to recover unpaid “wages” owed pursuant to § 226.7 or any other section of the Labor Code. As is now clear, the statute of limitations applicable to such claims is three years. In addition, an individual plaintiff may pursue alleged failures to comply with wage laws, including § 226.7, indirectly pursuant to California’s Labor Code Private Attorneys General Act of 2004, Labor Code §§ 2699, *et seq.* (“LCPAGA”). LCPAGA expressly establishes a private right of action for an aggrieved employee to sue on his or her behalf and on behalf of other employees to enforce this and other provisions of the Labor Code and to recover attorney’s fees. However, a claim under LCPAGA is subject to the unique procedures specified in Labor Code § 2699.3, including notice to employers and the Labor and Workforce Development Agency, prior to initiation of any such suit. And, as noted above, a plaintiff still could pursue these claims under California’s Unfair Competition Law, though without a right to jury trial or to recover attorney’s fees if successful.

Many have pointed to Labor Code § 218 as providing a basis for a direct private right of action under the

Labor Code to recover for missed rest or meal breaks. However, § 218 on its face states only that sections 200 through 243 of the Labor Code do not limit any *existing* right to sue. It does not appear to *create* any right of action. It reads: “Nothing in this article shall *limit* the right of any wage claimant to sue directly or through an assignee for any wages or penalties due to him under this article.” (Emphasis added.) To read this as creating a right of action would seem to defy rules of statutory construction articulated by the courts of California including, most recently, the Court in *Murphy*. Though some courts have cited to this provision in *dicta* as creating a cause of action, and a few others have relied on it for this proposition without application of settled rules of construction discussed above (*e.g.*, “[s]urely if the Legislature had intended to create ... a private right of action, it would have done so by clear and direct language”), the analysis employed in *Murphy* may suggest a contrary conclusion.

Unassailable is the fact that the Supreme Court’s decision in *Murphy* is a landmark, and certain to increase wage and hour litigation in the State of California. The cost of non-compliance with California’s Labor Laws just got a whole lot higher, as did the likelihood of being sued.

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It was an honor to share lunch with Judge Guilford in his courtroom. The experience was an enjoyable one and I came away with a richer understanding and appreciation of the litigation process in federal court. I want to thank Judge Guilford for graciously inviting us into his court and taking time away from his busy schedule to have lunch with us.

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A. Background

In 1978, Los Angeles County's electorate approved Proposition A, which amended the County Charter and gave the County a way to reduce costs while maintaining basic governmental services.² On June 7, 1989, then County Counsel, Dewitt W. Clinton, requested that the Los Angeles County Board of Supervisors form a non-profit public benefit corporation called Auxiliary Legal Services (ALS) to provide "legal and other related services" to the County as a mechanism to save costs in delivering needed legal services to the County and its taxpayers, as permitted under Proposition A. *Hall, supra*, 148 Cal.App.4th at pp. 320-321, 55 Cal.Rptr.3d 732. That request indicated that "[t]he proposed agreement [with ALS] will result in substantial savings over the cost of providing the services with County employees[.]" *Id.*, at p. 321.

On June 20, 1989, the Los Angeles County Board of Supervisors publicly adopted the County's Proposition A contract with ALS, which recited the County's need to "develop an economical and cost effective way to provide . . . supplemental legal services and representation for its officers and employees and for minors in dependency court proceedings[.]" *Id.* The Executive Summary to Mr. Clinton's Board request noted that the "fiscal impact" of contracting with ALS is "none" because the "[p]rogram is more cost effective than providing services with County employees[.]"³

Under the terms of the contract, ALS was an "independent contractor," and the workers ALS provided to the County were to be "employees solely of [ALS] and not of [the] County for any purpose." *Id.*, at p. 321. The lead plaintiff, Danna Hall became an ALS

employee, was thereafter paid by ALS, and through ALS, provided legal services to the County of Los Angeles from 1989 through 1999.

In April of 1999, Hall and others filed a class action against the County of Los Angeles, its Office of County Counsel, and ALS, alleging that the "three defendants [were] 'joint employers' or a 'single enterprise,'" and that ALS was merely a "payrolling scheme" that enabled County Counsel to maintain a "two-tier [attorney] work force" notwithstanding that all lawyers did the same work under the same working conditions. *Id.* As characterized by Hall, her "lawsuit 'is a federal and state equal pay act and . . . sex discrimination case brought on behalf of a class of about 200 women attorneys channeled by the County into the predominantly female [ALS] unit while receiving substantially less pay and benefits than the predominantly male . . . "official" [County Counsel] employee unit.'" *Id.* Hall alleged claims under the federal and state Equal Pay Acts (29 U.S.C. § 206(d) et seq.; Lab.Code, § 1197.5) and the Fair Employment and Housing Act (Gov.Code, § 12940). The class was certified in February of 2002.

After considerable discovery, the County defendants and ALS moved for summary judgment. In support of that motion, the defendants contended that there were separate applicant pools for ALS and County Counsel; that the hiring decisions in both ALS and County Counsel were based on merit, not gender; that although there were more female lawyers at ALS than County Counsel, both groups were gender-integrated; that there were no gender-based barriers to entry into either group; and that similarly situated males and females within each group were treated the same in terms of pay and benefits. *Id.*, at p. 322.

As part of their evidentiary showing on summary judgment, the defendants established the following:

- ◆ From 1989 through 1999, the highest differential between female and male lawyers at ALS was 71 percent female, 29 percent male; the lowest differential at County Counsel was 22 percent female, 78 percent male. *Id.*
- ◆ Similarly situated male and female lawyers at ALS were treated the same in terms of salary and benefits, and that similarly situated male and female law-

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2. See Los Angeles County Charter, art. IX, § 44.7 ("Nothing in this Article shall prevent the County, when the Board of Supervisors finds that work can more economically or feasibly be performed by independent contractors, from entering into contracts for the performance of such work.").

3. *Id.*, at p. 326. Likewise, the County's contract with ALS stated its intent was "to develop an economical and cost effective way to provide such supplemental legal services and representation for its officers and employees and for minors in dependency court proceedings [.]" (*Id.*) And, the County's Auditor Controller opined that this contract would result in "substantial savings" -- an "[a]lmost two million dollars in annual cost savings" to the taxpayers of the County. (*Id.*, at p. 323.)

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yers at County Counsel were treated the same in terms of salary and benefits. *Id.*

- ◆ From 1989 through 1999, the County of Los Angeles had a bona fide civil service system in place — i.e., that hirings into County Counsel during that time period were based upon merit, not gender.⁴
- ◆ County Counsel’s lawyers were paid more than ALS’ lawyers “due to cost-savings,” not gender. *Id.*, at p. 323.

For purposes of summary judgment, the defendants stipulated that plaintiffs would be considered “common law” employees of the County of Los Angeles.

Notwithstanding this stipulation, defendants contended that summary judgment was proper because, based upon the record: (i) plaintiffs failed to select a “proper comparator” (and, therefore, have failed to state a *prima facie* case of discrimination under the EPA and the FEHA); and (ii) even if plaintiffs could state a *prima facie* case, their claims failed because the pay differential between County Counsel and ALS lawyers were based upon two “factors other than sex” (i.e., bona fide civil service and cost-savings). The trial court granted defendants summary judgment on both grounds (“proper comparator” and “factors other than sex”); in a published decision, those rulings were affirmed on appeal. The balance of this article discusses the former.

B. The Selection of a “Proper Comparator” is Paramount

“The Equal Pay Act exists to ensure that employees performing equal work are paid equal wages without regard to gender.” *Id.* To establish a *prima facie* case of discrimination under that statute, “a plaintiff must

4. *Id.*, at pp. 322-323. For example, the County defendants proved that, “[b]etween 1989 and 1999, there were more than 30 competitive examinations open to outside applicants (including ALS employees) for positions with County Counsel. Notices of the exams were posted and otherwise publicly disseminated, and all qualified applicants were allowed to take the exams (which consisted of an oral interview, prior experience, education, and the other usual factors). An eligibility list was created and all attorney positions — 181 (58 percent of whom were female, 42 percent male) — were filled from that list.” (*Ibid.*)

establish that, based on gender, the employer pays different wages to employees doing substantially similar work under substantially similar conditions.” *Id.* If a plaintiff can make that showing, “the burden shifts to the employer to prove the disparity is permitted by one of the EPA’s statutory exceptions[,]” such a “factor other than sex.” *Id.*, at p. 323-324.

Hall contended that the County Counsel was her “common law” employer and that, therefore, the appropriate “comparator” -- the person or group to whom the comparison is made -- is male County Counsel lawyers who earn more than she does. The *Hall* court disagreed. According to the Court, “even assuming Hall is viewed as an employee of County Counsel, she is using the wrong comparator and that the appropriate comparator is male ALS lawyers.” *Id.*, at p. 324.

Although no California case (prior to *Hall*) had held that, under the EPA and the FEHA, a plaintiff must select a “proper comparator” in order to state a *prima facie* case of discrimination, the *Hall* court noted that California courts routinely look to federal law under the federal EPA and Title VII to interpret their State counterparts.⁵ Following federal law, the *Hall* court held that, “[t]o establish her *prima facie* case, Hall had to show not only that she is paid lower wages than a male comparator for equal work, but that she has selected the proper comparator.”⁶

1. Legislative History

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5. *Id.* “Because Labor Code section 1197.5 is substantively indistinguishable from its federal counterpart [the federal EPA], California’s courts rely on federal authorities construing the federal statute.” (*Id.*, citing *Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620, 623, 3 Cal.Rptr.3d 844 and *Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1316, 237 Cal.Rptr. 884.) Likewise, “[b]ecause FEHA has a federal counterpart (Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.) and the antidiscrimination objectives and public policy purpose of the two laws are the same, California’s courts routinely rely on federal decisions to interpret analogous parts of FEHA.” (*Hall, supra*, 148 Cal.App.4th at p. 326, 55 Cal.Rptr.3d 732, citing *Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1747, 52 Cal.Rptr.2d 620.)

6. *Hall, supra*, 148 Cal.App.4th at p. 324, 55 Cal.Rptr.3d 732. “The EPA does not require perfect diversity between the comparison classes, but at a certain point, when the challenged policy effects [sic] both male and female employees equally, there can be no EPA violation. [Citation.] [A plaintiff] 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 pp. 324-235, citing *Arthur, supra*, 174 F.Supp.2d at p. 976; *Hofmister, supra*, 53 F.Supp.2d at p. 891.)

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The *Hall* court first examined the legislative history to the EPA. In so doing, the *Hall* court concluded that “[t]he legislative history of the EPA shows 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.”⁷

2. Federal Precedent

Next, the *Hall* court examined federal cases under the EPA and Title VII (the FEHA’s federal counterpart), and concluded that, “[t]o establish her prima facie case, Hall had to show not only that she is paid lower wages than a male comparator for equal work, but that she has selected the proper comparator.” *Hall, supra*, 148 Cal.App.4th at p. 324, 55 Cal.Rptr.3d 732. A summary of the pertinent federal case law the *Hall* court examined is discussed below.

• *Hofmister 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 p. 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. The statistical compositions of the two groups in *Hall* (County Counsel and ALS) fell squarely within the four corners of *Hofmister*.

• *Arthur v. College of St. Benedict*

7. *Hall, supra*, 148 Cal.App.4th at pp. 324-325, 55 Cal.Rptr.3d 732, citing *Hofmister, supra*, 53 F.Supp.2d at p. 891; see also *id.*, at p. 892, fn. 13, citing Congressional Record, Vol. 109, Part 7 (88th Congress, 1st Session) pp. 8866, 8892, 8913-8917, 9194-9218, 9761-9762, 9854

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.

After the merger, St. John’s and St. Benedict’s both preserved their own separate pre-merger benefits plans for their existing faculty, but St. John’s plan was more lucrative than St. Benedict’s. 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.” *Arthur, supra*, 174 F.Supp.2d at p. 974.

In granting summary judgment, the *Arthur* court explained that, even though both groups performed “approximately equivalent work . . . [t]he EPA does not require perfect diversity between the comparison classes, but at a certain point, when the challenged policy effects both male and female employees equally, there can be no EPA violation.”⁸ The statistical compositions of the two groups in *Hall* fell squarely within the four corners of *Arthur*.

• *Schulte v. State of New York*

Under Title VII and the EPA, *Schulte* reached the same result as *Hofmister* and *Arthur*. In granting summary judgment, *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, even if the two groups of employees performed identical work.⁹ The statisti-

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8. *Id.*, at p. 976 (“[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.” . . . “Plaintiffs cannot make a comparison of one classification composed of males and females with another classification of employees also composed of males and females.”).

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cal compositions of the two groups in *Hall* fell squarely within the four corners of *Schulte*.

• ***Beall v. Curtis***

Under Title VII, *Beall* reached the conclusion. 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 because, although the job classification of nurse practitioners was approximately 97% female, almost one-third of the physician’s assistants were female as well. Since 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. *Beall, supra*, 603 F.Supp. 1563. The statistics of the higher-paid group in *Hall* fell squarely within the four corners of *Beall*.

3. Summary

In light of this authority, and “[b]ecause undisputed evidence establishes that, at any given time, ALS and County Counsel both employed a substantial number of women and that, within ALS, women were paid the same as men,” the *Hall* court concluded that “there is no basis for Hall’s use of a male County Counsel lawyer as a comparator.” *Hall, supra*, 148 Cal.App.4th at p. 325, 55 Cal.Rptr.3d 732. Accordingly, the *Hall* court concluded that “[f]or this reason alone, Hall’s [EPA and FEHA] claims fail as a matter of law.” *Id.*, citing *Strag, supra*, 55 F.3d 943 (failure to identify an appropriate comparator means the plaintiff has not set

9. *Schulte, supra*, 533 F.Supp. at p. 39 ([E]ven if plaintiffs were to succeed on their claim that psychologists and social workers performed equal work . . . 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 equally within each job classification.”).

forth a *prima facie* case).

C. Conclusion

Prior to *Hall*, there were no published California opinions addressing the selection of a “proper comparator” under the EPA or the FEHA. With *Hall*, practitioners no longer will have to continue to rely solely upon the federal authorities to dispose of claims of the kind in *Hall* on summary judgment (or appeal). For this reason, *Hall* is a significant decision, which will have a profound effect on all employers facing anti-discrimination claims, both in the public and private sectors.

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market, invest in an infrastructure, attract direct foreign investment, and gain access to a diversified mix of importers and exporters. Therefore, offering “safe havens” becomes the country’s main economic advantage.

In general, individuals seeking to hide assets look for the following characteristics in foreign havens: strong secrecy laws; easy access from the U.S.; English spoken; infrastructure (ease of doing business); value for the money; no mutual legal assistance treaty with the U.S.; non-transparency (the acts of hiding assets are not obvious); and no extradition policy.

Tax Haven Types “No Tax”

These countries generally do not have taxes for income, capital gains, or wealth. Instead, these countries usually earn revenue from corporate registration fees, annual fees, and a charge on the value of corporate assets.

“No Tax On Foreign Income”

These countries do impose income taxes, but only on domestic-earned income. Foreign income is excluded from taxation for purposes of income tax. So

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long as the income earned from foreign sources involves no local business within the country, the income is generally excluded. Generally, these countries follow two methods of taxation on corporations. The first is that they allow the corporation to conduct both internal and external business, taxing only the income from internal sources. The second is that they require a decision at the time of incorporation as to whether the company will conduct local business or will act only as a foreign corporation. In this second method, if the corporation will conduct local business, it incurs the appropriate tax liabilities.

“Low Tax”

These countries impose an income tax on company income, wherever it is earned, but the tax is minimal. Typically, these countries also have what is commonly referred to as “double taxation agreements” with countries imposing high tax liabilities. This agreement often reduces the withholding tax on the income derived from a high tax country by local corporations.

“Special Tax”

These countries do impose all or most of the usual taxes. However, they also either allow concessions for certain types of companies, or allow specialized types of corporate organizations.

Moving Funds

One purpose for seeking a tax haven and opening an off-shore bank account is to avoid the authoritative grasp of law enforcement. Opening an account with a foreign bank that has branches in the United States has a major drawback: a foreign bank with domestic branches might be subject to U.S. court action. This usually means that assets must somehow be secretly transported outside the country so they can be directly deposited or invested in foreign banks and securities.

Another possible advantage of opening an off-shore bank account includes the fact that they are not easily discovered. In addition, if they are discovered, most foreign countries are not inclined to cooperate with the United States. Because most foreign stocks and funds are not registered with U.S. government agencies, the individual with off-shore accounts can generally invest

free of any U.S. taxes.

Physical Transportation

Physically moving funds may be the most obvious tactic in hiding funds. Physical transportation of funds outside the United States can be relatively easy. First, the United States has a large border to monitor. Second, border officials are generally more concerned with investigating persons coming into the country rather than those leaving the country.

Wire Transfers

Individuals, many times, deposit their misappropriated funds in amounts less than \$10,000 in order to avoid the filing of a Currency Transaction Report. Once deposited, the money can be wired to accounts within the United States or outside.

Cashier’s Checks

Generally, funds are deposited and then a cashier’s check is purchased. The cashier’s checks are then usually either mailed or physically transported to the off-shore bank account. Obviously, the cashier’s checks are less noticeable than large amounts of cash.

Professional Intermediaries

Funds can also be handed over to a professional to handle the transfer for the individual. The professional can be an attorney, accountant, stockbroker, or money manager. The professional, generally, will then deposit the money into his or her own trust account and then transfer the funds either to a domestic or foreign location. In the United States, these professionals must file a report if the amount being transferred is more than \$10,000.

International Money Orders

The individual can purchase international money orders and deposit them in his or her foreign bank accounts. However, since 1995, all domestic money orders are required to have “NEGOTIABLE ONLY IN THE U.S. AND POSSESSIONS” printed with them. This was done in an attempt to curtail the use of these money orders to transport funds into foreign accounts.

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Bringing Funds Back

Once the funds have been successfully deposited into a foreign account, and have been left to appreciate, the individual may want to move funds back into the United States. Amongst the methods used by individuals, some of the common methods are the following: physical transportation, fictitious loans, fictitious foreign investors, fictitious fees, fictitious salaries, and cashier's checks and wire transfers.

Physical Transportation

Money can be brought into the country legally. The individual needs to file the appropriate form, a Currency and Monetary Instrument Report (CMIR). The money then, generally, loses its illicit taint as misappropriated funds.

Fictitious Loans

Some individuals will create a faux corporation in the foreign country where they have deposited their misappropriated funds. The individual may either mail or wire the funds back to himself or herself as a loan from the corporation.

Fictitious Foreign Investors

This method generally involves a legitimate corporation instead of a faux one. However, the corporation is in the United States. Rather than have the corporation pay loans to the individual, the individual uses the foreign accounts as "foreign investors" and provides capital to the emerging corporation.

Fictitious Fees or Invoices

Fictitious expenses can be labeled as finder's fees, labor costs, or consultant fees. They can also be labeled as costs for foreign exploits such as investigations into foreign lands, companies, or the feasibility of opening a branch abroad.

Cashier's Checks and Wire Transfers

This is the same method used in exporting the funds, only in reverse. The checks are made from the foreign banks, usually where the funds are deposited,

and then sent to the United States. The individual then usually deposits the checks into his or her accounts domestically, or cashes the check.

Investments

Some individuals maximize their abilities to invest their misappropriated funds. The general advantage to these investments is that it can be difficult to differentiate between funds that have been misappropriated and those that have not. A common technique is to create the investment in the name of a relative or friend to further hide the misappropriation.

Financial Investment

Generally, the advantage here is that the individual can purchase various types of properties that are exchangeable on an open market. The open market serves to "clean" the funds of their "misappropriation" label. General types of these investments are described below.

Stock

Stock represents an ownership interest in a corporation. By purchasing stock, the individual may no longer have cash or funds to hide. Generally, the stock acquired with the misappropriated funds will not be the only stock of which the individual owns, thereby commingling the misappropriated funds more effectively.

Commodities

The purchase of commodities generally works just as the purchase of stocks. The commodities market buys and sells marketable materials such as precious metals and produce, instead of shares in corporations. Therefore, the concept here is much similar to that of using misappropriated funds to purchase stock.

U.S. Government Obligations

Treasury bills can have short-term maturity dates. They generally mature in exactly one year or less and are issued in minimum denominations of \$10,000 with additional \$5,000 increments.

U.S. Savings Bonds

These are non-transferable registered bonds issued
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by the United States government. They can range from \$25 to \$10,000.

Giveways

Another commonly used method is to simply give the funds away. However, a common “giveaway” may simply resemble some kind of trust.

Trusts

The trust may allow the individual to transfer assets to the trustee. The trustee can then hold-on to the assets for the benefit of the named beneficiaries. This can allow the individual to monitor the assets and make use of them when necessary but the assets may not appear as the individual’s assets.

One type of trust, the Asset Protection Trust, warrants mention here. An Asset Protection Trust is generally established in a foreign country. The foreign countries usually have more favorable laws than those in the United States – favorable to the individual rather than the trustee or beneficiaries. Some of these favorable laws include shorter statute of limitations for fraudulent transfers (some as short as a year), and the refusal by the foreign country’s courts to enforce a judgment handed down by a United States court.

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