

The Honorable Dana M. Sabraw: A View From Both Benches

by Shannon Z. Petersen, Ph.D., Esq. of Sheppard Mullin Richter & Hampton LLC



Hon. Dana M. Sabraw

Judge Dana Makato Sabraw comes from a family of samurai and judges. His mother was born and raised Japanese and is descended from a line of samurai warriors that ended with the recent passing of Judge Sabraw's uncle, who fought as an ace pilot for Japan in World War II. Judge Sabraw's father served in the U.S. Army and during the Korean war was stationed in Japan, where he met and married Judge Sabraw's mother.

Honor runs deep in the Sabraw family, which boasts four living judges – one of Judge Sabraw's uncles, a retired Justice of the California Court of Appeal, and Judge Sabraw's aunt and cousin, who both sit on the California Superior Court of Alameda County. As for Judge Dana Sabraw, he has the distinction of having sat on both the state and federal benches. We recently discussed Judge Sabraw's background, his explanation of the differences in becoming and being a judge on the federal and the state bench, and his views regarding the honor of being a judge and what responsibilities it brings.

Judge Sabraw was raised in Sacramento and attended college at San Diego State University. After attending the McGeorge School of Law and a brief stint practicing law in Santa Barbara, Judge Sabraw relocated to San Diego.

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Rule of Professional Conduct 2-100 and Communications with Employee Witnesses

By Robert J. Gralewski, Jr., Esq. of Gergosian & Gralewski LLP

Imagine you are representing consumers in a class action against a car rental company. During a deposition of the company's designated "person most knowledgeable," you learn the names of several current and former employees of the car rental company who probably have information relevant to your case. One of the employees who you learn about is a current lot attendant who checks cars in upon their return, one is a former customer service representative, one is a current manger at the company's Lindbergh Field location, and one is a former manager at the same location. Being a zealous advocate, you immediately give the names of the employees to your associates and instruct



Robert J. Gralewski

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President's Message

By Charles Berwanger, Esq. of Gordon & Rees LLP

Your ABTL continues to provide excellent continuing education programs and opportunities for you to meet in a social context with the judges who decide the fate of your cases, as well as with your peers. Exemplifying the educational opportunities provided by ABTL is the very recent program on the Class Action Fairness Act of 2005, presided over by Magistrate Judges Adler and Battaglia. The program highlighted the substantial expansion of federal jurisdiction over class actions asserting state law claims as well as the ambiguities and uncertainties in CAFA. The program materials were excellent. Should you desire a copy of those materials, please contact ABTL's Executive Director Susan Christison at (619) 521-9570 or abtlsandiego@cox.net.



Charles Berwanger

The upcoming ABTL events will be equally educational, and several will provide a venue for socializing. They include:

Punitive Damages *Post-Campbell v. State Farm Insurance*, on September 7, 2005, from noon until 1:30 at the San Diego County Bar Association board room. The panelists, Harvey Levine, Judge Ronald Prager and David Kleinfeld, will discuss not only *Campbell* but also the significant recent California Supreme Court decisions dealing with punitive damages — *Johnson v. Ford Motor Company* and *Simon v. San Paolo US Holding Company*.

The next ABTL dinner program on September 12, 2005 will feature former assistant U.S. Attorney Roger Adelman, who will speak on complex civil litigation, the use of technology and jury expectations and persuasion.

The ABTL is proud to be a sponsor of a reception honoring magistrate Judge James Stiven on October 5, 2005. Magistrate Judge Stiven will be retiring from the federal bench and will be embarking upon a new career, teaching at the California Western School of Law.

You are reminded that October 21-23 the five

ABTL chapters will be putting on a program entitled "Building to the Close" at the Ventana Resort in Arizona. There will be a great turnout of ABTL members throughout California, as well as state and federal judges. You can not only attend a great program but also play golf, tennis and socialize with the many judges and lawyers who will be attending.

In case any of you have pondered the origin of the persuasion techniques displayed by Professor James McElhaney at the ABTL dinner on January 31, 2005, we have at least a partial answer. On November 14, 2005 the ABTL dinner will feature actors Alan Blumenfeld and Katherine James, who will speak on the use of acting techniques in the courtroom and in persuasion generally. For years, Alan and Katherine have put on a two-day program for the National Institute of Trial Advocacy. For you who have either attended this program or seen videotapes of the program, you will appreciate the insights Alan and Katherine impart.

The Southern District and Matters of Interest

The Southern District is proud to have as its court clerk W. Samuel Hamrick, Jr. Mr. Hamrick is highly respected by the Court and has helped make the Southern District a viable financially sound institution.

Mr. Hamrick reports that the budget for all federal courts is meandering through Congress and is to be adopted some time in September 2005. It is anticipated that there will be a 5% increase in the budget for the judiciary, which will allow the federal courts as a whole to maintain their present level of service. The battle for money, however, is not over once the budget is signed because the Administrative Office of the United States Courts then allocates money among the various courts. Mr. Hamrick anticipates having to spend a fair amount of time dealing with the Administrative Office to meet the financial needs of the Southern District.

Funding for the new Southern District courthouse is in the President's budget, which is before Congress. Funding this year is needed to enable completion of the courthouse by 2010. Simply stated, our present courthouse is busting at the seams. You may have noticed that several senior judges as well as one magistrate judge simply have no courtroom. They are effectively circuit judges, albeit in one building.

Mr. Hamrick reports that the Court is preparing to allow e-filing by the spring of 2006.

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Section 1021.5 and the Catalyst Theory (or, Why Can't Joe Get Paid?)

by Erik S. Bliss, Esq. Sheppard, Mullin, Richter & Hampton LLP

The Law Offices of Joe Aturnie are located on First Avenue, just down from Main Street. Joe is blessed to have a trendy chain coffee shop on all four corners of the intersection of First and Main. Joe met with Jane Clyant at one of these coffee shops to discuss Jane's legal problems over extra-large cappuccinos. They both noticed the new sign on the counter, mandated by the California Caffeine Consumption Reduction Act ("CCRA"), telling customers that "too much coffee may increase your blood pressure." "I just read an article about the CCRA in the newspaper," Jane mentioned when they sat down, "and I think it said that the law requires the sign to state very specifically that 'coffee increases blood pressure,' and not just that coffee 'may' increase blood pressure if you drink 'too much.'" When Joe got back to his office he

checked the statute, and Jane was right.

Joe had been wanting to expand his practice into class actions, and this seemed like the opportunity. He had heard that successful class action plaintiffs often get their attorneys' fees paid by the defendant under Cal. Civ. Proc. Code § 1021.5, which provides that "a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest," and that the court sometimes enhances those fees by a "multiplier." Jane agreed to be a plaintiff in a lawsuit



Eric S. Bliss

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Has the Class Certification Inquiry Changed Due to Proposition 64?

By Alan M. Mansfield, Rosner, Law & Mansfield; Roxane A. Polidora and Ryan Takemoto, Pillsbury Winthrop Shaw Pittman LLP



Roxane A. Polidora

Proposition 64 raises a number of issues that arguably neither proponents nor opponents contemplated when this initiative passed in November 2004. One of the uncertain questions is whether, after Proposition 64, Unfair Competition Law (“UCL”) claims are more or less likely to be certified for class-wide treatment.

As with many issues in the law, the answer to this question is a matter of perspective. From a plaintiff’s perspective, Proposition 64 was an amendment requiring that UCL suits be brought by or on behalf of injured persons and requiring such persons show compliance with C.C.P. §382 if they seek relief on behalf of others. From a defense perspective, Proposition 64’s newly added standing requirements, although procedural in nature, will have effects similar to a substantive change in the law because they require proof of injury, causation, reliance and/or materiality and damages in order to maintain a claim. These requirements create a host of individual issues where none previously existed. As a result, class treatment may be inappropriate because of the difficulty in satisfying the predominance requirement under California Code of Civil Procedure section 382. If the defense perspective prevails, it may be significantly more difficult to certify such claims. If the plaintiff perspective prevails, there may now be more reason than ever to proceed on a class-wide basis. However, both sides of the bar recognize these issues may ultimately be resolved somewhere in between their divergent perspectives.

The following addresses some aspects of this multi-faceted debate by considering issues from the both the plaintiff and defense perspectives: (1) how did the voters intend, if at all, to impact the class certification inquiry; (2) who can act as a class representative; and (3) why is it either more or less likely that such claims will be certified in the future?

A. Was Proposition 64 a Substantive Change in the Law for Class Certification Purposes?

According to the Analysis of the Legislative Analyst accompanying Proposition 64, this initiative changed the UCL in the following three ways: (1) it prohibits any person (other than the Attorney General and local public prosecutors) from bringing a lawsuit unless the person has suffered injury in fact and lost money or property, (2) it requires that a private action brought on behalf of others meet the additional requirements of C.C.P. §382, and (3) it requires that civil penalty revenues received by state and local governments from UCL suits be used only by the Attorney General and local public prosecutors for the enforcement of consumer protection laws. See Official Voter Information Guide dated August 9, 2004, “Proposition 64, Analysis by the Legislative Analyst” at 38-39.

1. A Plaintiff Perspective

Proposition 64 did not include a statement that it intended to change the substantive requirements of the UCL, but rather provides, “It is the intent of California voters in enacting this act to eliminate frivolous unfair competition lawsuits while protecting the right of individuals to retain an attorney and file an action for relief pursuant to [the UCL].” *Id.* at Section 1(d).

The decisions that have discussed these amendments to date have stated that the initiative did not change the substantive requirements of the UCL. See *Bivens v. Corel Corp.*, 24 Cal. Rptr. 3d 847, 854-55 n.4 (2005) (noting that Proposition 64 left “intact” the substantive provisions that create causes of action for unlawful, unfair or fraudulent business practices), *rev. granted*, 28 Cal. Rptr. 3d 3 (2005); *Benson v. Kwikset Corp.*, 24 Cal. Rptr. 3d 683, 700 (2005) (holding that Proposition 64 applies to pending cases, remanding the case for further proceedings to determine the standing issues, and stating that if plaintiff can comply with the new standing requirements, the retroactive application of Proposition 64 will not otherwise affect the Court’s application of substantive UCL

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Judge Sabraw worked as a business litigator with the San Diego office of Baker & McKenzie, where he focused on insurance and securities issues and, in 1992, became a partner. As Judge Sabraw jokes, his partners at Baker wanted to get rid of him, so they strongly supported his application to become a state court judge.

In 1995, Governor Pete Wilson appointed Judge Sabraw (who was only 37 at the time) to the San Diego Municipal Court for North County, where he presided primarily over criminal cases. In 1998, Judge Sabraw was elevated to the San Diego Superior Court, North County Division. From 1998 until 2001 Judge Sabraw continued to handle mostly felony cases both in a trial department and for one year as criminal supervising judge, and thereafter presided over civil cases in the Superior Court. In 2003, President George W. Bush appointed him to the U.S. District Court for the Southern District of California. Having sat on the municipal, superior, and now federal bench, Judge Sabraw has a unique insight among San Diego judges.

Judge Sabraw describes the process of becoming a judge as “a combination of merit first and good fortune second.” In describing the state application process, Judge Sabraw explained, “The application is very lengthy and very detailed. By the time you fill it out, it’s twenty to thirty pages long, and it covers all of your personal background and professional background, including cases that you have litigated and opposing counsel you have faced. If your application is of interest to the Governor it is forwarded to the local county committee.” If the local selection committee approves, the application is presented to the Judicial Nomination Evaluation Commission, which conducts its own evaluation of the applicant based on responses to questionnaires sent to local practitioners. Based on this information, the commission rates the candidate as exceptionally well qualified, well qualified, qualified, or not-qualified. “Once you have your rating, you’re then in a position to lobby,” Judge Sabraw said, and in this regard, he ascribes to the adage coined by former Speaker of the House of Representatives Tip O’Neill that “all politics is local.” Judge Sabraw received much of his support from his partners at Baker & McKenzie, the Asian Bar, his family, and various other mem-

bers in the legal and local community.

The process for becoming a federal judge is similar to becoming a state judge, but in his mind is “significantly more invasive and broad-based in that the federal process involves not only the local community ... but also a national community.” After a set of several local interviews, Judge Sabraw found himself in the White House in a room right next to the Oval Office being interviewed by a battery of White House attorneys, all of whom were younger than him (and he was only 44 at the time). When he interviewed for the state judge position the questions were “very general, pleasant questions” about his background and experiences. In Washington, “they’re really focused on judicial philosophy. They pose hypotheticals. They ask questions designed to ferret out judicial philosophy,” but there “weren’t any litmus type questions,” according to Judge Sabraw.

Judge Sabraw noted the significant differences in the way caseloads are structured and organized on the federal and state bench. In state court, “you are compartmentalized. You are either doing a direct civil calendar or a general overflow civil trial calendar, or you’re part of the master calendar, doing criminal cases, whether its arraignments, pre-preliminary hearing dispositions, preliminary hearings, post-preliminary hearing dispositions, trials, they are all very compartmentalized. Whereas in federal court you’re doing everything from the initial filing through trial and post trial motions for both civil and criminal.” State court judges focus on a particular area of law — juvenile, family, criminal, or civil, and may be responsible only for a particular stage of a litigation proceeding. Federal judges handle both criminal and civil cases, and preside over all phases of a case. As a state judge, Judge Sabraw presided first over criminal cases and then over civil cases, which he described as “perfect training for the federal court.”

In terms of the kinds of cases he sees, the biggest difference is in the criminal cases. Of the federal crimes, “probably 90% are border crimes, either drugs or immigration.” Of the other 10%, “they’re classic white collar crimes involving money laundering, bankruptcy fraud, income tax fraud, investor fraud, and securities fraud. These are really interesting cases.” In state court, the crimes are more varied and generally involve violence. “When I was on a felony trial rotation, I was doing back-to-back homicides,

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rape, kidnap and child molestation cases. Very serious. And in my mind there is nothing more important than that from a societal standpoint as far as maintaining law and order.”

On the civil side, on the state bench Judge Sabraw saw all kinds of cases, while on the federal bench he mostly sees constitutional claims, patent, anti-trust, and class action cases, and a fair number of labor, social security, ADA, and insurances cases.

The “big difference” is that as a federal judge he handles 150 to 200 civil cases, while state court judges assigned to civil cases today handle 500 or 600 such cases (when Judge Sabraw sat on the State bench, he handled between 600 and 800 civil cases at a time). “So the big difference is we have a fewer number of civil cases but we are blessed to have more resources than the state court judges have on civil cases. For example, here I have two law clerks, and they work only on civil matters. On the state side, I had one research attorney for over 600 cases.” While

on the state bench, Judge Sabraw decided 10 to 15 motions per week, while on the federal bench he decides about 3 per week. “So if the federal system is working correctly, and I think it is now with the addition of the five new judges, it’s designed to devote more resources to a relatively fewer number of cases than in state court.”

Another significant difference according to Judge Sabraw is that in state court attorneys have the right to argue their motions orally. “In federal court, there is not a right to oral argument. That can be good and bad. I know the bar has complained about the lack of oral argument.” Now that the federal “case load has dropped virtually in half because of the five new judges, many of us are now allowing oral argument and it’s been my practice and I think most of my colleagues are doing this as well” to allow oral argument on procedurally significant and dispositive motions. “I would say now I’m averaging probably one oral argument per week, out of every three calendared motions.” In state court, Judge Sabraw heard as many as five to seven oral arguments every week.

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Judge Sabraw gave high praise to the state court system in San Diego. "Given the huge volume of cases that the state court has to deal with, criminal and civil, it's a very well run institution. It's a great court, and it is filled with excellent judges."

If there is one area of improvement Judge Sabraw would like to see at the federal court level, it is reducing the time for civil cases to get to trial. As he explained, when in recent years the federal district court "only had seven or eight district judges, the court had over 1,000 cases per judge. It was totally overwhelmed. It was the busiest court in the country. And it was almost all criminal cases, which have statutory preference. So the court was really in a reactive mode on civil cases. I think now that we have virtually doubled the number of judges ... we're in a position where we ought to be more proactive" about getting civil cases adjudicated more quickly. "If there is anything that the federal court could do better in my mind, it would be

to implement something similar to what the state court has done with civil litigation through its Fast Track. I think, generally speaking, justice is better served by adjudicating cases more quickly."

In state court, the goal is to adjudicate a case within twelve months. The "vast majority" are actually adjudicated within 18 months and "virtually all of them within 24 months, even complex cases. In federal court, many cases are over three years old by the time they get to trial, and that's not a good thing." Judge Sabraw is trying to do something about this by setting trial dates as quickly as feasible, but always after consulting counsel. "I'm looking into that in particular in the area of patent litigation ... the patent bar is particularly interested in having relatively quick adjudication of those cases from filing to the trial date."

To those who may aspire to someday become a judge, Judge Sabraw advises: "Be Where You Are. Excel each and every day at what you're presently doing. I used to coach Little League when my son played baseball. You'd always see

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them to interview the employees to find out whatever they know that may be relevant to your case. You are quite happy with the memos they give you that you believe detail the facts you are certain will spell victory for the class.

A few weeks later as you outline your summary judgment motion, your secretary hands you a fax. It is a motion brought by the car rental company to disqualify you and your entire firm as counsel to your client and the class based upon the interview of the current manager, as well as based upon attorney-client communications conveyed by the former employees to your associates. The motion is ultimately granted and you find yourself and your firm disqualified from the case – a case in which you had invested about a year and half worth of time. Seems implausible? Unless you are careful and proceed with caution when interviewing the other side’s employees, this is an entirely possible outcome. *See Snider v. Superior Court* (2003) 113 Cal. App. 4th 1187.

California Rule of Professional Conduct 2-100 governs communications such as the ones described above. Because of the very serious consequences for improper contacts, any lawyer even thinking about interviewing a person currently or formerly employed by someone other than your own client – whether an action has been commenced or not – would be well served to review the rule itself, its annotations, and the recent *Snider* case. In addition, any practitioner thinking about contacting officers, directors, or employees in a corporate, securities, or derivative matter should also review *La Jolla Cove Motel and Hotel Apartments, Inc. v. Superior Court* (2004) 121 Cal. App. 4th 773. And anyone who may be involved in a wage and hour case should review *Koo v. Rubio’s Restaurants, Inc.* (2003) 109 Cal. App. 4th 719. The principles discussed in these cases are also applicable to all types of civil litigation.

Represented by Counsel?

If upon reviewing Rule 2-100 and the applicable cases you decide to proceed with interviews of your adversary’s employees, the first question you need to ask is whether the person you seek to communicate with is represented in the matter by counsel. The test is actual knowledge of representation in the matter at hand. Two of the leading

cases on this issue, which the *Snider* court relied heavily upon, are *Jorgensen v. Taco Bell Corp.* (1996) 50 Cal.App.4th 1398, and *Truitt v. Superior Court* (1997) 59 Cal.App.4th 1183.

In *Jorgensen*, the court rejected the contention that Rule 2-100 should apply not only when an attorney “knows” the other person is represented, but also where the attorney “should have known” that the other person was or would be represented. The court also ruled that knowledge that an organization employs in-house counsel does not trigger the application of Rule 2-100, unless the lawyer knows in fact that such counsel represents the person being interviewed when that interview is conducted. *Truitt* confirmed that Rule 2-100 does not provide for constructive knowledge.

Given this particular bright line rule, one might think they are clear to proceed full speed ahead with interviews in most situations, because rarely

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the kid, usually in right field, when the game’s in progress, and you’d see this little guy with his back turned to the game. Either that or he’s sitting down picking daisies. Not in the game. So when the kids would come running back in to bat, I’d call a huddle and I’d tell the kids, ‘Be where you are.’ And I would say, ‘What that means is: right now, you’re playing baseball. Get your head in the game. Play 100%. This is where you are. Be here. Do your best.’” This adage – “Be where you are” – “is what breeds ultimate success in any endeavor. If a lawyer excels day-to-day while they’re in the trenches, then he or she will be positioned well for the bench, if that’s the path they ultimately desire to follow.”

In Judge Sabraw’s view, being a judge is “the highest calling in the law. And I think it should be, in that we should have judges who are willing to make the financial sacrifice, who want to be on the bench to serve the public, to be a public servant, and not to go on the bench for stature or pursuit of power. Those are all the wrong reasons. I think if people go on the bench to serve justice, it can then be the most wonderful and satisfying career.” ▲

ABTL thanks Judge Sabraw for agreeing to participate in this insightful interview.

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does the attorney have actual knowledge of representation in the matter at hand. Not so fast. The *Snider* court emphasized that in cases where an attorney has reason to believe that an employee might be represented, the attorney would be well-advised to either conduct discovery or communicate with opposing counsel concerning the employee's status before contacting the employee. "A failure to do so may, along with other facts, constitute circumstantial evidence that an attorney had actual knowledge that an employee fell within the scope of rule 2-100. It might further provide support for a more drastic sanction if a violation of rule 2-100 is found." *Snider*, 113 Cal.App.4th at 1215-16. Rule 2-100 does not require advance permission of opposing counsel, and reaching out to opposing counsel tips your hand and probably means you won't be conducting the interview. However, you may decide, when balancing the risk versus the reward, that it is better to be left with formal discovery than forced to oppose a motion to disqualify.

It is incumbent on both sides to exercise caution and prudence to avoid the potential for violations of Rule 2-100 or breach of the attorney-client relationship. An organization's motion for disqualification or sanctions, likely to be evidentiary in nature, will be weaker if the organization's counsel does not take any steps in advance to alert the other side that its employees are represented or to guard their privileged material. Attorneys representing organizations with employees subject to potential interviews might want to instruct their employees to contact them before speaking to opposing counsel. They also can, as *Snider* suggests, send the other party a letter warning that some or all of their employees are represented by counsel in the matter and may not be interviewed under Rule 2-100 without the consent of counsel. However, in a wage and hour case, counsel may not want to claim that they represent all of the organization's assistant managers at all retail locations. *See Koo*, 109 Cal.App.4th 719.

Status of the Person to be Interviewed

After satisfying yourself with respect to the representation question, you also need to ask yourself if the person you intend to interview is a "party" within the meaning of Rule 2-100. Here, the rule has two parts and is in the disjunctive.

Part One: Is the person an officer, director, partner, or managing agent? Part Two: Is the subject matter of the interview an act or omission that may bind the organization or be an admission?

While it should be obvious who is an officer, director or partner, who is a "managing agent" for purposes of Rule 2-100 is a bit murky. But there are some clear tests that were enunciated and confirmed in *Snider*.

The "offending" attorney in *Snider* contended that the definition of managing agent in Rule 2-100 is the same as in Civil Code §3294, which requires wrongdoing by a "managing agent" before punitive damages may be awarded. In that context, the California Supreme Court defined "managing agent" to include an employee that "exercises substantial discretionary authority over decisions that ultimately determine corporate policy." *White v. Ultramar* (1999) 21 Cal.4th 563, 573. The Supreme Court later held that a managing agent is an employee that "exercise[s] substantial discretionary authority over significant aspects of a corporation's business." *Id.* at 577. In reaching this conclusion, the Court reasoned that a "managing agent" is more than a supervisory employee. *Id.* at 573.

The *Snider* court concluded that the definition of managing agent discussed in *White* applies equally well to Rule 2-100. Thus, according to *Snider*, "parties" for Rule 2-100 purposes are only "high-level management, not mere supervisory employees." *Snider*, 113 Cal.App.4th at 1208. The test is whether employees "exercise substantial discretionary authority over the decisions to determine organizational policy." *Id.* at 1209.

When trying to decipher whether a person's statements will be an act or omission in connection with the matter that may bind the organization, you may find yourself moving from the murky to the muddy. *Snider* does not provide a tremendous amount to go on with respect to this question. However, the way the court analyzed the situation does provide some guidance. In *Snider*, the court did not believe that the "act or omission" prong of Rule 2-100 had been triggered because the focus of the attorney's interviews had been on the employees' percipient knowledge and understanding of events surrounding the dispute, not about the employees' own actions concerning the dispute.

The "admission" question presents a slightly brighter line. Here, the test is whether the

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employee is a high-ranking executive or spokesperson with actual authority to speak on behalf of the organization. *Id.* at 1210 (citing *O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 572). Despite this clarity, lawyers must be careful that this portion of Rule 2-100 could apply to persons outside the “control group” if in fact the management level employee was given actual authority to speak on behalf of the organization or could bind it with regard to the subject matter of the litigation. *Snider*, 113 Cal.App.4th at 1210.

Former Employees

The interview rule is quite different for former employees. Such employees are permissibly contacted, irrespective of whether they are former members of the “control group”. As long as the interviewing attorney does not inquire into privileged matter, most courts have concluded that Rule 2-100's restrictions do not apply to former employees. Indeed, citing *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131, the comments to Rule 2-100 explicitly state that “[p]aragraph (B) is intended to apply only to persons employed at the time of the communication.” However, attorneys considering interviewing former employees should review *Continental Ins. Co. v. Superior Court* (1995) 32 Cal.App.4th 94, and *Nalian Truck Lines Inc. v. Nakano Warehouse & Transportation Corp.* (1992) 6 Cal.App.4th 1256, in addition to *Triple A*, for limitations on this general rule. *Snider* recommends that “[I]f a question arises concerning whether the employee would be covered by Rule 2-100 or is in possession of privileged information, the communication should be terminated.” *Id.* ▲

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Catalyst Theory

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against the coffee shop. Joe promised that Jane wouldn't have to pay for his work; his fees would be paid by the coffee shop after they won.

Joe researched the legislative history of the CCRA, and wrote an eloquent letter to the coffee shop's corporate offices detailing the terms and purpose of the law, demanding that the shop's sign be changed, and threatening a class action. Joe also demanded that the company pay his fees for work on the matter. He received a letter back:

“Thank you for your concerns regarding the CCRA and the sign at our shop on First and Main. We have fixed the sign. However, we reject your demand that we pay Ms. Clyant's fees. As you surely know, ‘the purpose of section 1021.5's authorization of a fee award is to incentivize private citizens to bring lawsuits enforcing important public rights.’ *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Mkts., Inc.*, 127 Cal. App. 4th 387, 402 (2005). ‘[I]n the context of section 1021.5, the term “party” refers to a party to litigation, and therefore precludes an award of attorney fees when no lawsuit has been filed.’ *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 570 (2004). Ms. Clyant did not file a lawsuit, and her attorneys' fees are therefore unrecoverable.”

The next day Joe met with Jane to commiserate in the second of the four coffee shops. Picking up their added-shot mochas at the counter, both quickly noticed that this shop's sign also did not conform with the strict terms of the CCRA. Joe and Jane decided to file suit against the second shop, and Joe figured not to repeat his mistake.

Joe quickly filed a complaint against the second coffee shop on behalf of all customers since the CCRA was enacted, alleging that the sign's non-compliance was a statutory violation and thus a per se unlawful business practice under Business and Professions Code section 17200. Within a week of the complaint, the coffee shop had changed its sign. But the shop wouldn't settle, and the case dragged on through class certification and discovery. After a short trial in which Joe quickly proved that the shop's sign violated the CCRA, the court found for Jane. Joe applied for fees, and eagerly awaited his first class action fee award.

Joe was disappointed when his application was denied. The court found it “significant that there is no evidence that [Jane] notified [the coffee shop]

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Catalyst Theory

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of the deficiencies in its [sign], or demanded their correction, before filing this action.” *Baxter v. Salutory Sportsclubs, Inc.*, 122 Cal. App. 4th 941, 946-47 (2004). The Court observed that, “[s]ince [the coffee shop] corrected those minor deficiencies shortly after the suit was filed, it appears that the litigation and the consequent attorney fees were largely, if not entirely, unnecessary.” *Id.* at 947. To collect fees, “a plaintiff must at least notify the defendant of its grievances and proposed remedies and give the defendant the opportunity to meet its demands within a reasonable time.” *Graham*, 34 Cal. 4th at 577.

Jane was enjoying a triple espresso in the third coffee shop when she ran into Joe, who gave her the bad news on his effort to collect fees from the second shop. But what luck: the third shop’s CCRA sign was also not proper. Jane and Joe agreed to give it another try. The next day Joe wrote a letter to the shop’s manager, with a copy to the chain’s corporate offices, and got no response. Joe then filed a class action against the third shop. The company filed a demurrer, arguing that the lawsuit was moot because it had already changed the sign. The demurrer was sustained.

Joe filed an application for fees, pointing out that he had tried to resolve the matter before filing a lawsuit, and that he had filed a lawsuit when his letters went unanswered, after which the shop changed its sign. The company filed declarations in opposition to the application, explaining that the company had changed the sign independent of any letters or lawsuits by Joe. Rather, a local Assistant Attorney General had pointed out the problems with the sign one day while ordering his decaffeinated, no-foam, soy latte. The store manager had notified the Vice President of Operations, who decided to change the sign. A new sign had been ordered before Joe wrote his letters, and coincidentally the signs were installed just after Jane’s complaint was filed.

The court denied Joe’s application. To collect fees under Section 1021.5, the court explained, there must be “a causal connection between the lawsuit and the relief obtained.” *Graham*, 34 Cal. 4th at 575. “If plaintiff’s lawsuit induced defendant’s response or was a material factor

or contributed in a significant way to the result achieved then plaintiff has shown the necessary causal connection.” *Californians for Responsible Toxics Mgmt. v. Kizer*, 211 Cal. App. 3d 961, 967 (1989) (internal quotations omitted). However, “[w]here there is no causal connection between the plaintiff’s action and the relief obtained, an attorney fee award is not proper.” *Westside Cmty. for Indep. Living, Inc. v. Obledo*, 33 Cal. 3d 348, 368 (1983). The court found that the sign would have been revised – indeed, the new sign was already ordered – without Joe’s letters and lawsuit.

Joe and Jane met in line at the fourth coffee shop, where Joe complained that he couldn’t keep fighting these battles without getting paid. They both smiled when they got to the counter and saw the nonconforming CCRA sign. This time, Joe decided that he would read the case law on Section 1021.5. Of particular interest was the *Graham* case he had seen in the courts’ opinions that had rejected his prior fee applications.

In *Graham*, Joe learned, the California Supreme Court reaffirmed the “catalyst” theory under Section 1021.5. In doing so, the court expressly diverged from the contrary federal view found in *Buckhannon Bd. & Health Care Home, Inc. v. West Virginia Dep’t of Health and Human Res.*, 121 S. Ct. 1835 (2001), which rejected the catalyst theory of fee recovery under various federal statutes.

The *Graham* court stated that, “[i]n determining whether a plaintiff is a successful party for purposes of section 1021.5, the critical fact is the impact of the action, not the manner of its resolution.” *Graham*, 34 Cal. 4th at 566 (internal quotations omitted). “The principle upon which the theory is based ... is fully consistent with the purpose of section 1021.5: to financially reward attorneys who successfully prosecute cases in the public interest, and thereby ‘prevent worthy claimants from being silenced or stifled because of a lack of legal resources.’” *Id.* at 568 (internal quotations omitted).

The decision in *Graham* discussed both the statutory and policy reasons behind the federal *Buckhannon* decision, and rejected them. *See Id.* at 569-74. The *Graham* majority also rejected the dissent’s call for a rule “that before a party can be considered to be a successful or prevailing party under Code of Civil Procedure section

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Catalyst Theory

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1021.5 ... there must be some court-ordered change in the legal relationship between the plaintiff and the defendant in the plaintiff's favor." *Id.* at 597 (Chin, J. dissenting). The dissent's concerns about "extortionate lawsuits" and a legal climate hostile to business (*Id.* at 602-03, Chin, J. dissenting), was countered by the majority's belief that "sensible limitations" on fee awards (like the ones Joe had encountered in his first three efforts), applied by trial judges in their discretion, would discourage baseless and unnecessary lawsuits "without putting a damper on lawsuits that genuinely provide a public benefit." *Id.* at 575.

Joe played it right down the middle with the fourth coffee shop: a letter; a follow-up letter when no response was received; a quick stop in the shop to check that the sign hadn't been changed; filing a class action lawsuit; and then a successful summary judgment motion. His application for fees was granted, and Joe was pleased when the court awarded him an amount above his standard hourly rate for his "contingency risk" (*id.* at 579), and the difficulties presented by the company's overzealous defense (see *id.* at 582-83).

And so Joe learned the hard way the requirements to collect fees under Section 1021.5 on a catalyst theory: the filing of a lawsuit – but just as importantly, prior to the lawsuit, a reasonable attempt to settle the dispute – and the lawsuit serving as the impetus for the defendant to issue the primary relief sought by the lawsuit. Joe also learned, by reading *Graham*, that "prelitigation negotiations are not required, nor is it necessary that the settlement demand be made by counsel, but a plaintiff must at least notify the defendant of its grievances and proposed remedies and give the defendant the opportunity to meet its demands within a reasonable time." *Id.* at 577. Finally, "[t]he trial court must determine that the lawsuit is not frivolous, unreasonable or groundless, in other words that its result was achieved by threat of victory, not by dint of nuisance and threat of expense." *Id.* at 575 (internal quotations and citation omitted). And at least the fourth coffee shop learned that ignoring attempts to informally resolve disputes prior to litigation could have serious financial consequences. ▲

Proposition 64

Continued from page 4

law), *rev. granted*, 28 Cal. Rptr. 3d 2 (2005). Moreover, some precedent may be available to answer this question. The "as a result of" language in the UCL is the same language used to identify those persons who can bring an action and who "suffered any damage" under the Consumers Legal Remedies Act ("CLRA"). See Cal. Civ. Code § 1780(a). The "suffered any damage" language has been broadly construed. *Kagan v. Gibraltar Sav. & Loan Ass'n*, 35 Cal. 3d 582, 593 (1984). And, in *Massachusetts Mutual Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282, 1292 (2002), the Court of Appeal interpreted the "as a result of" language in the CLRA as permitting a finding of causation based on the materiality of the information not disclosed to the affected persons.

2. A Defense Perspective

The Findings and Declarations of Purpose accompanying Proposition 64 state in Section 1(e): "It is the intent of the California voters in enacting this Act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution." Section 1(f) states that "[i]t is the intent of California voters in enacting this act that only the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public." Consistent with that intent, Proposition 64 standing requirements must be applied to each class representative and each class member, i.e. each must have been "injured in fact" and "lost money or property as a result of" the alleged unfair competition. If these standing requirements are not applied to each class representative and class member, Proposition 64's purpose of eliminating frivolous lawsuits by individuals who have not been injured would be compromised. In any event, it is well settled that each member of a class must satisfy standing requirements. *Collins v. Safeway Stores, Inc.*, 187 Cal. App. 3d 62, 73 (1986). To permit a class member who lacks standing to nevertheless participate in UCL litigation would be tantamount to permitting suits on behalf of the general public, lawsuits that now only public prosecutors are authorized to file and prosecute.

The CLRA, mentioned in the plaintiff perspective above, does not provide a suitable analogy for

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President's Message

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Apparently, many attorneys have encountered difficulties with e-filing in other districts and jurisdictions and may have suggestions on how to make the program work. Mr. Hamrick invites your comments. He can be reached at 880 Front Street, Room 4290, San Diego, CA 92101. His fax number is (619) 702-9900.

The San Diego County Superior Court and Matters of Interest

Assistant Presiding Judge Janice Sammartino graciously provided us with a brief report on the state of our local Superior Court.

For those who are concerned that there was a decline in civil filings of 17% at the beginning of the year, relax. There has been an upswing in filings and there will be no need for staff changes in 2006.

The Court continues to work to integrate more technology into its operations. San Diego is a major player on a state-wide level in developing and implementing an electronic case management system. It is hoped that by the end of 2006 some courts will have the system available. The system will allow for the facilitation of e-filing and may allow the online selection of hearing dates. ▲

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Proposition 64

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interpretation of Proposition 64. Under the CLRA, any person may bring an action who “suffers any damage as a result of” conduct prohibited by the CLRA. See Cal. Civ. Code § 1780(a). In *Kagan*, 35 Cal. 3d at 593, the Court held that “suffer any damage” under the CLRA included the infringement of a legal right. In contrast, after Proposition 64, a plaintiff alleging a UCL claim must have “injury in fact” and “lost money or property.” The requirement of pecuniary loss makes the broad interpretation of the CLRA’s “suffer any damage” element inapposite to the standing requirements in Proposition 64. In addition, in *Massachusetts Mutual*, the Court held the causation requirement from the “as result of” language in the CLRA could be satisfied by a showing of materiality. 97 Cal. App. 4th at 1292. Proposition 64’s newly added standing requirements of actual damage and pecuniary loss make the linkage between damage and conduct less susceptible to an inference.

B. Who Can Be a Representative Plaintiff?

As noted above, the Findings and Declarations of Purpose provide that the intent of Proposition 64 was to require the plaintiffs who maintain such action to be able to bring suit “under the standing requirements of the United States Constitution.” While this appears simple enough, what does it mean?

1. A Plaintiff Perspective

One example where this issue has crystallized is where the proposed plaintiff is an organization with members, such as the Natural Resources Defense Council or the Sierra Club. Such an organization likely would not have suffered direct injury as a result of a particular unlawful business practice and thus may not itself meet the “suffered injury in fact” criterion. Yet, California courts have permitted organizations whose members may have been affected by the practices in question to act as class representatives in a variety of circumstances. *Residents of Beverly Glen, Inc. v. Los Angeles*, 34 Cal. App. 3d 117, 128-29 (1973) (plaintiff association permitted to pursue claims on behalf of class of its members injured by defendants’ conduct); *San Diego County Council BSA v. Escondido*, 14 Cal. App. 3d 189 (1981) (Boy Scout Council found to have standing to sue under Cal. Civ. Proc. Code section 382 to enforce charitable trust did not directly benefit it); *National Solar Equipment Owners*

Assoc. v. Grumman Corp., 235 Cal. App. 3d 1273, 1280 (1992) (association has standing to act as class representative). In each of these circumstances, the association did not itself suffer injuries common to the class yet could comply with requirements of section 382 as a class representative. There is also body of federal law that addresses whether organizations possess “Article III” standing to bring suit on behalf of their members. *Warth v. Seldin*, 422 U.S. 490 (1975); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333 (1977); *The Cetacean Community v. Bush*, 386 F.3d 1169, 1179 (9th Cir. 2004). Article III standing does not require that the association plead or prove that it had been injured by a defendant’s conduct, but rather that one of the association’s members has been “injured-in-fact.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575 (1992). If the legislative intent was to adopt Article III standing requirements for determining who could bring suit under the UCL, then organizations arguably could act as representatives under appropriate circumstances.

2. A Defense Perspective

A class representative, as with any plaintiff, must meet the newly added standing requirements of injury, causation, reliance and/or materiality and damages. Before Proposition 64, to bring a UCL claim, a class representative did not need to show any actual harm. See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 561 (1998). Now, Proposition 64’s requirement of “injury in fact” imposes on a class representative the requirement of Article III standing. To establish Article III standing, a class representative must show “injury in fact” that is concrete and not conjectural, a causal connection between the injury and defendant’s conduct and a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Proposition 64, however, goes beyond Article III standing by requiring that a plaintiff have “lost money or property as a result of such unfair competition.” These requirements, which are in addition to the “injury in fact” requirement, make it clear that Proposition 64 extends beyond Article III standing and requires that a class representative also show pecuniary loss as well as reliance and causation. Through these additional standing requirements, Proposition 64 has imposed elements beyond Article III standing that a plaintiff

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or a potential class representative must establish to maintain a UCL action. The newly added standing requirements likely leave organizational standing intact. An organization may still assert claims on behalf of its members as long as its members meet the newly added Proposition 64 standing requirements.

C. Will Proposition 64 Impact Class Certification?

1. A Plaintiff Perspective

Code of Civil Procedure section 382 codified the equity tradition of virtual representation. *Weaver v. Pasadena Tournament of Roses Assoc.*, 32 Cal. 2d 833, 836-37 (1948). If certification is an issue of convenience and equity, and the UCL is a statute of equity (see *Cortez v. Purolator Air Filtration Products*, 23 Cal. 4th 163, 172 (2000)), then plaintiffs will argue that Proposition 64 merely altered the mechanism available to courts for providing equitable relief so that now private citizens could not act as private Attorneys General but only as class representatives. *Payne v. National Collection Systems*, 91 Cal. App. 4th 1027 (2001) (discussing fundamental procedural differences between actions brought on behalf of general public and those brought on behalf of class members). Thus, whether such claims can be asserted on a class-wide basis would be based on the same level of proof for establishing a UCL claim discussed in *Kraus v. Trinity Management Systems*, 23 Cal. 4th 116, 134 (2000) (which distinguished proof of a UCL claim from those of a fraud-based claim), and *Prata v. Superior Court*, 91 Cal. App. 4th 1128 (2001). See also *Stop Youth Addiction*, 17 Cal. 4th 553 (discussing general standards to prove a UCL violation).

Another factor to be considered in class certification equation was noted in *Frey v. Trans Union Corp.*, 127 Cal. App. 4th 986 (2005). To the extent that the “substantial benefit” criterion of class certification allowed courts to consider whether proceeding on a non-class representative basis was a superior method of proceeding (see, e.g., *Corbett v. Superior Court*, 101 Cal. App. 4th 649 (2002)), this option no longer exists and therefore should not be considered by courts in considering the certification question. If class certification is the only available method in equity to provide redress, plaintiffs will argue that class certification will

become the court’s only available alternative for fashioning equitable relief involving private citizens. This could result in class certification of UCL claims becoming more likely, not less.

2. A Defense Perspective

Proposition 64 standing requirements create substantial obstacles for certifying a UCL class action, particularly in cases where plaintiffs allege affirmative statements or representations as the basis for a UCL claim. Each class member must have standing to bring suit in his or her own right. *Collins*, 187 Cal. App. 3d at 73. Thus, after Proposition 64, each class member must have suffered “injury in fact and lost money or property as a result of” the alleged UCL violation.

The language “as a result of” imposes on plaintiffs and class members the additional burdens that each show causation and reliance. Requirements of causation and reliance, however, could affect whether commonality exists among the class members, especially where reliance and causation are likely to differ among the class. An example of how the standing requirements of causation and reliance can affect class certification is *In Re Tobacco Cases*, 2005 WL 579270 (San Diego Sup. Ct., March 7, 2005). In that case, a certified class alleged that cigarette manufacturers made false statements about the health risks and addictive nature of smoking, thus inducing the class to purchase cigarettes. *In Re Tobacco Cases*, 2001 WL 34136870, at *2 (San Diego Sup. Ct., April 11, 2001). After Proposition 64 was passed, the Court decertified the class holding that “a showing of causation is required as to each class member’s injury in fact . . .” and “significant questions then arise undermining the purported commonality among the class members, such as whether each class member was exposed to Defendants’ alleged false statements and whether each member purchase cigarettes ‘as a result’ of the false statements.” 2005 WL 579720, at *6. Thus, particularly in cases where reliance and causation may vary among potential class members, certification of a class may be more difficult after Proposition 64.

D. Conclusion

If Proposition 64 only works a change in standing requirements, it should have little effect. On the other hand, if Proposition 64 standing requirements are applied to each class member, it will significantly impact the number of certified UCL class actions. ▲

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