

# ASSOCIATION OF BUSINESS TRIAL LAWYERS

# abt

# REPORT

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## Letter from the President

When I graduated from law school and embarked on my litigation career, I thought that with a few years of hard work I would master the rules of civil procedure and the local rules and learn the reputations and preferences of the judges—at least for L.A. Central Civil and the Central District. Like many new lawyers, I underestimated the task that confronted me, and I failed to grasp that I was aiming at a moving target. First, there are many more judges than I ever realized. There are now more than sixty judges in the Central Civil Courthouse dedicated to handling civil cases. And some of them change each year. In the past year alone, about a half dozen federal judges retired, were elevated to the Ninth Circuit or took senior status from the Central District, approximately the same number of new judges were sworn in, and there are still several vacant judgeships to be filled. The Federal Rules of Civil Procedure were revised dramatically in the discovery area a few years back. We then had to learn which rules the Central District opted out of. Last year, a major revision of the Central District's local rules became effective, and now another revision to the federal discovery rules is being circulated for comment. In the state system, the rules change every year as well. I had finally mastered the rules for bluebacks, but now there are those pesky footers. Does the line have to go across the entire page? Does the footer go on the



**Richard J. Burdge, Jr.**

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## Professional Liability Insurance: Beware of the Hammer Clause

One of the features which distinguishes most professional liability insurance policies from the more commonly known general liability policy is that under the former there is often a clause requiring the insured's consent to any settlement. Such "pride" or consent provisions are designed to allow the professional the option of refusing a settlement in order to vindicate his or her good name.

Unfortunately, with the benefit of the consent provision also comes a burden. Consent clauses are usually coupled with a "hammer" (aka "blackmail") provision which limits the insurer's liability to the amount it would have incurred had the insured consented to the settlement recommended by the insurer. Thus, a typical policy might contain the following language:

"The Insurer shall not settle any claim without the consent of the Insured. If, however, the Insured refuses to consent to any settlement recommended by the Insurer and elects to contest or continue the legal proceedings in connection with such claim, the Insurer's liability for the claim shall not exceed the amount for which the claim could have been settled plus legal expenses incurred up to the date of such refusal."

Some hammer clauses also eliminate the insurer's liability for defense expenses incurred after the date of refusal, and some even allow the insurer to tender the defense back to the insured at that point.

Thus, although the insured might be afforded the right to refuse to consent to a settlement, that right comes with a significant cost attached to it. A hammer clause creates pressure on the insured to accept a settlement recommended by the insurer because the failure to do so exposes the insured to significant risk, including the risk of payment of both further legal expenses and a potentially significant judgment.

The practical effect of a hammer clause might come as a surprise to many professionals insured under a policy containing such a provision. For example, a professional with a policy containing limits of \$2 million per claim would normally have no uninsured exposure when facing a claim with a potential maximum value of \$1 million. If, however, the insurer invoked the hammer clause after the insured's refusal to consent to a settle-



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ment of \$300,000, the insured could face potential liability for all legal expenses incurred subsequent to the refusal, as well as potential liability for the amount of any judgment in excess of the recommended \$300,000. Thus, by invoking the hammer clause, the insurer has transformed a \$2 million policy into a \$300,000 policy.

Fortunately, the picture from the professional's perspective is not quite as bleak as it might seem. It is not a simple matter for an insurer to posture the claim to establish the prerequisites to invocation of the hammer clause. Moreover, even where the insurer believes that all the prerequisites exist, there is still no guarantee that the insurer will prevail in any subsequent coverage litigation with the insured. Thus, in deciding to invoke the hammer clause, the insurer must also weigh its potential risks in the event that it is determined that the attempt to invoke the hammer clause was improper.

A prerequisite to application of the hammer clause is the existence of a settlement proposal recommended by the insurer and rejected by the insured. This presupposes that the recommended settlement would also be acceptable to the claimant. As a practical matter, however, the likelihood of a settlement proposal acceptable to the claimant and the insurer is significantly reduced where the insured has stated his or her desire not to settle the claim. If the professional liability policy is one allowing the insured to choose his or her own counsel, chosen counsel will follow their client's wishes and attempt to avoid a situation where the prerequisites to invocation of the hammer clause exist. If counsel is appointed by the insurer, the insurer might be reluctant to instruct counsel to negotiate a settlement while cognizant that such a course of action is contrary to the insured's wishes. Moreover, defense counsel might be reluctant to follow the insurer's instruction to negotiate a settlement where that instruction conflicts with the wishes of defense counsel's other, and primary, client - the insured. Frankly, it is the brave insurer which risks a bad faith claim by pursuing settlement against the express wishes of the insured.

Another prerequisite to application of the hammer clause is that the proposed settlement fully and finally resolve the claims against the insured. In *Security Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1383 (7th Cir. 1995), the Court rejected the insurer's attempted reliance on a hammer clause where the proposed "settlement" did not finally resolve the claims against the insured. The Court held that "the term 'settlement' in this provision makes sense only if it means a full and final disposition of a claim, and that assumes that a release of liability will be issued."

Another hurdle faced by insurers in attempting to invoke the hammer clause is the potential argument by the insured professional that the refusal to consent to a proposed settlement resulted from the failure of the insurer and defense counsel to adequately advise the insured of the facts concerning the merits of the claim and the proposed settlement. For example, if appointed defense counsel opines that liability is questionable, and the insured refuses to consent to a proposed settlement based on the likelihood of vindicating his or her reputation at trial, the insurer's attempt to invoke the hammer clause after a judgment at trial will likely be countered by the insured's contention that had defense counsel given proper advice regarding the likelihood of liability, the insured would have consented to the proposed settlement. An insurer faced with a bad faith lawsuit in this scenario might think twice before insisting on the insured's

contribution to the judgment pursuant to the terms of the hammer clause. This is particularly true where defense counsel appointed by the insurer is also facing a malpractice claim for the allegedly faulty advice concerning the merits of the litigation.

Notwithstanding the common use of hammer clauses in professional liability policies, there is a dearth of legal authority addressing the interpretation of such provisions. The one case in California (and one of only a few in the entire United States) to even involve a hammer clause is *Transit Casualty Co. v. Spink Corp.*, 94 Cal.App.3d 124 (1979), overruled in *Commercial Union Assurance Companies v. Safeway Stores, Inc.*, 26 Cal.3d 912, 921 (1980) on grounds unrelated to the hammer clause. *Transit v. Spink* did not address the relationship between the insured and the insurer whose policy contained the hammer clause. Nevertheless, in light of the dearth of other authority on the issue, *Transit v. Spink* will likely be looked to for guidance in any litigation involving the hammer clause.

*Transit v. Spink* was an action by an excess insurer against the primary insurer and the insured for damages suffered by the excess insurer (consisting of the amount of a judgment in excess of the primary limits paid by the excess insurer) resulting from the failure of the primary insurer and the insured to settle the underlying action within the primary limits. The Court of Appeal affirmed the judgment in favor of the excess insurer against both the primary insurer and the insured. As to the insured, the Court held that the consent clause did not give the insured unfettered discretion to reject a settlement without concern for any obligation of good faith. Rather, the insured's decision on whether or not to consent to a settlement was governed by the obligation of good faith and fair dealing, at least as to the excess carrier. This specific holding was overruled in *Commercial Union*.

In addition to addressing the claim by the excess carrier against the insured, the Court in *Transit v. Spink* also responded to the primary carrier's defense that its hands were tied by the insured's refusal to consent to the proposed settlement, noting that the primary insurer could have invoked the hammer clause to parry the "intransigence of the policyholder..." 94 Cal.App.3d at 137. Thus, although not addressed in the context of a direct challenge to the propriety of the insurer's reliance on the provision, *Transit v. Spink* at least indirectly approves of application of the hammer clause.

In light of the Supreme Court's overruling of *Transit v. Spink*, at least as to the holding concerning the extent of the insured's duty of good faith and fair dealing to the excess insurer, the precedential value of the decision, including the apparent approval of invocation of the hammer clause, is subject to question. Nevertheless, the decision in *Transit v. Spink* at least raises some significant issues regarding the rights of the insurer and the insured with regard to a hammer clause.

The Supreme Court in *Commercial Union* held that the insured's duty of good faith and fair dealing to his excess carrier does not "compel [ ] him to accept a settlement offer or proceed at his peril where there is a substantial likelihood that an adverse judgment will bring excess insurance coverage into play." (26 Cal.3d at 921.) However, the Supreme Court did *not* hold that there was no obligation of good faith and fair dealing owed by the insured to the excess insurer. It only held that such a duty did not require the insured to protect the excess insurer's interests by accepting a settlement offer within the primary limits.

Just as the insured is subject to an obligation of good faith and fair dealing, the insurer's decision on whether or not to invoke the hammer clause is also limited by its obligation of good faith and fair dealing. In deciding whether to invoke the hammer clause, the insurer, consistent with the covenant of good faith and fair

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left, right, middle, or across the whole page? The only sure thing is that the rules will change shortly after you have learned them.

Now, after years of practice, my goals are slightly different: with hard work I hope to learn about changes in the rules when they occur, and I have developed ways to learn the reputations and preferences of judges before whom I am appearing for the first time. ABTL has played, and continues to play, an important role in fulfilling those goals. Over the years, ABTL has presented any number of programs dedicated to introducing new state and federal judges to the membership and to previewing and explaining changes in the rules. More importantly, ABTL has provided an opportunity to talk informally with hundreds of lawyers and judges. Whether at the receptions before the programs or over the dinner table, those conversations have yielded a wealth of information about how particular judges or courtrooms operate, and have provided a unique forum for discussing issues of concern to practicing trial lawyers and the bench.

In addition, ABTL is represented on numerous committees formed by the local courts, the Judicial Council and various bar associations to address issues relating to trial practice. We also review and comment on proposed rules. Just this year alone, we are involved with several developments that should be of interest to you as a business trial lawyer.

The Judicial Council's Complex Civil Litigation Task Force, chaired by Justice Richard Aldrich, has circulated for comment a draft of its proposed Deskbook on the Management of Complex Litigation. This Deskbook is somewhat like the federal *Manual for Complex Litigation, Second*, but it is different in many ways. Our Courts Committee is currently reviewing the Deskbook and preparing comments on behalf of the ABTL. The Deskbook is a major step forward in improving how state courts manage complex civil cases, many of which, of course, are the business cases that our members handle.

The Deskbook's full value will not be realized, however, if the courts do not devote the necessary resources to these cases. San Francisco and Orange County Superior Courts already have complex litigation programs. In Los Angeles, we only have the "long cause" court, Central Civil West, and despite the significant improvement in how cases are handled there under the supervision of Judge Harvey Schneider, there is a long way to go before it becomes a true complex litigation program. Not all complex cases turn out to be long causes, particularly if creatively managed, and not all long causes are complex. More significantly, the current system is subject to tactical abuses by those who forum shop by convincing an assigned judge that the case will take more than twenty days. At that point, a new opportunity to challenge the trial judge arises; you all know how the game can be played. Shifting the most complex cases to a new judge on the eve of trial loses all the efficiency benefits of individual calendaring and makes little sense. The Presiding Judge, Victor Chavez, and Assistant Presiding Judge, James Bascue, have expressed support for a complex litigation program where complex cases are identified early and assigned to a complex litigation judge for all purposes. They have been stymied at the present time by a lack of resources for law clerks, courtroom personnel and other resources that are essential to making the court work. However, such a court should significantly improve the efficiency of handling complex cases in order to pay for itself. If you think the time has come for a complex litigation program, notwithstanding the funding problems, make your views known to us or the Court.

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## Parallel Proceedings: Criminal and Civil Litigation

**(Editor's Note: This article is continued from our last issue with a discussion of settlement considerations, the joint defense privilege and sentencing.)**

### Settlement Considerations

One way to free up witnesses to testify in civil proceedings is to resolve their criminal liability. Quick criminal settlements may also be advantageous for purposes of sentencing guideline calculations (see discussion in Part VII C., *infra*). However, as discussed above in Part V, if the criminal case is to be settled through a plea, the plea may have collateral effects in the civil litigation. Thus, if early resolution of the criminal case seems appropriate, there should be careful coordination between civil and criminal counsel to try to find a criminal resolution which is least damaging to the civil case and yet still acceptable to criminal prosecutors.

In structuring criminal plea agreements, attention must also be paid to the criminal penalties to be imposed, and the effect of such penalties in the civil case. For example, a restitutionary payment in a criminal case may be viewed in the civil case as an "admission" of an amount owed, whereas a fine might not be so viewed. On the other hand, a restitutionary payment made in a criminal case might be creditable against a civil judgment, whereas a fine would not.

*The Civil Case.* A civil settlement between private parties will not resolve any pending criminal proceedings. It is also unlikely that private civil litigants will incorporate into a settlement agreement a promise that the aggrieved party will not report to or cooperate with law enforcement authorities if the conduct in question is otherwise punishable criminally. Such an agreement is arguably against public policy in that it undermines society's interest in deterrence and punishment of criminal conduct, and enables a financially able litigant to buy a way out of prosecution. (Conversely, it is ethically impermissible, and potentially illegal, for a lawyer to exact a civil settlement by using a threat to report criminal conduct. Disciplinary Rule DR-105; see also, ABA Model Rule 4.4; 519(2)). It might, however, be possible to include in a civil settlement an agreement that the aggrieved party in the civil case will notify prosecuting authorities that, at least from a monetary standpoint, the aggrieved party has been "satisfied" by the civil resolution.

*Simultaneous Or "Global" Settlements.* It is not uncommon for settlement negotiations to be ongoing simultaneously in civil and criminal proceedings, much in the way a civil defendant might negotiate with two different plaintiff groups suing on the same facts. Whether to settle civil and criminal cases simultaneously, or seriatim, will be a tactical decision unique to each case. When the government is a party to civil litigation or administrative proceedings, a "global settlement" of civil, criminal, and administrative proceedings may be sought. Caution is necessary, however, because the question whether a United States Attorney has the authority to bind other government agencies and depart-

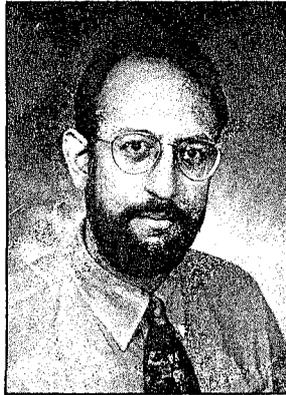


Jan Nielsen Little

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ments is complicated and unsettled. See generally *United States v. Igbonwa*, 120 F.3d 437 (3rd Cir. 1997) (citing cases). Even if a United States Attorney has such authority, careful drafting is necessary to ensure that the proposed settlement clearly reflects her intent to exercise it — even if the United States Attorney in question is only committing to bind other United States Attorneys offices. See, e.g., *United States v. Russo*, 801 F.2d 624 (2nd Cir. 1986).

Truly “global” settlements are rare, however. Often the government is unwilling to “package” simultaneous settlements and will instead require that one action be resolved before another is considered. (For example, the IRS will generally delay resolution of civil tax liability until issue(s) relating to criminal tax liability have been resolved.)



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Rather than negotiating one giant settlement agreement, more often a corporation is in the position of trying to negotiate “simultaneous” settlements with various parties: with private litigants, with prosecutors, and/or with various branches or agencies of government, in civil or administrative actions. The potential advantages or disadvantages, and the availability and advisability, of simultaneous or “global” settlements will be unique to each case.

**Other Issues**

*Retention Of Counsel.* The introduction of a criminal investigation or administrative proceeding during a pending civil case will almost certainly require the retention of additional counsel. Rare is the practitioner who can function comfortably and competently in all three arenas, civil, criminal, and administrative. Moreover, there are divergent interests and strategies presented by the civil and criminal defense of the case (the classic example presented by Fifth Amendment issues) and the client is best served by receiving expert advice on all fronts.

It will also likely be necessary to retain separate counsel for some individual employees or officers, especially when criminal liability considerations are present. Conflict of interest considerations will prevent corporate counsel from representing individual officers or employees who may be asked to testify against the corporation: if employees of a company are subpoenaed to give testimony in a criminal proceeding, the company should hire separate counsel for them to avoid conflicts of interest.

It is common for corporations to pay for criminal counsel for employees, unless there is evidence that the employee knowingly committed a crime against the company, in which case indemnity is usually denied. It is not a conflict of interest for an individual's employer to pay his attorneys' fees. See, e.g., *U.S. v. Scharrer*, 614 F. Supp. 234, 240 (S.D. Fla. 1985); *U.S. v. Hoffer*, 423 F. Supp. 811, 818 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 561 (2nd Cir. 1977). Most states have corporate indemnification statutes: for example, in California, employees have a right to indemnification for such expenses under California Labor Code § 2802, and permissive indemnification for corporate officers is provided for in California Corporations Code § 317. See also Delaware Code Title 8, § 145 (permissive indemnity of corporate officers). Many corporate by-laws also provide for indemnity for legal expenses, and usually require the employee to execute an “undertaking” to repay the expense should it later be determined that the employee acted in a manner inconsistent with the best interests of the company.

The retention of separate counsel for employees and officers becomes an expensive venture. Some economies may be achieved by one attorney representing a group of employees among whom there is no conflict. See, e.g., *In Re Grand Jury Proceedings*, 859 F.2d 1021, 1026 (1st Cir. 1988) (refusing to disqualify counsel on grounds of multiple representation absent evidence of actual conflict).

*Joint Defense Privilege.* Where multiple counsel have been retained, it may be desirable for some or all of them to enter into “a joint defense agreement,” between the civil and the criminal counsel, or among various criminal counsel, or among civil counsel, in order to share information without fear of waiving the attorney-client privilege. The “joint defense privilege” has long been recognized in federal court. See *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965); *Continental Oil Co. v. United States*, 330 F.2d 347 (9th Cir. 1964). This privilege is an extension of the attorney-client privilege whereby communications between lawyer and client remain confidential when the lawyer shares those communications with lawyers for co-defendants to present a common defense. *Waller v. Financial Corp. of America*, 828 F.2d 579, 583 n.7 (9th Cir. 1987); see also *U.S. v. Schwimmer*, 892 F.2d 237, 243 (2nd Cir. 1989).

Key elements which should be covered in drafting a joint defense agreement include: the existence of a “common interest;” preservation of confidentiality among the joint defense group; a prohibition of dissemination of joint defense information without permission; a recognition that while the sharing of information may further common goals, the joint defense agreement does not require sharing of information; and provisions for withdrawal from the joint defense group and for the return of documents and preservation of confidences in the event of such withdrawal.

It is always important to consider the desirability of a joint defense agreement before sharing information with co-counsel. To avoid ambiguity, the existence and terms of such an arrangement should be clarified, preferably in writing, before document or information exchange begins. Bear in mind that it may not be in your client's best interest to be party to a joint defense agreement because of its disclosure restrictions. For example, corporate counsel contemplating a possible voluntary disclosure to the government will not desire a joint defense agreement, but will prefer to conduct an internal investigation under the attorney-client privilege provided by *Upjohn Co. v. United States*, 449 U.S. 383 (1981), and retain the option whether or not to waive that privilege.

**Voluntary Disclosure Issues**

*Sentencing Guidelines Considerations.* The Federal Sentencing Guidelines place a premium on a defendant's admission of responsibility and on his cooperation with authorities.

The guidelines applicable to individuals, effective November 1, 1987, provide that disclosure of an offense to the government (prior to the government's discovery of the offense) may provide grounds for a “downward departure” from an otherwise applicable sentencing range. Fed. Sentencing Guidelines § 5K2.16. The guidelines further provide that where an individual criminal defendant “clearly demonstrates acceptance of responsibility for his offense,” which will usually come about in the context of a guilty plea, he may receive a 2-point reduction of the “offense level” otherwise applicable. Fed. Sentencing Guidelines § 3E1.1(a). And, where an individual defendant provides “substantial assistance” to governmental authorities in investigating or prosecuting others, this may also provide grounds for a “downward departure” from the otherwise applicable sentencing guideline range. Fed. Sentencing Guideline § 5K1.1. These reductions

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of the offense level or downward departures from the guideline range may make a substantial difference in a criminal sentence, of several months or even years of confinement.

The guidelines applicable to organizations, effective November 1, 1991, similarly provide for sentence reductions where there is cooperation and disclosure. The guidelines provide a 1-point reduction in offense level for "affirmative acceptance of responsibility," a 2-point reduction of offense level for acceptance of responsibility and "full cooperation in the investigation," and a 5-point reduction of offense level for self-reporting of an offense not previously known to the government, full cooperation, and acceptance of responsibility. Fed. Sentencing Guideline § 8C2.5(g). In addition, a downward departure from an otherwise applicable guideline range may be achieved for the providing of "substantial assistance to authorities." Fed. Sentencing Guideline § 8C4.1. Again, these reductions have the potential to make an enormous difference — potentially millions of dollars — in the fine imposed.

Because of these provisions of the sentencing guidelines, counsel representing an individual or a corporation facing substantial criminal risk may well counsel early disclosure and/or cooperation with governmental authorities, which in many cases may also require a criminal plea. In the context of existing (or possible) parallel proceedings, the disclosure and cooperation incentives of the Federal Sentencing Guidelines alter the calculus in the already difficult decision-making process. Following are just a few of the considerations counsel should consider:

- Should the corporation which discovers a potential criminal violation in its ranks make an early disclosure to the government to take advantage of the Sentencing Guidelines' incentives, even though doing so may trigger instigation of civil lawsuits or administrative proceedings?
- Where the government is already investigating criminal conduct, will there be a "race to cooperate" among individuals, or between individuals and their corporate employer?
- If a corporate criminal conviction is likely, do the potential sentencing advantages of self-reporting and cooperation outweigh the consequences in a parallel civil action of the admissions and collateral estoppel effects of a criminal conviction?
- If an individual's criminal conviction is likely, should the corporation expect that the individual will be rushing to cooperate, and strategize accordingly for a quick civil settlement before that cooperation is revealed to civil plaintiffs?

*Other Voluntary Disclosures.* Federal agencies also encourage, and in some instances require, disclosure of misconduct. In some regulated areas, disclosures are statutorily required. *See, e.g.*, 18 U.S.C. § 1512 (requiring government contractors to report kickbacks to their contracting agency); 12 C.F.R. § 21.11 (requiring federally insured banking institutions to report suspected bank fraud to the Comptroller of Currency); *Cf.*, California Penal Code § 387 (corporate criminal liability for non-disclosure of serious concealed danger subject to regulatory authority). "Voluntary" disclosure programs are formally in effect in other agencies: for example, the Department of Defense has a well known voluntary disclosure program for government contractors; the Department of Justice operates under a 1991 policy paper governing voluntary disclosure in environmental cases; and the Internal Revenue Service has a voluntary disclosure program. Other agencies, even if lacking a formal voluntary disclosure program, may look favorably on voluntary disclosure. Voluntary disclosures can be especially important for government contractors to avoid or minimize suspension or debarment sanctions.

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## Documents Generated By the Opposing Party: Protecting the Work Product

In an era of increased specialization, an attorney's stock in trade typically is his specialized knowledge of a particular industry or company. The attorney who has amassed a library of "smoking gun" documents generated by the adversary industry or company can better serve his clients' needs, particularly where it is known that such "smoking gun" documents are not often produced by the defendants in discovery. As a result, it becomes increasingly important to protect from discovery the library of specialized information that an attorney may have developed. At first blush, it may appear that such information naturally falls within the protection of the attorney work product doctrine. However, the California work product doctrine, as codified in Code of Civil Procedure § 2018, is not so clear.

Code of Civil Procedure § 2018(c) gives absolute protection to "any writing that reflects an attorney's impressions, conclusions, opinions, or legal theories." All other forms of work product enjoy a qualified privilege and must be disclosed if the court determines that "denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." Code of Civil Procedure § 2018 does not define work product but specifically states that it is a restatement of existing law and is not intended to expand or reduce the discovery of work product under existing law. *Id.* section 2018(d). The only guidelines provided by section 2018 is to set forth the state's policy to preserve the rights of attorneys to prepare their cases for trial with a certain degree of privacy and to prevent attorneys from taking undue advantage of their adversaries' industry and efforts.

Under section 2018, therefore, an attorney's library of "smoking gun" documents generated by his client's adversary is not absolute work product and, if it is work product at all, would enjoy only qualified protection. California courts do not squarely address this issue. In *Nacht & Lewis Architects, Inc. v. Superior Court*, 47 Cal. App. 4th 214, the Court of Appeal held that compelled production of a list of potential witnesses interviewed by opposing counsel would reflect counsel's evaluation of the case by revealing which knowledgeable witnesses counsel deemed important enough to interview and, therefore, would constitute qualified work product. By analogy, counsel's selection of certain "smoking gun" documents generated by his client's opponent should enjoy the same qualified work product protection as the selection process would reflect counsel's evaluation of the case.

Some federal courts have long recognized that an attorney's compilation or synthesis of documents is protected "opinion" or absolute work product. In *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138 (D. Del. 1982), plaintiff's counsel assembled a binder of critical documents which was reviewed by plaintiff's principals, officers and employees in preparation for deposition.



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The defendant sought production of the binder. Plaintiff argued that the selection and ordering of documents constituted privileged work product reflecting counsel's opinions, mental impressions, conclusions or legal theories. The District Court agreed, holding that the process of selection and distillation was entitled to protection as work product. The Court, however, ordered disclosure of the binders because they were used to refresh the deponents' recollection. The reasoning of *James Julian, Inc., supra*, was adopted by the Third Circuit Court of Appeal in *Sporck v. Peil*, 759 F.2d 312 (3rd Cir. 1985), cert. den. *Peil v. Sporck*, 474 U.S. 903 (1985), where the Third Circuit overruled the District Court's order of production of documents grouped by defense counsel to prepare a deponent. In *Sporck, supra*, the Third Circuit Court of Appeal held that the selection and compilation of documents by counsel in preparation for pretrial discovery was absolutely protected. *Id.* at 316. Numerous jurisdictions follow the reasoning of *James Julian, Inc., supra*, and *Sporck, supra*. See e.g., *Omaha Public Power Dist. v. Foster Wheeler Corp.*, 109 F.R.D. 615 (D. Neb. 1986) (counsel's segregation of documents is work product); *Scwarzkopf Technologies Corp. v. Ingersoll Cutting Tool Co.*, 142 F.R.D. 420 (D. Del. 1992) (court denied motion to compel specific identification of documents withheld from discovery on the ground that the attorney's document selection process is protected work product and a specific identification of withheld documents would essentially require counsel to reveal his understanding of case).

Not all federal courts adopt the "compilation" aspect of work product. For example, in *Bohannan v. Honda Motor Co.*, 127 F.R.D. 536 (D. Kan. 1989), the District Court ordered production of documents generated by defendant and obtained by plaintiff from a litigation group. It held that even if the lawyer's synthesis of the documents were to constitute work product, the mere acquisition of such documents from a non-party did not protect the documents as work product. It further held that plaintiff had not met its burden of establishing that the material was grouped or synthesized in anticipation of litigation. The District Court was unpersuaded by plaintiff's argument that it needed to withhold the documents until later in order to monitor the defendant's future discovery compliance and that it had signed an agreement with the litigation support group not to disclose the materials to defense counsel. The *Bohannan* reasoning was followed in *Hendrick v. Avis Rent A Car System, Inc.*, 916 F. Supp. 256 (W.D. N.Y. 1996), in which the District Court granted General Motors' motion to compel disclosure of statements of General Motors employees which the plaintiff had obtained from third party sources, noting that the sharing of information among similarly situated plaintiffs does not shield the information from disclosure. However, the court noted that the plaintiff was not being required to reveal a precise list of every document his counsel had examined or obtained from other lawyers but merely to identify statements made by or attributable to General Motors employees. See also *Bartley v. Isuzu Motors*, 158 F.R.D. 165 (D. Colo. 1994) (court ordered plaintiff to produce documents generated by defendants in other cases, holding that such documents did not constitute work product).

In light of the foregoing conflicting federal authority and the absence of California authority, certain precautions should be undertaken by any counsel who wishes to protect his investigation of the opponent's documents. Under Code of Civil Procedure § 2031(a), a party may only obtain discovery of documents that are in the "possession, custody or control of any party" to the

action. Documents that are in the possession of that party's attorney for his general use do not necessarily belong to his client, particularly if those documents are not maintained in the client's file. See, e.g., *Poppino v. Jones Store Co.*, 1 F.R.D. 215 (W.D. Mo. 1940) (the mere fact that the attorney has possession of a document does not make his possession of the document the possession of his client); *In re Buono's Will*, 14 Misc. 2d 760, 179 N.Y.S. 2d 717 (1958) (discovery does not extend to all personal papers of the attorney but only to those papers in the possession of the attorney belonging to his client). Therefore, it would be prudent to segregate all investigative materials from client files during the discovery phase of litigation.

In the event that the documents must be maintained as part of the client's file, attorneys should lay a proper foundation for the invocation of work product before they commence documentary investigation. It is not sufficient to declare in conclusory language that the documents are work product and reflect the attorney's thought processes and mental impressions. The attorney should be able to truthfully declare that he or she reviewed numerous documents from third party sources and only retained certain documents which he or she believed were significant to their client or practice. That selection process should then be protected work product.

Of course, a party may attempt to subpoena the "smoking gun" documents directly from his adversary's attorney. The fact that the documents are maintained as part of the attorney's library should not render them fair game for his client's adversary. What is maintained by a party's attorney for his general practice and not for a particular case would not satisfy the threshold of relevance to a particular action. Moreover, impressions, conclusions and theories could be gleaned by the attorney from reviewing the documents in his "library." In *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986), the Eighth Circuit reversed the District Court's entry of default judgment against the defendants as sanctions for in-house counsel's refusal to answer questions regarding the existence or non-existence of certain documents of her employer. The Eighth Circuit recognized that in-house counsel's acknowledgement of the existence of certain documents would reflect her judgment as an attorney as her recollection of the documents concerning a certain subject would be limited to those documents she had selected as significant and important to her legal theories.

In sum, many precautions should be taken during the discovery process to protect documents generated by the client's adversary.

—Denise M. Parga

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In agency voluntary disclosures, the fact of disclosure is generally viewed favorably, but does not serve as a bar to criminal prosecution. Thus, except in cases where disclosure is statutorily required, the decision whether to make a voluntary disclosure is a strategic one: do the intangible benefits of disclosure (potentially more favorable consideration from the agency, the ability to "package" and present the information in the most favorable way, and potentially greater control over the transmission of information to the government) outweigh the very tangible risks of disclosure (subjecting the client to potential criminal investigation, civil lawsuits, and administrative sanctions for conduct which may otherwise have remained undiscovered, and providing the evidence, in the form of admissions, which may be used in criminal, civil, or administrative proceedings).

Another important factor to consider in determining whether or not to make a voluntary disclosure is the fact that if a voluntary disclosure is made to criminal or administrative authorities, the materials provided to governmental authorities, and the work product behind those materials, may be discoverable by the government or by parties to a parallel civil case as a result of a waiver of the attorney-client privilege or work-product doctrine. In 1988, the Fourth Circuit decided the seminal case of *In Re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988), cert. denied, 490 U.S. 1011 (1989) and held that voluntary disclosures made to government officials constituted a waiver of the attorney-client privilege and work-product protections. And, in *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414 (3rd Cir. 1991), the Third Circuit, after a lengthy analysis of the authorities in this area, found that voluntary disclosures to government agencies investigating companies waived the attorney-client privilege and exposed documents to discovery by third parties. The Third Circuit found a waiver despite the fact that (a) the companies reasonably expected the SEC and the Department of Justice to maintain the confidentiality of the information disclosed to them, and (b) the companies had followed the SEC's regulations concerning preservation of confidential documents, and had disclosed information to the Department of Justice pursuant to a stipulated court order for confidentiality. Two district courts in California recently have followed the Third Circuit's *Westinghouse* opinion and held that production of documents to a government agency waives the work product immunity. *McMorgan & Co. v. First California Mortg. Co.*, 931 F. Supp. 703 (N.D. Cal. 1996); *United States v. Family Practice Associates*, 162 F.R.D. 624 (S.D. Cal. 1995). See also *In re Salomon Brothers Treasury Litigation*, No. 91 Civ 5471 (RPP) (S.D.N.Y., June 30, 1993) (Salomon Brothers must turn over to civil plaintiffs its submission given to the SEC during government securities litigation). Thus, while counsel making a voluntary disclosure may try to obtain confidentiality agreements from government agencies, reliance on their enforceability is ill-advised.

In summary, there may be incentives and value in making voluntary disclosures of misconduct to government agencies, but careful thought must be given to the potential ramifications in parallel criminal or civil proceedings.

The world of parallel proceedings is marked not by straight lines and linear progressions; rather, the situation is usually one where the "civil action...is tied in a tight knot with a criminal prosecution...With patience, [however], some formidable knots may be untangled." *Campbell v. Eastland*, 307 F.2d 478, 479 (5th Cir. 1962) (Wisdom, J.). Patience, caution, sensitivity, and constant questioning and revisiting of issues as the knot unravels are the keys to success in this area.

—Jan Nielsen Little and Ragesh K. Tangri

## Jurisdictional Discovery Against Foreign Parties

A recurring problem in international litigation is the extent to which foreign parties, who have been sued in the United States, can be subjected to U.S.-style discovery, where those parties have objected to the Court's exercise of personal jurisdiction over them.

This problem is important because it illustrates a Catch-22 for U.S. plaintiffs who seek to have the Court exercise personal jurisdiction over foreign defendants: on the one hand, a U.S. plaintiff will frequently need to conduct discovery to establish the jurisdictional facts necessary to overcome a foreign defendant's motion to dismiss; on the other hand, the foreign defendant will argue that until and unless the Court has determined that personal jurisdiction exists, it should not be compelled to respond to discovery authorized by a U.S. Court, especially where such discovery would not be allowed in its home forum.



Peter S. Selvin

At the threshold, it is settled law that a U.S. Court has the discretion to allow discovery concerning jurisdictional facts in a case where a foreign defendant contests the Court's exercise of personal jurisdiction. See, e.g., *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989), citing *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430-31, n. 24 (9th Cir. 1977). At the same time, however, discovery will not be allowed where the pertinent facts bearing on the question of jurisdiction are not in dispute (*H2O Houseboat Vacations, Inc. v. Hernandez*, 103 F.3d 914, 917 (9th Cir. 1996)) or where the development of additional facts would not affect the outcome of the Court's jurisdictional determination (*Razore v. Tualip Tribes of Washington*, 66 F.3d 236, 240 (9th Cir. 1995)).

In circumstances where a U.S. court determines that jurisdictional discovery will be allowed as to a foreign defendant who has contested the court's exercise of personal jurisdiction, an important question frequently arises: whether a U.S. plaintiff will be permitted to invoke the discovery procedures available under U.S. law or whether the plaintiff must instead proceed only via the Hague Convention or other bilateral agreement governing the production of evidence overseas.

As to foreign defendants over whom it has been determined that the Court has personal jurisdiction, the answer was provided by the U.S. Supreme Court in *Société Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522 (1987). In that decision, the Court held that U.S. plaintiffs are not required to proceed exclusively via the Hague Convention in obtaining the production of evidence overseas, even in circumstances where the production of evidence which is sought may potentially put the foreign defendant in conflict with the law of its forum. In the *Société Nationale* decision, the U.S. Supreme Court admonished U.S. District Courts to proceed on a case by case basis in determining the application of the Hague Convention, and warned that special concern must be given to the prevention of discovery abuse and the demands of international comity. *Id.* at 546-547.

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## Jurisdictional Discovery

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In *Société Nationale* the Supreme Court did not address, however, whether the application of the Hague Convention becomes mandatory where the foreign defendant contests personal jurisdiction and the U.S. court has not yet made a determination on that issue. In such circumstances, international comity would seem to favor mandatory application of the Hague Convention.

Although the U.S. Supreme Court has not squarely addressed this issue, lower courts have. In *Geo-Culture, Inc. v. Siam Investment Management*, 147 Or.App. 536, 936 P.2d 1063 (1997), a U.S. plaintiff brought suit against HBZ Finance Limited (HBZ), a company based in Hong Kong. Arguing that the Oregon court lacked personal jurisdiction over it, HBZ moved to dismiss the complaint.

In response, the plaintiff sought an order from the court allowing it to take a telephonic deposition of HBZ to discover the pertinent jurisdictional facts. The trial court ruled that plaintiff could take discovery from HBZ concerning the pertinent jurisdictional facts, but only, at least initially, in accordance with the Hague Convention. The trial court "reserved" for later determination whether the U.S. plaintiff could utilize U.S. discovery rules and procedures in connection with his jurisdictional discovery.

Faced with the requirement that it proceed with jurisdictional discovery, if at all, solely in accordance with the procedures described in the Hague Convention, the plaintiff elected to simply respond to the HBZ's motion to dismiss — without proceeding with such jurisdictional discovery.

The Oregon court granted HBZ's motion to dismiss, and the plaintiff appealed. On appeal, the plaintiff argued, among other things, that the trial court erred in requiring it to proceed, at least initially, solely in accordance with the requirements of the Hague Convention.

Without reaching the international comity issues identified by the Court in *Société Nationale*, the Oregon Court of Appeals affirmed the lower court's determination that the plaintiff would be permitted to undertake jurisdictional discovery, at least initially, solely in accordance with the Hague Convention. 936 P.2d at 1067. It is significant that the decision in *Geo-Culture* appears to be the only U.S. decision which in recent years has limited in this way the means by which jurisdictional discovery of a foreign party can be taken.

Numerous cases decided by the federal courts go the other way. See, e.g., *Fishel v. BASF Group, et al.*, 175 F.R.D. 525, 528 (S.D.Iowa 1997) ("The Court does not believe plaintiff is limited to the Hague Evidence Convention until the Court rules on the personal jurisdiction issue"); *Rich v. KIS California*, 121 F.R.D. 254, 258 (M.D.N.C. 1988); *Jenco v. Martech International, Inc.*, 1988 US Dist. LEXIS 3991 (E.D.La. 1988).

Those courts which have not adopted the limitation articulated in *Geo-Culture* have required that foreign defendants respond to discovery directed toward jurisdictional issues, without regard to plaintiff's compliance with the procedures specified in the Hague Convention. In such circumstances, a foreign party may be tempted to refuse to provide such discovery on the theory that absent compliance by the U.S. plaintiff with the Hague Convention's procedures it cannot be compelled to respond to such discovery.

A U.S. Supreme Court decision on this point, however, should give pause to a foreign party contemplating such a step. In *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée*, 456 U.S. 694 (1982) the Court concluded that a U.S. Court can make a finding on personal jurisdiction over

a foreign defendant as a *sanction* for that defendant's refusal to respond to jurisdictional discovery. In that case, the U.S. Supreme Court affirmed the issuance of such a sanction against a group of foreign defendants who refused to comply with certain court-ordered discovery. The discovery in question represented an attempt on the part of the plaintiff to establish jurisdictional facts, in response to the foreign defendants' defense based on lack of personal jurisdiction.

The holding in *Insurance Corp. of Ireland* stands for the proposition that a foreign defendant who asserts a defense based on lack of personal jurisdiction will nonetheless be obliged to respond to discovery concerning jurisdictional facts, even if that discovery is not propounded in accordance with the Hague Convention's rules and procedures. The sanction for the failure of a foreign defendant to respond to such discovery may be an adverse finding on the issue of personal jurisdiction itself.

—Peter S. Selvin and Patrick Gunn

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dealing, must consider the insured's interests equally with its own. See, e.g., *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809, 818 (1979) ("The insurer, when determining whether to settle a claim, must give at least as much consideration to the welfare of its insured as it gives to its own interests."). Thus, in attempting to invoke the hammer clause, the insurer cannot act solely out of its self-interest in limiting its own potential liability, but also must give equal weight to the insured's interests, including the insured's interest in protecting his or her reputation and/or in limiting his or her future premium obligations. Inasmuch as the interests of the insured professional and the professional liability insurer will almost always conflict where the insured refuses to consent to a settlement, arguably the insurer cannot properly invoke the hammer clause except in situations where the insured is acting in bad faith and seeking to withhold consent for an "improper purpose" (such as to force the insurer to pay some or all of the deductible). Stated another way, so long as the insured is acting in good faith in refusing to consent to a proposed settlement, the implied covenant of good faith and fair dealing precludes the carrier from invoking the hammer clause because application of that clause would require giving greater weight to the carrier's interests than to the insured's interests.

This analysis finds support in *Security Officers Service, Inc., v. State Compensation Ins. Fund*, 17 Cal.App.4th 887 (1993), albeit in a somewhat different context. *Security Officers* involved a claim by a policyholder against its workers' compensation insurer for, inter alia, the insurer's allegedly improper settlement practices. The insured alleged that the insurer's failure to promptly and properly settle workers' compensation claims against the insured resulted in the insured having to pay significantly higher premiums for subsequent workers' compensation insurance policies. The insured's loss experience was part of the statutorily-mandated formula used to determine those subsequent premiums, and included the excessive reserves posted on those claims which the insurer failed to settle expeditiously. The Court of Appeal held that, notwithstanding the fact that there was no potential for an excess limits judgment under a workers' compensation policy, the implied covenant of good faith and fair dealing required the workers' compensation insurer to give due consideration to the impact on the insured's future premiums of the insurer's settlement practices. In reaching this holding, the Court rejected the insurer's argument that the policy's express allocation to the insurer of the right to settle precluded application of a good faith standard. Rather, conduct by the carrier in strict compliance with the language of the policy was found to be insufficient to defeat the insured's claims if that conduct was not also undertaken in good faith.

Obviously, *Security Officers* is not directly on point. However, its holding can be very important in a dispute over the carrier's invocation of the hammer clause. Just as the insurer in *Security Officers* was required to consider the impact of its settlement practices on the insured's interests, particularly the impact of those practices on the insured's future premiums, so too should a professional liability insurer give appropriate consideration to the insured's interests in protecting his or her reputation and in limiting future professional liability insurance premiums. Because the implied covenant of good faith and fair dealing requires the insurer to give "at least as much consideration" to the insured's interests as it gives to its own interests, arguably the hammer clause cannot be invoked to protect the insurer's interest where the insured is acting in good faith to protect his or her interests in refusing to consent to a settlement.

In light of the potential pitfalls facing an insurer which invokes a hammer clause, insurers are likely to tread carefully before attempting to bring the hammer down on their insured. A hammer clause is most likely to be invoked where the insurer believes that the insured is acting unreasonably in refusing to consent to a settlement, particularly where that refusal is tied to an attempt by the insured to obtain some collateral advantage over the insurer. Where, however, the insured's refusal to consent to a settlement is reasonable and in good faith, the insurer's ability to successfully invoke the hammer clause is subject to some doubt. As a result, before invoking the clause, the insurer will have to carefully consider whether the reasons for doing so warrant the risk that the attempt will be unsuccessful and/or warrant the risk of a finding that the insurer failed to act in good faith.

—Kenneth S. Meyers

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### Court of Appeal Seeks Volunteers for Settlement Conference Program

Litigants who file a notice of appeal in Los Angeles County receive by return mail an invitation to participate in the Court of Appeal's District-Wide Settlement Conference Program. This program, created jointly by the Court and the County Bar in 1996, offers the parties a chance to settle their case at the very beginning of the appellate process, saving months or even years of delay and often tens of thousands of dollars in costs and fees. The program depends on the participation of volunteer settlement officers, who agree to handle one conference approximately every quarter.

Joseph Lane, the Clerk of the Court, says the program has become a victim of its own success: "We're getting many more requests for settlement conferences than we have settlement officers to handle them." The Court is therefore looking for additional volunteer settlement officers from the County Bar's membership. Participation was originally limited to appellate specialists, but the program's popularity and the success of non-specialists have motivated the Court to expand its panel of settlement officers to include more non-specialists. "Appellate experience can be very useful," Mr. Lane explains, "but it's not necessarily essential. We've seen plenty of cases where the settlement officer's mediation skills and experience were what really counted."

Lawyers who want to work with the program should send Mr. Lane a letter expressing their interest and providing a brief description of their mediation and/or appellate experience. Write to: *Joseph Lane, Clerk, Court of Appeal, 300 South Spring Street, Los Angeles, CA 90013-1213*. Questions about the program should be addressed to the lawyer members of the settlement program's Steering Committee: Pamela Dunn, (213) 624-3062 (chair); Robin Meadow, (310) 859-7811; Robert Gerstein, (310) 393-5582; or Rita Gunasekaran, (310) 449-6000.

**Securities**

In *Diamond Multimedia Systems, Inc. v. Superior Court*, 1999 Daily Journal D.A.R. 97 (Supreme Court Jan. 4, 1999), the California Supreme Court held that the civil remedy of Corporations Code section 25500 for a buyer or seller of stock whose price has been affected by market manipulation is available to out-of-state purchasers even if the purchase or sale took place outside of California. The opinion is based on statutory construction, but is especially notable for its place in the nationwide debate over perceived abuses in securities class actions. Defendant Diamond Multimedia urged the court to construe the Corporations Code provision narrowly so that California would not provide a more attractive forum and more expansive remedies for market manipulation than under federal securities laws.



Michael K. Grace

The court noted that the Federal Private Securities Litigation Reform Act of 1995, which was designed to curb frivolous securities cases, appears to have resulted in the filing of an increased number of nationwide class action shareholder lawsuits in California courts under California law, but refused to consider what it described as "policy based arguments [which] must be addressed to Congress and/or the Legislature." The Court also rejected the argument that federal securities laws impliedly preempt actions for market manipulation under

California law, citing the Securities Litigation Uniform Standards Act of 1998. Although observing that this recent federal legislation "may accomplish what defendants urge this court to do" with its express prohibition of securities fraud class actions under state law, the court noted that shareholders' rights under state and federal law are cumulative and that Congress chose to bar only class actions, and not individual actions, under state securities laws.

**Employment**

In *Laird v. Capital Cities/ABC, Inc.*, 1998 Daily Journal

D.A.R. 12739 (Court of Appeal, December 15, 1998), the Court of Appeal for the Third Appellate District affirmed summary judgment for a parent corporation against an employee of a subsidiary corporation suing for employment discrimination and wrongful termination. The opinion is a primer on four theories of parent corporation liability in the employment context. The court analyzes the "integrated enterprise" test derived from federal labor case law, considering interrelation of operations, common management, centralized control of labor relations and common ownership or financial control between a parent and its subsidiary; the agency test, requiring that a "parent corporation so control the subsidiary as to cause the subsidiary to become merely the agent or instrumentality of the parent"; the alter ego test, requiring "specific manipulative conduct" by the parent toward the subsidiary, relegating the subsidiary to a mere instrumentality; and promissory estoppel. Plaintiff failed to establish triable issues of fact under any of these theories. Unmoved by plaintiff's equitable plea that she would lose her lawsuit because she had failed to sue the subsidiary, the court found that the "truly inequitable result in this case would be to impose liability on a defendant who has none as a matter of law."



Jeffrey W. Kramer

**Copyright**

**Joint Authorship**

In *Thomson v. Larson*, the Second Circuit Court of Appeals affirmed the lower court's finding that Lynn Thomson, a New York University professor and independent contractor dramaturg who made significant contributions to the writing of *Rent*, was not a co-author with John Larson, who was credited as sole author of the *Rent* script. (Larson died suddenly after the final dress rehearsal.)

The parties had no written agreement. At trial, the court found that Thomson had contributed independently copy-

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**Shareholder Class Actions Limited to Federal Court**

Although much has been written about the Supreme Court's recent ruling in *Diamond Multimedia*, 1999 Daily Journal D.A.R. 97 (Supreme Court Jan. 4, 1999), scant attention has been paid to the fact that the decision may have no impact on future litigation. In *Diamond*, the Supreme Court ruled that nationwide class actions may be maintained under California Corporations Code Section 25400, the state's broad anti-securities fraud statute. But, what the Court giveth, Congress had already taken away. Such lawsuits may not be brought under the Securities Litigation Uniform Standards Act of 1998. Signed into law on November 3, 1998, the Act bars shareholder class actions from proceeding in state court. Instead, such lawsuits are forced into federal court, where plaintiffs must meet the strict pleading standards of the Securities Litigation Reform Act of 1995.

The Uniform Standards Act of 1998 is the latest attempt

by Congress to reduce the number of baseless securities fraud lawsuits brought after a company's stock price declines. The Securities Litigation Reform Act of 1995 first sought to attack the problem by imposing heightened pleading requirements on plaintiffs. The result was a spate of lawsuits in state court, such as *Diamond Multimedia*. The Uniform Standards Act of 1998 seeks to force those lawsuits back into federal court. It contains a number of important exceptions, however, that may make it possible for plaintiffs to continue to bring lawsuits on dual tracks in federal and state court.

Among other things, the Uniform Standards Act does not apply to derivative actions. Thus, plaintiffs would apparently be free to file securities fraud class actions in federal court, coupled with parallel derivative actions in state court.

— Vivian R. Bloomberg

**Labor Law**

In *Lambert v. Ackerly*, 98 Daily Journal D.A.R. 10484 (October 1, 1998 Ninth Circuit Court of Appeals), the Ninth Circuit held, as a matter of first impression, that employees who were fired for complaining to their employer concerning their employer's overtime violations could not state a claim for retaliatory termination under the Fair Labor Standards Act.

In *Sheppard v. Freeman*, 98 Daily Journal D.A.R. 10911 (Court of Appeal October 19, 1998), the Fourth Appellate District held that except where a statutory exception applies, an employee or former employee cannot sue other employees based on their conduct relating to personnel actions whether or not the employees are determined to have been acting within their scope of employment and regardless of their personal motives.

**Civil Procedure**

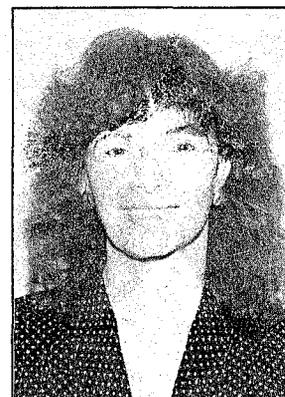
In *Truck Insurance Exchange v. Superior Court*, 98 Daily Journal D.A.R. 10673 (Court of Appeal, October 8, 1998), the Second Appellate District held that a peremptory challenge is exhausted only when the change of judge occurs. Therefore, when the first challenge was dismissed as untimely and the judge was not removed from the case, the party did not lose the right to challenge the new judge when the original judge retired.

In *Valley Engineers Inc. v. Electric Engineering Co.*, 98 Daily Journal D.A.R. 11091 (Ninth Circuit October 26, 1998), the Ninth Circuit affirmed the dismissal of an action as an appropriate discovery sanction for concealment of critical documents.

In *Sherman v. Kinetic Concepts, Inc.*, 1998 Daily Journal D.A.R. 11781 (November 17, 1998), the Fourth Appellate District held that a new trial was warranted and monetary sanctions under Code of Civil Procedure §§ 128.5 and 2023 for trial costs and attorneys' fees were mandated where, after trial, plaintiff discovered new evidence which the defendant had concealed during discovery.

**Insurance**

In *Cigna Property and Casualty Ins. Co. v. Polaris Pictures Corp.*, 98 Daily Journal D.A.R. 11008 (Ninth Circuit October 22, 1998), the Ninth Circuit held that an insured's failure to disclose material facts concerning its principal's prior claims history supported rescission of a marine insurance policy.



Denise M. Parga

**Arbitration**

In *James W. Moore v. First Bank of San Luis Obispo*, 1998 Daily Journal D.A.R. 12750 (December 15, 1998), the Second Appellate District held that the arbitrators' legal error of refusing to award attorneys' fees to the prevailing party under a contractual attorneys fee provision was not subject to judicial review.

—Denise M. Parga

**Significant Decisions from the Federal Courts Committee**

Continued from page 10

rightable material to the script of *Rent*. Despite these contributions, the court found that *Rent* was not a "joint work," "prepared by two authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101. The joint work test has two requirements:

- (1) each contributor must make "some non-de minimis copyrightable contribution"; and
- (2) the contributors must have the mutual intent, at the time of creation, to be joint authors.

Although Thomson satisfied part one of the test, the Court of Appeals affirmed the lower court's conclusion that there was no evidence that Larson intended to be a joint author with Thomson. Factors that the court considered included (1) Larson's rejection of a book writer to assist him with the script, (2) Larson's sole discretion over what portions of Thomson's work would go into the script, (3) Larson's prior use of co-author credits in other projects, indicating his awareness of the designation, and (4) Larson's billing of himself as sole author and Thomson as "dramaturg." Intent is especially important to examine "where one person...is indisputably the dominant author of the work and the only issue is whether that person is the sole author or she and another...are joint authors" (quoting *Childress v. Taylor*, 945 F.2d 500, 508 (2d Cir. 1991)).

**Fair Use Doctrine and Extraterritoriality**

In *Los Angeles News Service v. Reuters Television Int'l, Ltd.*, 149 F.3d 987 (9th Cir. 1998), the Ninth Circuit Court of Appeals affirmed the ruling of then District Court Judge Kim McLane Wardlaw that the fair use defense did not shield defendants from liability in copying two "Reginald Denny" videotapes for subsequent distribution by international new services. Applying the four-factor fair use test, the Court concluded that the unauthorized use of the tapes was for a commercial purpose and not transformative, the portion taken amounted to "the heart" of the works, and the effect of the infringement on the market for the works was substantial and adverse. The only factor favoring defendants was that the nature of the works was factual and informational rather than fictional and creative. With three of the four factors favoring the copyright holder, the Ninth Circuit approved of the lower court's summary adjudication that the fair use defense did not apply.

The Ninth Circuit reversed the lower court's ruling precluding damages for extraterritorial infringement by adopting, for the first time, the Second Circuit's rule that an infringer may be liable for damages caused abroad by a domestic act of infringement. Because the unauthorized copying of the videotapes took place in New York, the copyright owner was deemed to acquire an equitable interest in profits realized abroad from that infringement. The Ninth Circuit held that a copyright owner "is entitled to recover damages flowing from exploitation abroad of the domestic acts of infringement committed by defendants."

—Michael K. Grace  
and Jeffrey W. Kramer

Other changes are well underway in the Superior Courts. Full weapons screening (i.e., judges, staff, jurors, lawyers, litigants, witnesses and anyone else who wants to enter the building) is scheduled to commence in July at the Central Civil Courthouse. It is long overdue. In 1998 alone, more than 4,000 restricted items were confiscated from people passing through the weapons screening at those courts that now have it in Los Angeles. If that many weapons were taken from people who knew they were going through screening, imagine how many weapons are brought into a courthouse with no screening. For everyone's safety, screening will start downtown soon. In order to accomplish that, all but five of the eighteen entrances that we now use will be closed. Perhaps the summer was chosen to implement the system so that there will be a few months of operation before the first rainy day. In any event, the Court knows there will be bugs in the system. The court is looking to the lawyers for patience, cooperation and ideas for solutions to problems.

Furthermore, while court *consolidation* (and the "no" vote of the judges in L.A. County) has grabbed all the headlines, *coordination* is underway. Instead of 50+ trial departments in Central Civil, there now are 60+, through the utilization of a number of municipal court judges who randomly are assigned superior court matters at the filing window. The superior court trial departments are also receiving municipal court filings. Branch courts, such as Long Beach, Pasadena and Santa Monica, are also fully coordinated. This means that you need to be familiar with even more judges than you needed to know last year. Undoubtedly, there will be problems with coordination efforts, which you will want to bring to the attention of the court administration, and ABTL can help you do that.

On the federal front, the "White Commission" sent its Final Report to the President and Congress on December 18, 1998. Entitled *Commission for Structural Alternatives for the Federal Courts of Appeals, Final Report*, it is available on the web at <http://app.com.uscourts.gov/>. At more than 100 pages including appendices, it is a lot to digest, but the Commission has proposed a significant change in the structure of the Ninth Circuit, which, if adopted, would change how you and I practice. Greatly oversimplified, the Report proposes dividing the Ninth Circuit into three "divisions." California would be split into separate divisions. The opinions of one division will not be binding on the trial courts in the other divisions. Thus, under the proposal, the potential exists for different federal law in Northern California from that in Southern California. Although a new "super *en banc*" procedure is proposed to resolve interdivisional conflicts, such review would be discretionary, so not all conflicts between divisions would be addressed. The Report has its supporters and its detractors, and it now is a "political" issue with the President and Congress. If you or your clients have a position on the proposals, your Senators and Representatives are interested in hearing from you.

On any of these matters or others affecting the courts, the ABTL Officers and Governors would be pleased to pass your comments and ideas along to the appropriate committee or member of court administration. Or you could take advantage of the ABTL tradition I mentioned earlier and use the next ABTL program to discuss your ideas with one of the judges at the reception or during dinner.

—Richard J. Burdge, Jr.

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