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Black Box or Pandora's Box

In April 2002, the Institute of Electrical and Electronics Engineers Standards Association ("IEESA"), in association with the Department of Transportation and other government agencies, began releasing information regarding the ongoing development of motor vehicle event data recorders ("EDR"). Better known as a "black box," and as well known and utilized for years in airplanes, the technology is now earthbound. By 2004, the National Transportation Safety Board ("NTSB") had recommended that all autos to be equipped with a data recording device. Widespread adoption of this technology in commercially sold automobiles will and already has begun to dramatically influence auto-related personal injury litigation.

The MVEDRs, or black boxes, are being designed to record specific information such as speed, acceleration, location, and time (some devices record up to 42 data elements). Recording such data has been promoted by car manufacturers and government agencies for the significant safety information the data yields. Supporters of the technology, such as Jim Hall, the cochair of the IEESA development project and former NTSB head, attest that the primary purpose of furthering the technology and integrating it into commercial automobiles is that "the more accurate the data we gather on highway crashes, the better chance we have to reduce the devastating effects of crashes." Indeed, the "NTSB considers this so important that it features 'automatic crash sensing and recording devices' high on its current list of the 'Most Wanted' transportation safety improvements."

While the data may be used in the larger scale to make advancements in auto technology and highway design, on the individual crash basis, a more immediate impact may be its evidentiary value in litigation. Whether for safety or evidentiary purposes, Mr. Hall claims that the boxes will serve to "objectively track what goes on in vehicles before and during a crash to complement the subjective input we now get from victims, eyewitnesses, and police reports." This technology will impact the evidentiary standards and the efficiency and accuracy of accident examination, reconstruction, and reliability.

Although the recorded data will eliminate many of the problems associated with testimonial inconsistencies and unknowns in many auto accident cases, the recording and dissemination of the data recorded remain a key concern to many. The devices record information about the individual vehicle's whereabouts and activities and, thus, the driver. Privacy issues naturally arise.

First and foremost, there is little legislation in place regulating the specific devices by name. Indeed, in the litigation arena, there are presently no restrictions on the use of the recorded information. If the data is requested in the

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process of litigation, there are presently no specific protections or basis for refusal to produce it.

Additionally, California is the only state so far to require car dealers to disclose the presence of an MVEDR to potential buyers, thus, many people do not even know that their activities are being recorded.

The use of the data by insurance companies to monitor their insureds' driving and determine insurance rates and/or coverage based on the data received will also concern consumers, as will the "tracking" potential. Global positioning system ("GPS") technology allows pinpoint location data to be transmitted in real time. While this technology already exists and is in use in other devices, such as cell phones, recorded location data is one of the primary concerns raised in relation to the widespread use of the EDR devices. The type of data recorded poses constitutional questions as to whether the use of such records, whether in real time via GPS or after an accident, infringe upon individual freedom of movement and right to privacy.

Thus, the advancement in technology can serve as both a blessing and curse. Like a DNA fingerprint, the black box data will provide objective evidence regarding the vehicle's movement immediately prior to an accident. The participants' subjective memories of the facts will be concretely confirmed or refuted. Such objective evidence should help the determination of both liability and causation in auto accident litigation and may, indeed, allow for faster and more comprehensive prelitigation evaluations of the cases.

As noted above, the use of black box technology also raises significant constitutional issues, specifically relating to individual privacy rights. Accordingly, the propagation of such technology will also bring with it significant debate and will likely, eventually, bring more legislation. Indeed, like California, the New York Legislature, in April 2005, began contemplating bills to regulate black box technology.

Although the commercial integration of the technology remains in its childhood, still awaiting equipment and data consistency, the legal community has already begun to analyze and, of course, debate, the pros and cons of the technology's applications. While the required use of EDRs will undeniably impact the litigation of auto-accident actions, the extent to which such evidence will be allowed remains to be seen. As the technology of onboard data recorders further develops and becomes more prevalent, the state legislatures and courts must continue to tackle the regulation of the devices, the data recorded, and the admissibility and weight of such evidence for auto-related litigation.

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REAL ESTATE

Supreme Court Approves A Lis Pendens As Remedy for Fraudulent Conveyance

In *Kirkeby v. Superior Court (Fascenelli)*, the California Supreme Court issued an opinion approving a notice of pendency of action—commonly referred to as a lis pendens—to prevent any further transfers of real property to defraud creditors.

The Supreme Court held that a creditor may record a lis pendens to prevent a further transfer by a debtor's transferee of an interest in real property in furtherance of an attempt to render the property unavailable for satisfaction of a debt. The court made it clear, however, that the recordation of a lis pendens may not be used without a transfer being, at least, alleged by the creditor.

The case arose of a dispute between a brother and sister who were co-owners of a company called FasTags, Inc. FasTags was a manufacturer and wholesaler of identification tags for pets. Plaintiff Kirkeby alleged that after she resigned from the FasTags board of directors in 1988, her brother Frederick Fascenelli and his wife Diana Fascenelli looted the company. Kirkeby filed a lawsuit in 2001, alleging 27 different causes of action against the Fascenellis, including a cause of action based on two alleged fraudulent conveyances. The aggregate amount of damages sought was \$4.9 million.

With respect to the fraudulent conveyance action, Kirkeby alleged that Frederick obtained a \$50,000 loan from FasTags by representing that he would use the funds to construct a building to house FasTags operations but, instead, used the funds to purchase a residence for himself and Diana. After making the purchase, the Fascenellis immediately transferred their interest in the property to a family limited partnership. In addition, Frederick transferred his interest in another residential property to a family trust which then also transferred it to the partnership. Kirkeby alleged that these transfers were made to defraud creditors in collection of their claims and requested that the transfers be voided to the extent necessary to satisfy the claims in her complaint. These transfers formed the basis of Kirkeby's fraudulent conveyance claim.

After filing and recording a lis pendens against both properties, the Fascenellis successfully obtained an order expunging the lis pendens. The trial court found that the essence of Kirkeby's complaint was for collection of money (as opposed to a dispute over property ownership) and, therefore, did not state a proper cause of action for the use of a lis pendens.

Kirkeby petitioned the appellate court to overturn the trial court's decision, which was denied. The appel-

late court held that the complaint did not allege a claim that affected title to or the right to possession of real property to support the lis pendens, which is a requirement under Code of Civil Procedure section 405.4. That is, the use of a lis pendens cannot generally be used as a collection remedy for an unsecured obligation. The California Supreme Court granted a discretionary review of the matter.



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As set forth in *Urez Corp. v. Superior Court*, “a lis pendens is a recorded document giving constructive notice that an action has been filed affecting title to or right to possession of the real property described in the notice.” Pursuant to California Code of Civil Procedure section 405.20, a lis pendens may be filed by any party in an action who asserts a “real property claim.” Section 405.4 defines a “real property claim” as “the cause or causes of action in a pleading which would, if meritorious, affect (a) title to, or the right to possession of, specific real property...” If the pleading filed by the plaintiff does not properly plead a real property claim, the lis pendens must be expunged under Code of Civil Procedure section 405.31.

It is important to note, and the Supreme Court made it clear, that there are at least three different procedures by which a party whose real property has been encumbered by a lis pendens can seek to expunge or remove the lis pendens from the property. These include asserting through a motion that the lawsuit itself does not allege a proper real property claim (as above) and that the plaintiff is unable to establish the probable validity of the real property claim by a preponderance of the evidence. Other methods to expunge a lis pendens include a motion alleging the failure to comply with recording, service, or filing requirements; that the claim is secured by the property owner filing an undertaking; or that the creditor failed to file an undertaking as ordered by the court as a condition for maintaining the lis pendens.

The Fascenellis moved to expunge the lis pendens on the basis that the plaintiff did not allege a real property claim. This decision was not based on a factual finding that Kirkeby could not support the claim but rather that the claim as alleged did not fit within the definition of a “real property claim.”

The Supreme Court disagreed finding that Kirkeby’s claim did relate to real property and that it also affected “title to, or right to possession of, specific real property.” The court based its finding upon the conclusion that the Uniform Fraudulent Transfer Act (UFTA), which is codified in Civil Code section 3439 et seq., provides that a “fraudulent conveyance is a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim.” One of the remedies for

a fraudulent conveyance, as set forth in California Civil Code section 3439.07(a)(1), provides that a creditor can void the transfer or obligation to the extent necessary to satisfy the creditor’s claim. Thus, the Supreme Court concluded that, if successful, the result of a fraudulent conveyance claim can be the voiding of a transfer of title to specific real property:

By definition, the voiding of the transfer of real property will affect title to or possession of real property. Therefore, a fraudulent conveyance action seeking avoidance of a transfer under subdivision (a)(1) of Civil Code section 3439.07 clearly “affects title to, or the right to possession of “...real property and is therefore a real property claim for the purpose of lis pendens statutes.

Here, Kirkeby adequately pled a fraudulent conveyance claim by alleging that the Fascenellis transferred title to the subject properties with intent to defraud. She also sought an order from the court voiding the transfers to the extent necessary to satisfy her claims. As such, the court concluded that she had properly stated a real property claim because it would affect title to specific real property. If she prevailed, she would be able to set aside the transfers in order to satisfy her claim.

The court also noted that despite its approval of the lis pendens procedures for these purposes, the procedure could be subject to abuse. The court suggested that trial courts could liberally impose sanctions upon anyone who files a fraudulent transfer action and records a notice of lis pendens before uncovering credible evidence of fraud.

The availability of a lis pendens to prevent further disposition of real property assets is a strong and powerful remedy for a creditor. Typically, the creditor with an unsecured nonconsumer-based claim, must first prepare attachment applications and seek the approval of the superior court before tying up the property. A lis pendens does not require court approval, a nonconsumer debt, and can be filed and recorded immediately upon filing the complaint, subject to service and recording requirements. A lis pendens will cloud title to the property during the pendency of the lawsuit. The availability of sanctions, on the other hand, should discourage an abuse of this process. Nonetheless, for a creditor—acting in good faith—this is a welcome addition to its arsenal of creditor remedies.

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WILLS AND TRUSTS

What is a No Contest Clause?

Due to the recent media coverage surrounding the life and death of Terri Schiavo, many persons are creating testamentary documents (e.g., wills and trusts). Yet, many are not aware of a powerful testamentary tool called the “no contest clause.” Whether you are a testator or a beneficiary, you should know what a “no contest clause” is and why you do not want to violate it.

In California, any person creating a testamentary document can include a “no contest clause.” The purpose of the “no contest clause” is to prevent a beneficiary from seeking to void, in whole or in part, any provision of a testamentary document and to cause a complete and total disinheritance if the “no contest clause” is violated. An example of a “no contest clause” is as follows:

In the event that any beneficiary under this Will/Trust seeks to obtain in any proceeding in any court an adjudication that this Trust or any of its provisions is void, or seeks otherwise to void, nullify, or set aside this Will/Trust or any of its provisions, then the right of that person to take any interest given to him or her by this Will/Trust shall be determined as it would have been determined had such person predeceased the execution of this Will/Trust without issue.

Why would someone use a “no contest clause”? One could use the above clause when it is anticipated that a beneficiary will be unhappy with the property distributed to him (i.e., all I got was this cheap...), and it is further anticipated that the same beneficiary will attempt to tie up the estate in litigation until a favorable settlement is reached. Should the unhappy beneficiary attempt to challenge the validity of the testamentary document, enforcement of the above no contest clause would result in a complete and total disinheritance. Thus, a donor (i.e., the person who created the testamentary document) can rest in peace knowing that their final wishes will not be thwarted by a greedy beneficiary trying to get more than what was gifted to him.

California courts have routinely upheld the enforceability of the “no contest clauses” and have stated such clauses “are favored by the public policies of discouraging litigation and giving effect to the purposes expressed by the testator.” However, California’s stated public policy is to avoid a forfeiture, absent the donor’s clear intent. Consequently, California courts should enforce no contest clauses only when the challenger is attempting to thwart the testator’s clear intent.

Unfortunately, California courts can thwart a testator’s intent by enforcing a “no contest clause.” Imagine, for example, that you create a will that distributes property to your spouse and two children. The will includes a “no contest clause,” causing a complete and total disinheritance in the event of a contest. Imagine further, that your will distributes \$1 million to your spouse and \$5,000 to your partially-disinherited daughter. However, your will failed to expressly state how a retirement IRA worth \$10,000 would be distributed, because the IRA came into existence after your will.

After your death, your spouse files an action seeking a judicial clarification as to how the IRA is to be distributed. In response, your partially-disinherited daughter asserts that your spouse contested the will causing a complete and total disinheritance of the entire \$1 million. The action is heard by the court, and the court rules that your spouse’s action violates the “no contest clause,” thereby causing a complete and total disinheritance of the \$1 million. Sound harsh? Sounds like your intent to give your spouse a sizable distribution was thwarted because your spouse simply wanted court clarification as to how the after-the-fact IRA was to be distributed.

Putting aside community property issues and the possible invocation of the safe harbor provisions of the California Probate Code, the above factual scenario is a very real possibility. Unfortunately, disinheritance is not the only adverse consequence relating to the use of and enforcement of a “no contest clause.” For example, the mere threat of enforcement of a “no contest clause” may discourage a beneficiary from seeking court assistance in uncovering undue influence.

Because of the negative consequences associated with the use of and enforcement of a “no contest clause,” some legal professionals, including this author, are questioning whether courts should continue to enforce no contest clauses. More specifically, the Executive Committee of the California State Bar’s Trusts and Estates Section voted to approve legislation proposed by the Litigation Committee of the section that would abolish the enforceability of no contest clauses in California. The proposal passed by a 2-1 margin.

Although the California Legislature has not yet proposed the legislation, many hope that it will act soon. Regardless of what the Legislature does, before using a “no contest clause” in your testamentary document and/or before challenging a testamentary document, make sure to consult with a qualified legal professional.



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LITIGATION

What's a Deposition

So, you have been served with a notice of deposition, or your attorney has told you that you need to appear for one. Having your deposition taken is usually a necessary part of being a party to a lawsuit, but most clients would prefer not to have to go through this process. You are not alone in looking forward to your deposition with less enthusiasm than a trip to the dentist. Much of the anxiety that comes with having your deposition taken stems from not knowing what to expect from the process. But, as a well-known childhood hero once said, “knowing is half the battle.” By knowing what to expect at the deposition, as well as how to conduct yourself during the deposition, some of the anxiety and uncertainty surrounding this process may be alleviated.

Let's begin with a basic explanation of the deposition process. Depositions are a part of the discovery portion of a lawsuit. Discovery allows parties to uncover the facts, themes, and issues in the case through various means, such as written interrogatories, production of documents, and depositions. A deposition is a question-and-answer session where the attorneys for the parties involved in the case ask questions of individuals or businesses that may have relevant information that will help the parties build their cases. A deposition can be taken of parties, witnesses, companies, police officers, or any other person who may have knowledge about relevant facts and/or circumstances involved in the case.

Depositions can occur at a variety of different locations, but they most often will take place in a conference room at one of the attorney's offices. There are usually a number of people who will be present at the deposition. There will be a court reporter who takes down everything that is said on a machine and then transcribes the verbal dialogue into a written document that reads like a script. Attorneys for the parties involved in the action will also be present, along with your attorney. Any party to the action may also attend any deposition conducted in the lawsuit.

The setting for a deposition is usually casual, but do not be misled by the informal setting. A deposition is a formal, legal process that should be taken seriously. The deposition process is governed by a certain set of rules, making it different from ordinary conversation between individuals. Your appearance and demeanor, as well as the answers you provide, will be closely scrutinized by opposing counsel, so it is important that you are properly prepared for the deposition.

The following is a list of items to keep in mind when you are being deposed by opposing counsel:



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- The most important thing to remember is that you need to answer the question honestly. Neither your attorney nor opposing counsel wants you to hide information or distort the truth. You are under an obligation to tell the truth, and you will take an oath to that effect.
- Answer the question truthfully but do not volunteer more information than what is being asked for by opposing counsel's question. If opposing counsel wants more information, then he or she will ask you a follow-up question to elicit that information.
- Take a moment to think about your answer before you say anything. This will give you time to think about the question and make sure that you understand it. Your pauses are not recorded by the court reporter. Additionally, this will give your attorney time to object to the question, if it calls for an objection.
- Carefully listen to the question being asked. Before you answer the question, make sure that you understand the question. Do not attempt to guess at what opposing counsel is trying to ask. If you do not understand the question, ask the attorney to repeat it or to rephrase it.
- If the attorney uses a technical term or legalese and you are not sure what that terms means, ask the attorney to define it for you. Do not assume that the attorney means the same thing that you think the term may mean. It is perfectly all right to ask the attorney to define the word or rephrase the question for you.
- Do not guess as to the answer to the question. A deposition is not a test, and you are not expected to remember everything that has happened to you. If you do not know or you no longer remember the answer, it is perfectly acceptable to say, “I do not recall,” “I do not know,” or “I do not have the expertise to give an opinion.”
- If opposing counsel's question is too complex or compound for you to retain all of the parts of that question in your mind, the question is probably too complex and ambiguous to answer. Ask opposing counsel to rephrase or break down the question into parts.
- Sometimes a lawsuit will involve events that call for questions involving time, speed, or distance. Opposing counsel is entitled to your best estimate, but no one wants you to guess at an answer. Think

about the question and give a reasonable answer. Tell opposing counsel if you do not recall or are uncomfortable giving an estimate. If you are only able to give a rough estimate, let opposing counsel know that your response is a rough estimate only.

- Speak audibly so that everyone in the room can hear your answers. Do not use words like “uh-huh” or shakes or nods of the head to answer a question. The court reporter can not take down nonverbal answers.
 - Try to relax and remain calm. Answer in a polite, serious, and professional manner and be respectful to the other participants. Not only is what you say in a deposition important, your appearance and demeanor also make an impression on opposing counsel.
 - If you start to feel angry or frustrated, ask to take a break so you can regain your composure. Do not resort to sarcasm or humor, as these types of responses may not convey the same message when read in a transcript at a later time.
 - If you are given a document to review, read it carefully and slowly. Do not assume you know what the document is or what it says. Before you read the content of the document, look at the other portions of the document, including the date, the information listed in the letterhead, the recipient, the author, the address, and the other people copied in on a letter. After you have an understanding of the framework behind the document, then carefully review the contents. If the document is lengthy, do not feel like you need to review it quickly and understand it right away. Do not feel rushed. Take the necessary time to read the document so you are comfortable.
 - You may ask to speak with your attorney at any point in the deposition, but you should try to wait if there is a question pending.
 - Conversations or information gained from your attorney is privileged information and you should not testify to this information.
 - Your attorney may make objections to opposing counsel’s questions. These objections usually serve to preserve the written record if an attorney later wants to argue for the exclusion of the anticipated testimony on some legal grounds. You are still required to answer the question, unless your attorney specifically instructs you not to answer. Listen carefully to what your attorney says when making the objection, as this information may be helpful when formulating your answer to the question.
 - If you start to lose your concentration or if you forget some or all of the question being asked, request to have the question read back to you. If you need to take a break, ask for one.
- Wait until opposing counsel finishes asking his or her question before you start to respond. You may anticipate what opposing counsel is going to ask you, but the question may be different than what you may have anticipated. This will also preserve a clear transcript as well as allow your attorney to interject any relevant and necessary objections.
 - If you later realize during the deposition that a previous answer may have been incorrect or incomplete, ask for a break and advise your attorney immediately. Your attorney will then determine whether or not to interrupt the deposition so that you can supplement or correct your previous testimony. If you realize this after your deposition is completed, contact your lawyer immediately and advise him or her of the error or omission. This will give your lawyer the opportunity to quickly remedy the situation or at least attempt to lessen its impact.
 - Do not be intimidated by the deposition process or any of the participants attending the deposition. Answer confidently and to the best of your ability. Your attorney is present to protect your interests and will help you to avoid any pitfalls in testifying, as well as ensure that opposing counsel conducts himself or herself by the rules.
 - Do not give your opinion unless you are asked to give one. Answer the question with the facts required by the question and do not provide any editorial comments or opinions.
 - Do not allow opposing counsel to cut you off before you finish your answer. Politely let opposing counsel know that you have not finished your response and then insist that you be allowed to finish.
 - When you finish answering the question, stop. Do not ramble or try to fill a pause by continuing to talk. If opposing counsel asks an open-ended question, keep your answer short and succinct. If opposing counsel wants or needs additional information, it is up to him or her to elicit that information from you with follow-up questions.
 - Dress appropriately and present yourself with a well-groomed and professional appearance. It is perfectly acceptable, but not necessary, to wear a suit or other professional attire to your deposition.

Depositions may seem like an intimidating process but with the proper preparation, you can make it through your deposition virtually unscathed. Keep open communication lines with your attorney, get a good night’s sleep, and it will all be over before you know it!

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EMPLOYMENT

Sex, Lies, and Videotape: Have Your Supervisors Been Trained? New Rules for Mandatory Sexual Harassment Training in 2005

Who is covered?

Under a law that took effect on New Year's Day 2005, employers of *50 or more employees* must train supervisors regarding sexual harassment for a minimum of two hours every two years. Temporary service employees and independent contractors are included for the purpose of calculating the number of employees.

What is required?

Under the new rules, codified at California Government Code section 12950.1:

- Supervisors employed as of *July 1, 2005*, must receive two hours of training on or before January 1, 2006.
- Employees hired or promoted into a supervisory position after *July 1, 2005*, must be trained within six months of hire or promotion.
- Supervisors *trained between January 1, 2003, and December 31, 2004*, do not need to be retrained by January 1, 2006.
- Training must be provided to all employees who have "*supervisory authority*," which generally includes the authority to exercise independent judgment to:
 - ▶ hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline employees;
 - ▶ direct the work of employees or adjust their grievances; or
 - ▶ effectively recommend any of these decisions.

Contents of Training:

- Information and practical guidance regarding sexual harassment laws, including harassment prevention and correction and available remedies.
- Interactive training required.

Legal Effects of Training:

- Training does not provide a "safe harbor" against liability under state law; however, it is anticipated that failure to provide training may be considered by some courts as grounds for punitive damages in sexual harassment lawsuits.
- If an employer fails to comply with the new law, the remedy shall be for the state Fair Employment and Housing Commission to "issue an order requir-

ing the employer to comply." (Cal. Gov. Code § 12950(e).)

- Federal courts recognize that training employees to prevent sexual harassment and to be familiar with the employer's complaint process can help establish an affirmative defense where a supervisor's sexual harassment of an employee does not result in a tangible employment action, such as firing or demotion, and where the employee fails to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise. (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 807-8; *Burlington Industries v. Ellerth* (1998) 524 U.S. 742, 765.)



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Hobson's Choice

- Employers are strictly liable for unlawful harassment committed by supervisors.
- Executives, high-ranking managers, and owners with authority to exercise discretion over personnel matters will certainly qualify as statutory "supervisors."

Beyond that, it is not always clear whether frontline supervisors and middle management employees have sufficient discretionary authority to qualify as "supervisors" under California's Fair Employment and Housing Act ("FEHA") or whether they simply have limited authority to direct other employees but lack the requisite discretion to meet the statutory definition of a "supervisor." Training employees with "quasi-supervisor" duties may increase the risks that the quasi-supervisors will be deemed "supervisors" for liability purposes. On the other hand, hindsight is 20/20, and a failure to provide the training may increase an employer's risk of liability if such employees are subsequently found to be statutory "supervisors" under the theory that the offensive behavior could have been avoided had the newly-required training been provided. One option for avoiding this dilemma is to train all employees, thereby eliminating any suggestion that receiving the training connotes supervisory status and ensuring that employer policies are well publicized.

What should employers do?

- Provide effective interactive training about employer duties to prevent and correct sexual harassment and the supervisors' role in helping the company to comply with the law.
- Provide realistic examples of what is and what is not sexual harassment so supervisors will know it when they see it.
- Provide training about company sexual harassment policy and what a supervisor should do to take immediate and appropriate action upon receiving a sexual harassment complaint or otherwise recognizing possible sexual harassment, including conduct that may create a "hostile work environment."

- Provide opportunities for role playing and practice so supervisors can practice the diverse skills needed for effective intervention in responding to a complaint and spotting questionable behavior.
- Include various forms of media to accommodate different learning styles: visual; audio; and kinesthetic.
- Provide a sign-in sheet for all attendees and maintain the lists with your personnel records.

When in doubt, call a good lawyer.

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Shred it, Burn it, But Don't Throw it Away: New Law Mandates Permanent Destruction for Disposing of Confidential Employment Documents

Commencing June 1, 2005, the Fair and Accurate Credit Transactions Act (FACT) requires employers disposing of employment documents containing confidential personal information to do so by shredding or burning them. By so doing, employee personal information, such as social security numbers, addresses, telephone numbers, and other confidential information obtained from consumer reporting agencies, will be permanently protected from disclosure or from falling into unauthorized hands.

The new rules extend to computer disks and other tangible media. Hence, confidential information stored on such media must be destroyed before it is discarded. As for data stored on computer hard drives that are sold or donated to third parties, the law compels employers to remove the data in a method that makes it irretrievable.

Additionally, employers have a duty to restrict access to confidential personal information while it is being stored and maintained by the employer. Noncompliance with the new regulations subjects an employer to federal or state fines, civil liability, and the specter of class-action lawsuits.

Practical Tips For Compliance

- Separate employee personal confidential information (i.e., health information, criminal, credit, and consumer background checks) from general personnel files;
- Limit access to personal confidential information files to those who have a business duty to access the information and establish a confidentiality policy with regard thereto;
- Set up a protocol for destruction of personal confidential information (in both documentary and electronic media form);

- Make sure that any third party to whom document destruction is outsourced complies with the new legal requirements.

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INSURANCE LAW

California Supreme Court Complicates Computation of Brandt Fees

Attorneys' fees are an important element of damages in an insurance bad faith case. Under principles announced in 1985 in *Brandt v. Superior Court*, an insured who has unreasonably been denied policy benefits can recover tort damages, including attorneys' fees incurred to obtain the policy benefits.

The California Supreme Court recently issued its opinion in *Cassim v. Allstate Insurance Company*, giving guidance as to how those attorneys' fees are to be calculated. That opinion makes the calculation quite complicated in cases in which the insured's attorney prosecutes the action under a contingency fee agreement. Likely, computation of the fees will require presentation of expert testimony on each side of the issue.

In *Cassim*, policy benefits of approximately \$40,000 were obtained. Due to Allstate's alleged bad faith in failing to pay those benefits in a fire loss case, the jury awarded approximately \$1.8 million in compensatory damages and an additional \$5 million in punitive damages.

On appeal, Allstate argued that since plaintiff's counsel had a 40 percent contingency fee arrangement with his client, plaintiff's attorney fee recovery should be limited to 40 percent of the contract benefits obtained, that is, 40 percent of \$40,000 or \$16,000. This view was adopted by three Supreme Court justices in a concurring and dissenting opinion. However, the majority thought otherwise.

Nor did the majority agree with plaintiff's contention that the fees awarded, approximately \$1.2 million, were appropriate, since 40 percent of the entire amount awarded was the only limitation on fees. Plaintiff argued that all of the causes of action and all of the defenses were inextricably related in the litigation because Allstate took the position that the policy was void because of allegations that the plaintiff had committed arson and fraud.

Plaintiff's counsel kept no contemporaneous time records from which any reasoned analysis could be done as to the amount of effort spent obtaining the contract benefits, as opposed to obtaining the tort recovery and punitive damages.

Under these circumstances, the California Supreme Court adopted a unique methodology for establishment of attorneys' fees.

The court commenced by recognizing that the attorneys' fees may not exceed the amount attributable to the attorneys' efforts to obtain the payment due under the insurance contract. Correspondingly, fees attributable to obtaining any portion of the plaintiff's award which exceeds the amount due under the policy are not recoverable.

The court recognized that a computation on these principles was "best done by the trial court, sitting as a trier of fact." However, the parties have a right, if they desire, to have the issue submitted to a jury for determination.

The court also recognized that differences would exist if plaintiff's counsel had an hourly fee agreement as opposed to a contingency agreement. Under an hourly agreement, time spent to obtain policy benefits could be allocated from time records. Since the insured would have incurred those amounts directly, that is the amount which should be paid. However, in a contingency fee agreement, especially where contemporaneous time records are not available, the computation is more difficult. Further, in each instance, a complication arises to the extent that some portion of the legal fee represents legal work that was related to both the tort and the contract recoveries and was, thus, at least partially attributable to the attorney's efforts to obtain the amounts due on the insurance contract. In those circumstances an apportionment is necessary.

The Supreme Court Method of Calculation

The Supreme Court explained what it believed was the proper method of calculating *Brandt* fees in a contingent fee context. That method requires the trier of fact to determine the percentage of the legal fees paid to the attorney that reflects the work attributable to obtaining the contract recovery.

The following principles apply:

- No portion of legal fees attributable to the punitive damage award can be recovered as *Brandt* fees.
- *Brandt* fees can never exceed the legal fees for the combined tort and contract recovery; in most cases the amount will be far less.
- To determine the percentage of the legal fees attributable to the contract recovery, the trial court should determine the total number of hours



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an attorney spent on the case and then determine how many hours were spent working exclusively on the contract recovery. This amount is clearly recoverable.

- Hours spent working on issues jointly related to both tort and contract should be apportioned with some hours assigned to the contract and some to the tort. The object here would be to develop an appropriate percentage of those fees which are appropriately recoverable.

Unfortunately, the court gave no real guidance as to how the apportionment should be done. In a hypothetical situation stated in the opinion, the court surmised that a trial court could reasonably conclude that half the hours spent on the joint contract/tort issues are fairly attributable to the contract. That apportionment is, however, not required and is subject to determination based on the facts actually presented.

Ultimately, plaintiff bears the burden of proving by a preponderance of the evidence the amount of attorneys' fees due.

The formulation by the Supreme Court is complex and will lead, as the dissenting justices stated, to "complicated and protracted litigation." As in many contexts, this fee litigation will present issues perhaps as complex as the underlying case itself. The fee litigation must be appropriately strategized to permit the best possible result. Evidence and witnesses must be marshaled in support of each party's position concerning the appropriate amount of fees. At stake, in many cases, as in *Cassim*, will be hundreds of thousands of dollars.

In these circumstances, any assistance to the trial court (or the jury) should be welcomed. That assistance could come in the shape of expert opinion by credible attorney fee experts or consultants who can present a detailed analysis of how time was spent (or likely spent) in the case by counsel and which amounts should be recoverable, measured on the standards established by the Supreme Court in *Cassim*. Counsel should seriously consider the use of expert testimony on this key component of insurance litigation.

André E. Jardini

Mr. Jardini is a Director of the firm and practices in the firm's litigation department. He is President of KPC Legal Audit Services Inc. Email: aej@kpclegal.com.

FIRM BRIEFS

Melissa J. Quigley has joined KPC as an associate. Melissa attended the University of Kansas as an undergraduate, obtaining her bachelor of arts degree in biology and pre-law in 1998. She graduated from Loyola Law School and was admitted to the California bar in 2003. After college and during law school, she worked full-time at the Lexus Division of Toyota Motor Sales, U.S.A., in Torrance, where she was a Planning, Business Development, and Technology Strategist.

Also joining the firm as an associate is **Alexis L. Walker**. Alexis attended UCLA as an undergraduate, obtaining a bachelor of arts degree in earth and space science in 1997. She earned her juris doctor from Loyola Law School in 2002. Since graduating from law school, Alexis has worked in the domestic violence unit of the Office of the City Attorney and with firms that specialize in family law and employment law.

Christina M. Le has also joined KPC as an associate. Christina attended UC Berkeley as an undergraduate, graduating in 1999 with a bachelor of arts in history. She attended Loyola Law School where she graduated in December 2004. Christina comes to KPC from Mercury Insurance Group where she worked as a law clerk for their in-house legal department for more than two years, while attending law school.

Melissa, Alexis, and Christina will be practicing in the firm's litigation department, specializing in insurance defense.

KPC IN ACTION

Steve Garcia recently spoke to the Long Beach Escrow Association on the topic "Alphabet Soup Meets Corporate Law: DBAs, LPs, LLPs, LLCs, and Cos."

In July, **Greta Hutton** and Kelley Milks, Executive Vice President of Narver Associates, presented an interactive seminar to the Long Beach chapter of the Women Presidents' Organization entitled "2005 Employment Law and Workers' Compensation Insurance Update." Parties interested in receiving materials from this talk should contact Ms. Hutton, gh@kpclegal.com



Steven Ray Garcia

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