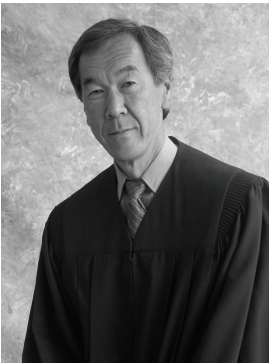


Q&A with the Honorable Kazuharu Makino By Heather Condon



[Editor's Note: For this judicial interview, we met with the Honorable Kazuharu Makino of the Orange County Superior Court. Judge Makino was originally appointed to the Orange County Municipal Court in 1986 and the Orange County Superior Court in 1989; both appointments were made by Governor George Deukmejian.]

Q: *What drew you to the law?*

A: When I was an undergraduate, I was a philosophy major. There was very little future in philosophy beyond undergraduate school; so I looked for something that might be interesting and that would utilize my degree in philosophy. Many of my friends, also philosophy majors, mentioned philosophy as a useful stepping stone into law.

-Continued on page 5-

- IN THIS ISSUE -

- ◆ Q&A with Hon. Kazuharu Makino Pg. 1
- ◆ Scope of ITC Exclusion Orders Limited Pg. 1
- ◆ President's Message Pg. 2
- ◆ Frivolous Litigation: What Is It and What Can You Do About It..... Pg. 3
- ◆ Why Jury Polling Counts..... Pg. 3
- ◆ Brown Bag Lunch Update Pg. 4
- ◆ Avoiding Common Procedural Avoiding Common Procedural and Evidentiary Law and Motion Errors Pg. 4

Scope of ITC Exclusion Orders Limited By Jeffrey Thomas and Joshua Jessen

Imagine you are responsible for an Orange County-based technology firm. You learn that a competitor is infringing one of your company's patents, and thus unfairly capturing market share. The competitor is manufacturing the infringing products overseas and importing them into the United States. Sometimes the products are being imported directly into the United States. Other times, they are being sold to other companies abroad, incorporated into larger products (e.g., an infringing microprocessor incorporated into a laptop computer), and then imported into the United States. You must stop the infringement as soon as possible.



In such a scenario, one option you should consider is filing a complaint with the International Trade Commission (ITC). An administrative agency located in Washington, D.C., the ITC has the power to initiate an investigation into your company's infringement allegations and to issue an exclusion order banning the importation of infringing devices into the United States. This is a very powerful remedy, especially in the wake of the United States Supreme Court's decision in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) – which made it more difficult for patent-holders to obtain permanent injunctive relief against infringers. The ITC has become increasingly popular over the past several years as a forum in which to litigate patent-infringement disputes.



In many respects, an ITC proceeding is similar to patent litigation in federal district court. But there are

-Continued on page 6-

The President's Message

By Richard J. Grabowski



We are well into what has been a difficult year for most of our bench and bar. Though glimmers of an economic recovery are starting to appear on the horizon, those glimmers were nowhere in sight as we approached our June meeting and annual fund raiser for the Public Law Center. Since the very early days of our chapter,

the ABTL-OC has committed itself to supporting the Public Law Center. Our support, which began modestly, has grown over the years to the point where we are a significant contributor to the Public Law Center. In 2008, our chapter President Martha Gooding provided leadership for a very successful June program, which took our chapter across the \$100,000 threshold of total contributions to the PLC.

By many measures, this certainly should have been the year where our members and sponsors scaled back their strong support for the PLC. Our courts, our members, and our sponsors have all been severely affected by budget cuts and the recession. All of us have had to re-examine every expenditure. But, the measure of any commitment is not taken in the good times. It is the level of support and dedication in the difficult times that defines true commitment. In these difficult times, we can all take great pride that our Chapter has proven itself a true friend of the Public Law Center. Our June fundraiser had a record turnout from both the bench and bar, with a record number of pledges from our members. As a result, we were not only able to make a significant contribution from our chapter to the PLC, but also eclipse our 2008 contribution by 10%.

At our September dinner, we presented the Executive Director of the PLC, Ken Babcock, with a check in the amount of \$22,000. As Ken will tell you, there is no more important time than now to support the PLC, which is facing record demand in its mission of providing access to justice for Orange

-Continued on page 7-

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Frivolous Litigation: What Is It and What Can You Do About It

By Michael S. LeBoff



We have all seen cases that make you shake your head and wonder how any reasonable person could file such a lawsuit. Such as a debtor filing a factually-meritless unfair debt collection practices claim to avoid a debt rightfully owed. Or a borrower filing a lawsuit to invalidate a loan because it was not funded with gold or silver. Or a plaintiff filing a false advertising claim based on advertising he never saw. These are not the important issues that made you want to become a lawyer — rather its lowest-of-the-low — the bowels of the law that sully our profession to the outside world.

However, most defense counsel do not set their hourly rates based on the merits of the action they are defending. An hour spent defending a frivolous lawsuit costs the same as an hour spent defending a meritorious one. So, as the party sued, you are forced to spend good money defending bad lawsuits. It makes you angry. Frustrated. Maybe even vengeful. So, when you are faced with a frivolous lawsuit, what can you do about it?

The most common response (and often the best) is to do nothing. But there are options.

1. What Is Frivolous Litigation

Of course, the first step in the process is identifying what is frivolous, which is often easier said than done. From the outset, it is important to realize only a small fraction of cases can be considered “frivolous” or “without probable cause.” Many defendants have lost cases they felt were frivolous, largely because they did not look at the case objectively. In addition, courts routinely express their displeasure for malicious prosecution lawsuits, and have intentionally set a very low bar for what passes for “probable cause.” (See, e.g., *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965-66, 12 Cal.Rptr.3d 54, 60.)

Nevertheless, either through a complete lack of facts or legal support, many cases should never be filed. While standards vary from state to state, gen-

Why Jury Polling Counts

By William C. O’Neil



Albert Einstein once said: “Do not worry about your difficulties in Mathematics. I can assure you mine are still greater.” Mr. Einstein’s comment notwithstanding, most attorneys find themselves more comfortable surrounded by words than numbers. While circumstances rarely require attorneys to understand quantum physics, let alone perform calculus, even the most basic arithmetic can cause confusion for intelligent people.

Take, for example, the procedural mechanism called jury polling. California’s Constitution, article I, section 16 provides: “Trial by jury is an inviolate right ... but in a civil cause three-fourths of the jury may render a verdict.” Typical juries consist of twelve jurors, which means that at least nine jurors must agree on a civil verdict. In the event that the jury is called to answer multiple questions on a special verdict form — whether a party was negligent, whether the negligence caused an accident, etc. — then the same nine jurors do not need to agree on each question. (See *Juarez v. Superior Court* (1982) 31 Cal.3d 759, 767-68.)

To ensure that the verdict form does indeed reflect the votes of at least nine jurors, the Legislature enacted a procedural framework permitting counsel to request that each individual juror be polled concerning their individual votes. California Code of Civil Procedure section 618 provides: “When the jury, or three-fourths of them, have agreed upon a verdict, they must be conducted into court and the verdict rendered by their foreperson. The verdict must be in writing, signed by the foreperson, and must be read to the jury by the clerk, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which is done by the court or clerk, asking each juror if it is the juror’s verdict. If upon inquiry or polling, more than one-fourth of the jurors disagree thereto, the jury must be sent out again, but if no disagreement is expressed, the verdict is complete and the jury discharged from the case.”

While some cases require only a basic jury verdict

-Continued on page 7-

-Continued on page 9-

Brown-Bag Lunch Update

By William C. O'Neill

United States District Judge Cormac J. Carney takes teaching younger generations seriously. Before the ABTL brown-bag lunch, attendees who arrived a bit early witnessed Judge Carney speaking to an enraptured high school group. He fielded questions about the serious (do you have cases that cause you to lose sleep at night?) to the more light-hearted (do you prefer being a judge or an attorney?) As to that latter question, Judge Carney smiled broadly and proclaimed that yes, indeed, he enjoys his time on the bench more than his time in private practice.

Judge Carney bid the students well and turned his attention to the ABTL's young attorneys in his audience. We were invited past the bar in the Federal Courtroom where Judge Carney informed us that his discussion would focus on professionalism – or lack thereof - that he sees as a pressing concern. Employing three examples of documented unprofessionalism, Judge Carney cautioned us that these examples were merely the tip of the iceberg in an inexplicable increase in rancor.

First, Judge Carney showed us Exhibit One, a letter written by an attorney to a lay individual in which the attorney berated and mocked the woman without provocation. Next, Judge Carney showed us a FRCP Rule 26(f) Conference Statement in which defense counsel personally attacked the ethics of plaintiff's counsel. Finally, Judge Carney showed us meet-and-confer correspondence dripping with sarcasm and personal attacks. The message was clear: whether the unprofessional actions occur in official pleadings or outside communications, the conduct certainly can attract a judge's attention. In our legal cause-effect world, the last thing a reputable attorney seeks is this sort of negative judicial attention.

Judge Carney also emphasized that unprofessional behavior does have its own ramifications outside of its judicial notice. He regaled us with anecdotes in which attorneys' conduct caused juror shock. For example, one jury felt compelled to emphasize that their mone-

-Continued on page 11-

Avoiding Common Procedural and Evidentiary Law and Motion Errors (and Pointing Out When the Other Side Makes Them)

By Jeremy G. March



Good law and motion practice can be vital to the successful prosecution or defense of a civil case: Motions such as demurrers to improper causes of action; motions to compel production of crucial evidence; and motions for summary adjudication of key issues can all help shape a case, affecting its prospects at settlement or trial.

However, even if your motion is made on solid substantive legal grounds, basic procedural errors may compel a court to deny it or continue it for further briefing. You and your client may be required to time, effort, and money correcting, refiling, or rearguing the motion. The error may even permanently damage your case (say, if a Motion for Summary Judgment, which might well have resolved the case in your favor, is denied because the exhibits were not properly authenticated and if there is no time to file a revised motion).

By the same token, attorneys opposing a substantively meritorious motion may be able to protect their clients by properly calling the court's attention to procedural errors in the motion.

Whichever side you are on, here is a non-exhaustive list of points and authorities dealing with some common procedural errors that may prevent a court from considering a motion on its merits. Finally, as food for thought, I have included points and authorities regarding two, somewhat less common but potentially fatal, substantive issues.

1. An attorney's declaration is insufficient to authenticate evidence in a Motion for Summary Judgment where the attorney does not establish personal knowledge. An affidavit submitted by a party's attorney in connection with an MSJ is not competent evidence where the attorney did not establish personal knowledge of the matters asserted therein. (*Maltby v. Shook* (1955) 131 Cal.App.2d 349, 351-353.)

2. Jurats: Proper content of jurats executed inside and outside the State of California. Every so often, a party will require a declaration from an out-of-state witness. These witness' declaration may contain crucial evidence and be of great interest to the court. However, the

-Continued on page 12-

-Q&A: Continued from page 1-

So I decided to take the LSAT, apply to law school, and it went from there.

Q: Please tell me a bit about the type of practice you had before taking the bench.

A: Before taking the bench, I was a deputy D.A. from 1977 to 1986. In this role, virtually all of my practice was in criminal law. However, when I was first hired, I was assigned to the Family Support Unit where I did one year of civil work.

Q: Why did you ultimately decide to transition into a judicial role?

A: As a deputy D.A., I was in the courtroom virtually every day and it became second nature to be able to function in a courtroom. In my position as a D.A., I watched a lot of judges and began to think that I could do a much better job than some of the judges that I was observing. I always thought that I could do a very good job as a judge. Additionally, in my judicial role, I am able to act more as a referee, which is more of my nature than being an attorney.

Q: Do you have any mentors or individuals that you consider influential?

A: The three judges who have impressed me the most are Everett Dickey, Jack Ryan, and Byron McMillan. This is not to say that there are other judges that I have thought are very good as well; these three, however, are the ones that stand out in my mind and all for different reasons. Judge Dickey is just like a legal scholar; he always knows the answer to every legal question. Judge McMillan has a perfect temperament; he never gets flustered or over-excited, never loses his temper, and is very quick to the point. In fact, to the extent that I don't talk a whole lot on the bench is in large part carried over from Judge McMillan. The same is also true of Judge Ryan. Judge Ryan was the best and most knowledgeable criminal judge I ever met.

Q: What do you enjoy most about being a judge?

A: I would say that the best thing about being a judge is that I am able to run my own courtroom the way that I think a courtroom ought to be run. From a judge's perspective, I am able to manage the caseload in a way that I find most effective and generally have more con-

trol over the entire process. I don't like to waste time; I move through cases quickly and get them tried if they need to be tried. Like I have said, I have seen a lot of courtrooms in operation; it's nice to be able to run my own courtroom in a way that I think that it should be run.

Q: What, if anything, do you like least about being a judge?

A: That is a tough one. In my role as a judge, there really is not much to complain about. I don't particularly like getting involved in the politics of the court house and, on a broader scale, the politics of the California court system. As an example, there currently is a lot of resistance and tension surrounding the newly enforced furlough days; I basically try to stay away from the politics involved with that. I was a supervising judge for about five years; apart from that prior role, I generally avoid getting involved in any of the court politics.

Q: What advice would you give to lawyers appearing before you for the first time?

A: One thing that I would recommend is to maintain a good reputation and maintain credibility in the courtroom. Attorneys should never make a representation that they think or know is false. A judge's trust in any attorney is dependent on the attorney's representations in the courtroom. When an attorney makes a misrepresentation before me, that attorney loses all credibility; the attorney's future representations are not worth anything to me. This is especially important for young lawyers, who are put under significant pressure to win or get some sort of favorable result. Lawyers should never cross the line and do something that is either unreasonable or unethical; it's not worth a lawyer's reputation. Another piece of advice that I would give to young lawyers is to make sure that they are prepared to present their case. Also, attorneys should always treat the court and each other with common courtesy; for example, if you are running thirty minutes late for a hearing, let us and opposing counsel know beforehand.

Q: What are some common mistakes that lawyers make in the courtroom?

A: One thing that comes to mind, especially in civil

-Continued on page 6-

-Q&A: Continued from page 5-

cases, is when attorneys submit huge stacks of exhibits. There is no sense of economy being used in selecting exhibits for trial. I also notice that today's attorneys are not as good with jury selection as those attorneys practicing twenty years ago. There are two parts to jury selection; there is the legal process regarding qualification of jurors and then there is the other part which is to get the jury ready for your case. With jury selection, you must have an idea of the potential weaknesses in your case and you must be willing to confront the jurors with those weaknesses instead of hoping that the jurors will somehow not see them. Attorneys don't do that as much anymore in jury selection.

Q: What are your pet peeves?

A: One pet peeve of mine is when attorneys don't show up on time or don't show up at all. Attorneys should keep the court and opposing counsel aware of his or her status. One example is when an attorney knows that a tentative for law and motion hearing will be posted at 3:00 P.M. on a Thursday and the attorney calls at 2:00 P.M. to say the motion is going "off calendar." Sometimes that can't be avoided. I understand that attorneys cannot always predict such things but if they know or have a reasonable belief that the motion won't proceed, early notice to the court would save the court and the legal research staff a lot of time and unnecessary work.

Q: Is there anything that you have learned as a judge that you wish you would have known when you were practicing?

A: While I wouldn't say that there is anything I wish I would have known, the one thing that was kind of an eye-opener for me when I first became a judge, is how much work a judge does that you don't ever notice as an attorney. For example, in jury selection, when I was an attorney I really didn't pay a whole lot of attention to the questions the judge asked, because I was getting ready to ask my own questions. My current jury selection questions can take one to two hours, depending on how the jurors answer the questions. I try to cover most of the general topics so that the attorneys can focus on their specific questions. Also, in advance of a trial, the court must schedule the jury panel; the number of potential jurors varies in each specific case, based on the expected length and type of the trial.

Q: How has the current state budget shortfall affected

the functioning of your courtroom?

A: For me, the biggest effect has been the result that the staff cuts have had on the court's operations. The cut on my current staff has changed the way my courtroom can function. For example, we no longer have a bailiff, who, apart from his duties with respect to security and safety, generally helped run the courtroom by, among other things, accepting filings and answering the phone. Also, there is a large concern about the furlough day in that the staff now loses a day of pay every month. The furlough days create case backup as we are now losing one day of trial per month. The controversy around these furlough days has caused turmoil and has generally hurt the court staff's morale. For many people, losing a day's pay each month is not easy to absorb.

Q: What do you enjoy doing in your spare time?

A: I play basketball during my lunch hour and I also play soccer in a fifty and older league. I don't travel much but I do try to visit Hawaii once or twice a year. I also enjoy spending time with my wife and attending my daughter's collegiate water polo games. Of course, there are also my dogs.

Thank you Judge Makino for your time.

◆Heather Cotton is an associate in the Irvine office of Howrey LLP.

-Scope ITC Exclusion: Continued from page 1-

important differences between an ITC investigation and a traditional patent-infringement action, many of which derive from the ITC's mission to protect U.S. trade and industry. First, to prevail in the ITC, it is not sufficient for a company merely to own the patent-in-suit; rather, the company must prove that it has established a "domestic industry" that exploits the patent. Second, the patent-holder must establish that infringing goods are actually being imported into the United States; if all of the infringing goods are being manufactured within the United States, the ITC is not the appropriate forum. Third, ITC actions are tried to an administrative law judge; there is no right to a jury trial. Fourth, the ITC Staff is a party to the ITC proceeding; representing the interests of the government, the Staff is involved in all aspects of the investigation. Fifth, actions in the ITC typically move much more

-Continued on page 7-

-Scope of ITC Exclusion: Continued from page 6-

quickly than patent cases in federal district court; the parties may receive an "initial determination" on the merits of the case within as little as 12-15 months from the date the investigation is launched. Finally, money damages are not a remedy available through the ITC; rather, the chief remedy in the ITC is an exclusion order banning the importation of infringing products into the United States.

The ITC can issue two kinds of exclusion orders. The first and more common type is a "limited exclusion order" (LEO). LEOs forbid the party accused of infringement from importing infringing products into the United States. The second and less common type is a "general exclusion order" (GEO). GEOs ban *all* parties (*i.e.*, companies not named as parties to the investigation) from importing infringing products. GEOs are only available where (i) "necessary to prevent circumvention of an exclusion order limited to products of named persons," or (ii) "there is a pattern of violation . . . and it is difficult to identify the source of infringing products." 19 U.S.C. § 1337(d).

Historically, regardless of whether an ITC complainant was seeking an LEO or a GEO, the ITC could extend the exclusion order not just to infringing products but also to larger products into which the infringing products were incorporated prior to importation – so-called "downstream products." For example, an exclusion order could ban the importation of a microprocessor, *as well as* the importation of all computers into which the microprocessors were incorporated.

Companies considering an ITC action should be aware that this "downstream relief" is no longer available with respect to LEOs, *unless the manufacturers of the downstream products are named as respondents in the investigation*. Stated differently, if a complainant wants an exclusion order to extend to downstream products, it will need to either (i) name the manufacturers of those products as respondents, or (ii) seek a general exclusion order. This is the holding of *Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340 (Fed. Cir. 2008), which the Federal Circuit handed down last fall. The *Kyocera* court held that the law does not permit the ITC to issue an exclusion order banning the importation of goods manufactured by *non-respondents*, unless the complainant is entitled to a GEO.

In the post-*Kyocera* world, companies faced with foreign infringement must carefully consider their options. Naming additional manufacturers of downstream products as respondents is one option, but in some cases those companies may be customers of the

complainant. This may present difficult business decisions. The alternative is to seek a general exclusion order; if this path is chosen, the complainant must develop a clear strategy from the beginning of the investigation regarding how to convince the ITC that a GEO is appropriate.

♦ *Jeffrey Thomas is a partner and Joshua Jessen is an associate in the Orange County office of Gibson, Dunn & Crutcher, LLP.*

-President's Page: Continued from page 2-

County's low-income residents. But the PLC needs more than our contribution. It needs volunteers. Ken has invited all of us to join the National Pro Bono Celebration scheduled for October 25 through October 31, 2009. Please go to www.publiclawcenter.org to learn how you can lend a hand and join in the celebration.

At our September meeting, we were very honored to be joined by Associate Justice Ming Chin of the California Supreme Court. Justice Chin provided us with important insights on issues affecting the impartiality of courts, particularly with respect to contested judicial elections. The issue of judicial impartiality is central to the administration of justice, and we as members of the bar should be at the forefront of efforts to preserve and foster rules which advance this aim. We are very grateful that Justice Chin took the time to spend an evening with us discussing this important topic.

♦ *Richard J. Grabowski is the Partner-In-Charge of Jones Day's Irvine office, and is a member of the Firm's Trial Practice Group.*

-Frivolous Litigation: Continued from page 3-

erally speaking, a lawsuit lacks probable cause where it is not founded on facts sufficient to support an *objective* belief that the evidence will sustain a favorable judgment, or where no reasonable attorney would have thought the claim tenable.

Aside from those cases completely lacking support in law or fact, there are several other scenarios that could make a case, or part of a case, frivolous.

-Continued on page 8-

-F frivolous Litigation: Continued from page 7-

Ignoring Newly-Discovered Evidence: A plaintiff may have had a reasonable basis for bringing a claim that later proves to be futile after getting into discovery and further investigation. Instead of admitting defeat and dismissing the claim, the persistent plaintiff may press on without regard to the newly-discovered lack of merit. Frivolous actions include not only claims initiated without probable cause, but also claims continued once the plaintiff should have known there is no chance of success. (*Zamos*, 32 Cal.4th at 966-67, 12 Cal.Rptr.3d 60-61 (citing Restatement Second of Torts, 674, com. c).) However, this does not mean that plaintiffs need to take adverse evidence at “face value,” and plaintiffs are able to challenge testimony and facts which may reasonably be thought untruthful.

Piling on Bad Claims: It is not uncommon to see a complaint that contains one legitimate claim followed up by several nonsensical claims. For example, this can be seen where a promissory fraud claim trails a garden-variety breach of contract claim, or pretty much every civil RICO action I have ever seen. In many states, a malicious prosecution action may be brought where only one of multiple theories of recovery was maliciously asserted. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292, 46 Cal.Rptr.3d 638, 663 (2006); *Crowley v. Katleman* (1994) 8 Cal.4th 666, 679, 34 Cal.Rptr.2d 386, 392; but see *Joseph H. Held & Assoc. v. Wolff* (Mo.App. 2001) 39 S.W.2d 59, 63 (holding entire action must lack probable cause).) But this rule does not eliminate the requirement to prove a favorable termination of the entire underlying litigation. (*Crowley*, 8 Cal.4th at 686, 34 Cal.Rptr.2d at 397.)

Suing an Innocent Defendant: As frequently happens in commercial litigation, when suing a company for some alleged wrongdoing, a plaintiff will also name the company president or other high-ranking individual, or an uninvolved parent or affiliate company, in an effort to manufacture some additional leverage in the underlying litigation. Aside from rarely achieving its desired result, it may also open the door to a subsequent sanctions motion or a malicious prosecution action by that extra innocent defendant — even if the plaintiff prevails against its primary target. (*Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 62 Cal.Rptr.3d 155.)

Overblown Damages Claims: Many of us have seen the following scenario: Plaintiff has a legitimate case as to liability, but little or no damages. Knowing that summary judgment will be difficult, if not impossible to obtain, plaintiff puts for a frivolous damages theory seeking millions for a relatively minor claim. A malicious prosecution action or other remedial action may lie where most — but not all — of the damages sought in the prior action were claimed without probable cause. (*Citi-Wide Preferred Couriers, Inc. v. Golden eagle Ins. Corp.* (2003) 114 Cal.App.4th 906, 914, 8 Cal.Rptr.3d 199, 205)

The Frivolous Class: Class actions are not entitled to any special treatment and same rules for frivolous litigation apply where the action was brought without probable cause. But what about those instances where the plaintiff may have a legitimate individual claim, but needlessly inflates the claim by asserting it as a class action? There is a lack of published case law to provide guidance in these situations. Nevertheless, if there is no probable cause for seeking class relief, the same rules and remedies should apply. At the very least, a plaintiff (and plaintiff’s counsel) may be subjecting themselves to sanctions for bringing a frivolous motion for class certification.

2. What Can You Do About It?

Once you have determined your case is frivolous, what next? The law provides a myriad of remedies for addressing frivolous lawsuits, but, before embarking on any such course, it is crucial to fully assess the costs of doing so, all with the knowledge that actually recovering damages or sanctions for frivolous actions is tenuous. Nevertheless, in certain situations, it may make sense to fight back, and here are some of the best options for doing so.

Malicious Prosecution: The most obvious recourse for frivolous litigation is bringing a subsequent lawsuit for malicious prosecution. The elements of that claim are that a prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in plaintiff’s favor; (2) the prior action was brought without probable cause; and (3) was initiated with malice. If you can establish each of the elements of a malicious prosecution action, then you are entitled to recover traditional tort damages, including costs incurred in defending the frivolous action (including attorneys’ fees), as well as other economic loss, harm to reputation, and mental or emotional distress. You may also be entitled to punitive damages.

Often, however, there will be serious questions as to

-Continued on page 9-

-Frivolous Litigation: Continued from page 8-

whether the plaintiff in the underlying litigation will be able to satisfy a malicious prosecution judgment. But even if the party itself is judgment-proof, a malicious prosecution claim may also lie against the attorney who brought the frivolous lawsuit. In addition, in some states, malicious prosecution may be covered by an insurance policy.

Be careful, however, to choose your malicious prosecution case wisely. In California, for example, malicious prosecution actions arise out of a constitutionally-protected activity, i.e., petitioning the courts. As such, to avoid being subject to an anti-SLAPP motion, you will need to be able to prove — at the outset — that you have a reasonable probability of winning your malicious prosecution claim. While other states do not have statutes comparable to California's anti-SLAPP laws, a frivolous malicious prosecution case could lead to other adverse consequences, such as retaliatory malicious prosecution action, or at the very least, wasting time and money pursuing a claim that has no value.

Attorneys' Fees Clauses: Perhaps the best mechanism to recover your losses and deter frivolous litigation is a contractual attorneys' fees clause because there is no need to debate whether the action was frivolous. Fees are awarded to the prevailing party regardless. However, if there is no *contractual* attorneys' fees clause, then look for *statutory clauses*. Most statutory attorneys' fee clauses only benefit the plaintiff, but there are some, such as the Uniform Trade Secrets Acts, which allow defendants to recover their fees, often upon a showing of bad faith by the plaintiff. The benefit to seeking recourse through a fee provision is that you can avoid going back to "square one" with a whole new lawsuit. All you need to do is bring a motion for attorney's fees in the same action and before the same judge that just threw out the case.

Motion for Sanctions: Federal Rule of Civil Procedure 11 allows the court to sanction an *attorney* for filing papers for an improper purpose or for making claims, defenses or legal arguments that are not "warranted by existing law or nonfrivolous argument for extending, modifying, reversing existing law of establishing new law." Every state has statutes that give courts similar discretion. Despite this discretion, courts rarely sanction parties, even for the most obvious and egregious abuses. But it can happen. And, as with a fee provision, you can seek sanctions through a motion, and avoid the need for a second lawsuit. If considering this alternative, however, be aware that Rule 11 and many analogous

state laws contain safe-harbor provisions, which allows the offending party to avoid sanctions by removing the frivolous aspects of the case in response to such a motion.

In every case, it will be a very fact intensive inquiry as to whether the action is frivolous. But, if you think the case may be frivolous, then do the ground work in the underlying lawsuit. For example, defendants contemplating a subsequent malicious prosecution action will want to use all of the discovery tools available in the frivolous case, including depositions and interrogatories, to ascertain the factual and legal basis for that suit as soon as possible. Furthermore, in the right situations, you also may be able to use the threat of sanctions or a potential malicious prosecution action to force a dismissal, as plaintiffs who file frivolous lawsuits often do so believing there will be no repercussions.

You should also carefully consider which motions you intend to bring during the frivolous lawsuit. Several courts have held that an unsuccessful motion for summary judgment or directed verdict can establish, as a matter of law, that the action has merit. This rule, however, does not apply where the unsuccessful motion was the product of fraud or perjured testimony.

At the end of the day, every business needs to tolerate a certain amount of frivolous litigation. For good or bad, it is simply part of the cost of doing business in this country. But that does not mean that defendants are powerless to fight back against serious or repeat violations.

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-Jury Polling: Continued from page 3-

form that lends itself to expedient juror polling, most members of the ABTL can attest that many cases present particularly complicated special verdict forms. To avoid the pitfall examined in a recent California Supreme Court case, litigators must readily understand the legal framework surrounding jury polling. The recent *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247 decision is informative.

1. The Trial And Appellate Court Proceedings In Keener

Scott Keener was killed while riding his motorcycle

-Continued on page 10-

-Jury Polling: Continued from page 9-

when a truck pulled away from a stop sign directly into Mr. Keener's path. Mr. Keener's survivors sued the truck driver and his employer. After deliberating for more than two days, the jury's verdict form revealed that the jury had found both drivers were negligent, the negligence of each was a substantial factor in causing Mr. Keener's death, and the plaintiffs suffered economic and noneconomic damages totaling \$4,940,000. Finally, the jury found that the defendant driver bore 80 percent of the responsibility for Mr. Keener's death, while Mr. Keener bore 20 percent of the responsibility. This final finding is at the heart of the controversy.

The trial judge, apparently *sua sponte*, polled the jurors individually. There was no question that at least nine jurors voted consistently with the verdict form as to eight of the nine questions: i.e., "Was Mr. Keener negligent;" "Was the truck driver negligent;" etc. The ninth question asked the jurors: "What percentage of responsibility do you assign to [the driver and Mr. Keener]?"

As to the ninth question, eight of the twelve jurors agreed that the percentage of responsibility was consistent with the verdict form — 80/20. Juror No. 6 assigned responsibility as a 90/10 split. Juror No. 4 assigned blame as 40/60. Juror No. 10 assigned blame as 50/50. The trial judge overlooked Juror No. 7, who had revealed during earlier polling that he had voted to find Mr. Keener *not* negligent. Essentially, Juror No. 7 was silent as to the apportionment polling question. This meant that only eight jurors *affirmatively* expressed agreement with the verdict to assign blame as 80/20 in favor of Mr. Keener. No one noticed this oversight concerning Juror No. 7. The trial judge asked the clerk to record the verdict, thanked the jurors, and then discharged them. The trial judge then asked counsel whether there was "anything further." Attorneys for each side replied that there was not.

The trial judge realized his error a few days later, and convened a hearing to inform the parties of this omission. The defendants moved to invalidate the apportionment verdict, which the trial court denied because the defendants had "waived" this request by failing to object to the irregularity. The defendants moved for a new trial, which the trial court also denied. The defendants appealed.

Showing that reasonable minds can differ, the appellate court reversed the trial court as to the apportionment issue on two grounds applicable to this article: (1) the verdict was not "complete" under

Section 618 because Juror No. 7's silence constituted "essentially a disagreement" and the requisite nine votes did not exist; and (2) defendants' failure to object at trial did not constitute "a waiver of an apparent defect" because the polling was confusing and defense counsel had "no realistic opportunity" to object to the defective procedure.

2. The California Supreme Court Grants Review And Reverses

The Supreme Court reversed unanimously the appellate court and, applicable to this article, concluded that: (1) a juror's silence during polling is essentially an affirmative vote for the verdict; and (2) a party's failure to object to a verdict rendered by less than the three-fourths constitutional requirement is tantamount to a forfeiture of that objection for appellate review. (*Id.*, pp. 259, 270.)

As to its first conclusion — juror silence is equal to affirmation — the Court analyzed the text of Section 618 to determine the answer to the following question: Does Section 618 require at least nine affirmative votes in agreement or no fewer than three affirmative votes in disagreement? Put another way, did Juror No. 7 affirmatively have to state that he agreed with the apportionment verdict to render a complete verdict?

As characterized by the plaintiffs, and adopted by the Court, Section 618 effectively creates a "rebuttable presumption: If a verdict *appears* complete, it *is* complete *unless* there is an affirmative showing [during polling] to the contrary." After comparing multiple other states' statutes, the Court concluded that Section 618 requires "*affirmative* disagreement — an utterance, statement, or some similar active conduct — of more than one fourth' of the jurors in order to prevent a trial court from finding the verdict to be complete and from then discharging the jury." In the *Keener* case, Juror No. 7 did not express any "disagreement." Indeed, Juror No. 7 did not express anything at all. Anything other than affirmative disagreement — silence or affirmative agreement — will be treated equally and an un-polled juror will be treated as agreeing with the verdict.

The Court then turned to the second question: Did the defendants forfeit their right to assert that the verdict was invalid by not objecting to the incomplete polling? Decades of precedent, the Court concluded, required forfeiture in this case.

Preliminarily, litigators should be aware that the

-Continued on page 11-

-Jury Polling: Continued from page 10-

proper term in this legal context is “forfeiture” rather than “waiver.” In analysis a lexophile can appreciate, the Court explained that the semantic difference between the two terms exists because forfeiture “refers to a failure to object or to invoke a right, whereas [waiver] conveys an express relinquishment of a right or privilege.”

Turning back to the substantive law, the Court noted that the “most frequently quoted statement of the applicable rule” in the jury polling arena is as follows: “Failure to object to a verdict before the discharge of a jury and to request clarification or further deliberation *precludes a party from later questioning the validity of that verdict* if the alleged defect was apparent at the time the verdict was rendered and could have been corrected.” A litigant simply cannot “sit on his or her hands, but instead must speak up and provide the court with an opportunity to address the alleged error at the time when it might be fixed.”

As an example of this forfeiture rule, the Court discussed a case in which eight polled jurors responded that they agreed with the verdict, three jurors disagreed with the verdict, and one replied, “Yes, I voted.” After a juror expressed confusion with the process, the judge explained that the polling is to determine how each juror individually voted. Curiously, the polling then evidenced ten jurors who responded that the verdict represented their vote, and two who stated that the verdict did not represent their vote. The appellate court in that case held that the defendant forfeited his right to challenge the polling irregularity because “any impropriety could have been cured if raised on time.”

Having concluded that Juror No. 7’s silence constituted acceptance of the verdict and that the defendants waived any irregularity in the jury polling, the Court affirmed the trial court award and reinstated the jury’s verdict.

3. Conclusion

If the court permits, provide each juror with a distinct, color copy of the special verdict form so that each juror can record their personal votes on each question. This will permit the jurors to provide clear and efficient responses during the individual polling questions. In the unlikely event that a judge is skeptical of providing additional material jurors during deliberation, CACI No. 5017 does reference distributing draft copies of the verdict form(s) for jurors’ use.

Create a system to keep track of the polling re-

sults. It could be as simple as printing a Word document with twelve numbers below each verdict question. Place an O if the vote is in favor of the client, place an X if the vote is against. Any open spaces should remind diligent attorneys to ensure against repeating the *Keener* case mistakes. Review the local rules. Los Angeles County Local Rule 8.56 tracks Section 618 closely, but throws in a few procedural permutations.

Finally, common sense goes a long way. While researching this article, a trial judge told this author about an attorney who wanted to prove he had won unanimously. After his losing adversary chose not to poll the jury, the prevailing attorney confidently requested that the jury be polled. Lo and behold, the jury had voted in his favor – 8 to 4. The jury subsequently hung and the attorney was forced to explain to his client why his bravado bested his client’s interests.

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-Brown-Bag Lunch: Continued from page 4-

tary award was *not* due to the attorneys’ conduct. Stepping away from the courtroom, outbursts also have professional and personal ramifications. Judge Carney emphasized the importance of one’s past if the attorney has judicial aspirations. These incidents will be noticed and discussed by the California State Bar’s Judicial Nominees Evaluation Commission.

The ABTL thanks and appreciates Judge Carney’s willingness to host and teach the younger lawyers in our group. The value received from our brief and informative Bench-Bar connection in Judge Carney’s courtroom allowed all of us who attended to see firsthand how law and procedure mesh with the realities of the practice. Taking the view from the Bench back to our desks enhances us, our clients and the practice of law generally.

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-Avoiding Mistakes: Continued from page 4-

court will be unable to accept them if they do not have proper jurats. As is commonly known, CCP Sec. 2015.5(1) requires declarations signed within the State of California to state (at a minimum) the date and place of execution. Such jurats may be in substantially one of the two following forms: (a) "I certify (or declare) under penalty of perjury that the foregoing is true and correct"; or "I certify (or declare) under penalty of perjury *under the laws of the State of California* that the foregoing is true and correct" (emphasis added).

Occasionally, however, attorneys forget that CCP Sec. 2015.5(2) requires a slightly different jurat for declarations executed outside of the State of California. Such a jurat must state the date of execution and that it is so certified or declared under the laws of the State of California. These "out-of-state" jurats may be in substantially the following form: "I certify (or declare) under penalty of perjury *under the laws of the State of California* that the foregoing is true and correct" (emphasis added).

Although this may seem like a technical difference, the courts have made clear that a declaration is defective under section 2015.5 absent an express facial link to California or its perjury laws. (*Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 612.) While a defective jurat in a supporting declaration will probably not cause a court to deny (or grant) a motion, it could well result in delays and extra expense while the court continues the hearing and requires the attorney to obtain a new declaration with a proper jurat.

3. Pleadings and memoranda of law are not, by themselves, evidence. Counsel sometimes make factual allegations in their points and authorities but include no supporting evidence. Statements in the pleadings or memoranda of counsel are hearsay, self-serving, and incompetent as evidence. (*Reid v. Overland Machined Products* (1961) 55 Cal.2d 203, 209 [citing *Jeffers v. Screen Extras Guild, Inc.* (1955) 134 Cal.App.2d 622, 623; *Mitsuuchi v. Security-First National Bank* (1951) 103 Cal.App.2d 214, 219; and 6 Wigmore, Evidence, § 1709, pp. 39-40.].)

4. Joinder: When it's appropriate and when it's not. In complex cases or other cases involving multiple plaintiffs or defendants, parties will often (and sometimes indiscriminately) file "joinders" in support of one another's motions. Joinder is appropriate where a co-party's interests are identical to the moving party and where joinder would conserve the parties' resources. (*Calvert Fire Ins. Co. v. Kropper* (1983) 141 Cal.App.3d 901, 905.) Thus, a party

whose interests are somewhat different than those of the moving party, or that wishes to make unique arguments not found in the motion, may need to file their own motion rather than merely filing a notice of joinder.

5. Judicial Notice: Parties requesting judicial notice must provide court with materials sought to be noticed. A party requesting judicial notice of material under Evidence Code, Sections 452 or 453 must provide the court and each party with a copy of the material. See California Rule of Court ("CRC") 3.1306(c). If the material is part of a file in the court in which the matter is being heard, the party must (1) Specify in writing the part of the court file sought to be judicially noticed [CRC 3.1306(c)(1)]; and (2) Make arrangements with the clerk to have the file in the courtroom at the time of the hearing [CRC 3.1306(c)(2)].

6. Late-filed papers: Court need not consider. CRC 3.1300(d), concerning late-filed papers, indicates that the court may, in its discretion, refuse to consider a late filed paper, though its minutes or order must so indicate.

7. Notice of motion must specify relief sought and grounds on which that relief is sought. CCP Sec. 1010 requires, in pertinent part, that a notice of motion specify the grounds on which it will be made. A notice of motion must state in the opening paragraph the nature of the order being sought and the grounds for issuance of the order. CRC 3.1110(a). At least one case suggests that a total failure to specify the grounds for a motion may be fatal. (*Traders Credit Corp. v. Superior Court* (1931) 111 Cal.App. 663, 665.) These requirements suggest that a moving party is not entitled to relief that they request in their Points and Authorities but that is not requested in the Notice.

8. Points and Authorities Memorandum required for most motions; consequences of not including one. A party filing a motion, unless it is a specialized type of motion such as those listed in CRC 3.1114, must serve and file a supporting memorandum. CRC 3.1113(a). This memorandum must contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced. CRC 3.1113(b). The court may construe the absence of a memorandum as an admission that the motion or special demurrer is not meritorious and cause for its denial. CRC 3.1113(a).

-Continued on page 13-

-Avoiding Mistakes: Continued from page 12-

CRC 3.1114 sets forth, as a non-exhaustive list of motions not requiring a memorandum of points and authorities, the following: (1) Application for appointment of guardian ad litem in a civil case; (2) Application for an order extending time to serve pleading; (3) Motion to be relieved as counsel; (4) Motion filed in small claims case; (5) Petition for change of name or gender; (6) Petition for declaration of emancipation of minor; (7) Petition for injunction prohibiting harassment; (8) Petition for protective order to prevent elder or dependent adult abuse; (9) Petition of employer for injunction prohibiting workplace violence; (10) Petition for order prohibiting abuse (transitional housing); (11) Petition to approve compromise of claim of a minor or a person with a disability; and (12) Petition for withdrawal of funds from blocked account.

9. Points and Authorities memorandum: Consequences of exceeding maximum page limitation or of failing to include table of contents, table of authorities, or summary of argument. Parties filing especially large Memoranda of Points and Authorities may need to include tables of contents and authorities and a summary; or they may even need to obtain court approval beforehand. The court may disregard “outsize” points and authorities that do not meet such applicable requirements.

Specifically, except in a summary judgment or summary adjudication motion, no opening or responding Memorandum of Points and Authorities may exceed 15 pages. CRC 3.1113(d). A party may apply to the court ex parte but with written notice of the application to the other parties, at least 24 hours before the memorandum is due, for permission to file a longer memorandum. The application must state reasons why the argument cannot be made within the stated limit. (CRC 3.1113(e).) A memorandum that exceeds 10 pages must include a table of contents and a table of authorities. (CRC 3.1113(f).) A memorandum that exceeds 15 pages must also include an opening summary of argument. (Id.) A memorandum that exceeds these page limits must be filed and considered in the same manner as a late-filed paper. (CRC 3.1113(g). CRC 3.1300(d) (concerning late-filed papers, indicates that the court may, in its discretion, refuse to consider a late filed paper, though its minutes or order must so indicate).)

Note that CRC 3.764(c)(2) also includes special, longer length limits for Points and Authorities supporting motions to certify a class, decertify a class,

or modify a class certification order. Specifically, an opening or responding memorandum filed in support of or in opposition to a motion for class certification must not exceed 20 pages. A reply memorandum must not exceed 15 pages.

10. Points and authorities raised for first time in reply are generally not considered. Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.)

11. Sanctions: Advance notice may be required. At least two California cases specify that Due Process does not allow sanctions to be imposed against an attorney without specific notice beforehand.

In *Blumenthal v. Superior Court* (1980) 103 Cal.App.3d 317, 320, the Court of Appeal overturned an award of sanctions against an attorney in connection with his client’s failure to respond to discovery, explaining that “...counsel had no reason to suspect sanctions would be awarded against him individually. The most basic principles of due process preclude the taking of his property without notice of an intention to do so [citing *Lambert v. California* (1958) 355 U.S. 225, 228, and other authority]. Because these rights have been violated, we must annul the award of sanctions.” (*Id.*, at 320.)

Similarly, in *Corralejo v. Quiroga* (1984) 152 Cal.App.3d 871, the Court of Appeal reversed another order imposing sanctions on an attorney. The court explained that a Notice of Motion saying that the moving party sought an “Order for Payment of Expenses, including attorney’s fees...pursuant to [CCP] Section 128.5” does not clearly provide that sanctions were being sought against the attorney. The attorney, explained the court, must be put on notice of the need to prove his or her own blamelessness in the complained of actions. (*Id.*, at 873-874.)

Separately, CCP Sec. 2023.040, concerning sanctions under the Discovery Act, states in pertinent part that: “A request for a sanction shall, in the notice of motion, identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought...” [emphasis added].

12. Separate statement accompanying discovery motion must be “full and complete” in and of itself. Failure to define technical terms used therein; reproduce discovery requests cited or alluded to therein; or other such problems may be grounds for denying the discovery motion.

-Continued on page 14-

-Avoiding Mistakes: Continued from page 13-

Any motion involving the content of a discovery request or the responses to such a request must be accompanied by a separate statement. (CRC 3.1345(a).) Most motions to compel further responses to interrogatories or to Requests for Production, for example, must be accompanied by separate statements.

A separate statement must provide all the information necessary to understand each discovery request and all the responses to it that are at issue. (CRC 3.1345(c).) The separate statement must be full and complete so that no person is required to review any other document in order to determine the full request and the full response. Id. Material must not be incorporated into the separate statement by reference. (Id.)

The separate statement must include — for each discovery request (e.g., each interrogatory, request for admission, deposition question, or inspection demand) to which a further response, answer, or production is requested — the following: (1) The text of the request, interrogatory, question, or inspection demand [CRC 3.1345(c)(1)]; (2) The text of each response, answer, or objection, and any further responses or answers [CRC 3.1345(c)(2)]; (3) A statement of the factual and legal reasons for compelling further responses, answers, or production as to each matter in dispute [CRC 3.1345(c)(3)]; (4) If necessary, the text of all definitions, instructions, and other matters required to understand each discovery request and the responses to it [CRC 3.1345(c)(4)]; (5) If the response to a particular discovery request is dependent on the response given to another discovery request, or if the reasons a further response to a particular discovery request is deemed necessary are based on the response to some other discovery request, the other request and the response to it must be set forth [CRC 3.1345(c)(5)]; and (6) If the pleadings, other documents in the file, or other items of discovery are relevant to the motion, the party relying on them must summarize each relevant document [CRC 3.1345(c)(6)].

Separate statements accompanying discovery motions do not always provide the court and the opposing party with all information they need. For example, some separate statements reproduce interrogatories and responses that use technical terms (say, “hazardous materials”) without defining these terms. Without these definitions, it may not be possible for the court to understand the discovery requests or responses or determine if a further response should be compelled. This can be a fatal defect. Where a party moving to compel discovery fails to comply with the Rules of Court applicable to a Separate Statement, the

court has discretion to deny the Motion to Compel. (*Mills v. U.S. Bank* (2008) 166 Cal.App.4th 871, 893 [citing *Neary v. Regents of University of California* (1986) 185 Cal.App.3d 1136, 1145].)

13. Issues not briefed: Trial court may not need to consider proposals not advanced by litigants. Sometimes, parties’ pleadings will beg, but not brief, a major legal question. The court may not be required to consider such questions. The Court of Appeal has explained that “[w]e cannot conclude that the trial court erred when it failed to consider something the Plaintiffs never proposed.” (*Block v. Major League Baseball* (1998) 65 Cal.App.4th 538, 545.) The Court of Appeal has also noted that “[i]n the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge’s attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it could be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.” (*Nave v. Taggart* (1995) 34 Cal.App.4th 1173, 1177 [quoting *Sommer v. Martin* (1921) 55 Cal.App. 603, 610].)

14. When does an “innovative” legal argument become frivolous? Attorneys owe a duty of “zealous advocacy” to their clients [see, e.g., *In re Zamer G.* (2007) 153 Cal.App.4th 1253, 1267]; and CCP Sec. 128.7(b) allows a party to make a “nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.” But far can an attorney rightly go in advancing a “novel” argument. In *McDonald v. John P. Scripps Newspaper* (1989) 210 Cal.App.3d 100, a case involving a legal challenge to the outcome of a children’s spelling bee, the Court of Appeal explained that: “It is creative and energetic counsel who from time to time challenge existing law and question past policies. This insures that the law be a living and dynamic force. Although noble aims were not advanced here, we are mindful...that the borderline between appeals that are frivolous and those that simply have no merit is vague, and that punishment should be used sparingly ‘to deter only the most egregious conduct.’ [citing *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650-651]...[T]his opinion [should] serve as a warning notice for counsel to be discerning when drawing the line between making new law or wasting everyone’s time...Our courts try to give redress for real harms; they cannot offer palliatives for imagined injuries.” (210 Cal.App.3d at 106-107.)

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November 4, 2009

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