

Q&A with the Honorable Steven L. Perk By Corbett H. Williams



[Editorial Note: For this judicial interview, we met with the Honorable Steven L. Perk of the Orange County Superior Court. Judge Perk was originally appointed to the Orange County Municipal Court by Governor Pete Wilson in 1995. He is a member of the ABTL's Judicial Advisory Council.]

Q: What drew you to the law?

A: When I first became interested in attending law school, I was looking for a little more long-term security and growth potential in terms of a career. I liked the variety—the broad spectrum of career pathways that a law degree would give. That was very appealing to me and is one of the main reasons that I decided to go to law school.

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Workplace Privacy: *The Confidentiality of Text Messages and the Attorney-Client Privilege* By Hon. Jay C. Gandhi and Panteha Abdollahi

The average employee is estimated to spend nearly one hour per day on personal internet usage, and this does not include the time spent on personal matters using employer-based e-mail systems, employer-issued BlackBerrys, or employer-issued cellular phones. (See Losey, *Clicking Away Confidentiality: Workplace Waiver of Attorney-Client Privilege*, 60 Fla. L. Rev. 1179, 1180 (2008).) At the same time, nearly 80 percent of employers regularly monitor their employees' internet usage. (Id.)



On December 14, 2009, the United States Supreme Court granted *certiorari* in *City of Ontario v. Quon* (United States Supreme Court Docket # 08-1332) and, in so doing, appears headed into the “new frontier” of workplace privacy jurisprudence and ubiquitous electronic communication. (See *Quon v. Arch Wireless Operating Company, Inc.*, 529 F.3d 892, 904 (9th Cir. 2008).) But this terrain may be fraught with unintended consequences, including as to the attorney-client privilege. Specifically, the Supreme Court's analysis and ruling in *Quon* may shed light on a significant issue brewing in the lower courts: whether employees waive the protections of the attorney-client privilege when they communicate with their personal attorneys using technology owned and monitored by their employers.



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The President's Message

By Sean P. O'Connor



This promises to be a great year for the Orange County Chapter of ABTL, and I am honored to serve as the Chapter's President. Before turning to what we have planned for this year, I would like to acknowledge some people. First, I am fortunate to be surrounded by a talented and energetic Executive Committee –

Darren Aitken, is our Vice President; Melissa McCormick is our Treasurer; and Mark Erickson is our Secretary. Linda Sampson serves as our Chapter's Executive Director, and she performs her job flawlessly.

I am pleased to announce one new feature for 2010 at our dinner programs. We have added a wine sponsor to our dinner program who is providing hosted wine during the reception before the start of each dinner program. For the February and April dinner programs our wine sponsor was long-time ABTL supporter Zamucen & Curren LLP. Many thanks to Zamucen & Curren for its continued support of our Chapter. We also extend our thanks to our copying sponsor, Merrill Corporation. And a special thanks to our ABTL Report sponsor, Skorheim & Associates, whose generosity enables us to send out these quarterly reports.

Although the year is barely underway, our Chapter already has two great programs under its belt. In February, Judge Norbert Ehrenfreund captivated the audience with a presentation on how the Nazi war crime trials changed the course of national and international judicial systems. In early April, we were told "the story behind the trial" by the defense lawyers who successfully secured dismissals for their clients in the Broadcom trials.

Our Chapter's signature event comes next – the annual wine tasting fundraiser benefiting the Public Law Center that will be held on June 9, 2010. 2010 will be the 11th consecutive year of our Chapter sup-

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New Spate of Class Actions Seeks to Penalize California Employers Who Do Not Provide Adequate Seating for Employees

By Aaron L. Agenbroad and Steven M. Zdravetz



A wave of class action suits has recently been filed against several large employers for alleged “seating” violations under the California Labor Code (“Labor Code”). In these cases, the plaintiffs seek to enforce Section 14 of Industrial Welfare Commission (“IWC”) Wage Order 7-2001, a seldom used and relatively untested

provision of the Labor Code that requires employers to provide seating for their employees under certain circumstances. While historical precedent gave employers some comfort, a recent decision in the Northern District of California has expanded the damages available to plaintiffs and likely will fuel additional claims.



IWC Wage Order 7-2001

Wage Order 7-2001 (“Wage Order”) applies broadly to all industries, businesses, or establishments operated for “the purpose of purchasing, selling, or distributing goods or commodities at wholesale or retail, or for the purpose of renting goods or commodities.”

Section 14 of the Wage Order (entitled “Seats”) requires that:

- A. All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.
- B. When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

Brown-Bag Lunch Update

By Michelle A. Burr

ABTL members received a behind-the-scenes tour of the new California Court of Appeal Courthouse in Santa Ana on March 23, 2010, courtesy of Justices Hon. Kathleen O’Leary, Hon. Richard Aronson, and Hon. Richard Fybel. After some initial discussion about March Madness, the Justices sat down with the group to discuss and address several questions and topics.



The Court’s settlement program was discussed at some length, particularly whether the Justices believe it has been successful. The Justices agreed that the program is only as successful as the efforts the parties put into it. Oftentimes, according to Justice Fybel, the parties do not utilize the program because they do not fully understand the risk of the appeal. Although decisions at the trial level are routinely affirmed, Justice Fybel estimates that in civil appeals about one-third of the decisions are overturned. Justice Aronson added that the number of settlement conferences taking place has decreased because there used to be a backlog of cases being appealed whereas now the cases are moving through the process more quickly. As a result, there is less time to hold a settlement conference while an appeal is pending.

The Justices then addressed some of the common mistakes they see lawyers make in oral argument and in their briefs on appeal. The most common theme - do not ignore your case’s weaknesses. As Justice Fybel noted, “People know the weaknesses, but hope to fool us and underestimate their opponent. Independent research by the Court will lead to the discovery of your weaknesses.” Justice Aronson added, “We focus on the weaknesses and we want an explanation as to why we should not give the weaknesses much thought.” Notably, when we sat in the audience during oral argument following the brown bag lunch, this very theme played out before us. An attorney cited a case in his brief but *added* several words to the cite that significantly changed the meaning of quote and the import of the case. The panel questioned the attorney about the misquote and asked him to explain how words were added. Of course, the attorney had no explanation. Following oral argument, the Justices reiterated to the group following that they do read the

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Conducting Key Class Action Discovery: How and When Depositions of Unnamed Class Members Can Be Taken In State and Federal Court
By Scot D. Wilson



In many ways, discovery in class actions is the same as it is in other types of litigation. In certain respects, however, discovery in class actions is fueled by unique considerations that can dictate key strategic decisions and outcomes. Class certification decisions are supposed to be made at the earliest practicable stage. As a result, parties frequently jockey for position regarding the scope, structure and sequence of class and merits discovery. Even in cases where discovery is bifurcated into “class” and “merits” phases, there is nearly always some overlap, and it is well-established that, prior to the certification hearing, parties are entitled to conduct discovery relevant to class certification issues.

As the party seeking class certification, plaintiffs bear the burden of demonstrating that requirements for class certification under California Code of Civil Procedure section 382 or Federal Rule of Civil Procedure 23 are met. In determining whether these requirements are satisfied, the allegations of the complaint are generally taken as true. However, parties that merely try to rest on the allegations of the pleadings do so at their own peril for several reasons. First, courts have wide discretion to consider any evidence which goes to the class certification requirements even though the evidence may also relate to the underlying merits of the case. Second, and even more importantly, increasingly there seems to be a trend in state and federal courts throughout the country to treat motions for class certification as *evidentiary* motions. Consequently, it is more important than ever for both plaintiffs and defendants to present compelling evidence at the class certification stage and to conduct discovery that yields such evidence early in class action litigation.

Typically, a substantial part of the parties’ discovery plan is aimed at the issue of *predominance*, i.e., whether common questions of law or fact applicable to the class predominate over individual issues that may be unique to each particular class member. In both the consumer and wage and hour context, more motions for class certification are denied on predominance grounds than for any other reason. Plaintiffs often try to demonstrate that their case is very simple, uniformly affecting each class member in the same way,

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Q: In what areas of the law did you practice before becoming a judge?

A: I began my career with the District Attorney’s office, and after that, I went with an insurance defense firm called Tuverson & Hillyard for about a year and a half. At that time, a friend of mine, Cliff Roberts, had a practice doing business litigation. He was looking for somebody who had experience trying cases which I had. I went to work with him and I spent about five or six years there. I really enjoyed that—it was a very enjoyable time.

Q: Why did you become a Judge?

A: Well, I came to a point in my career where I was wanting to try something a little different. I had thought about being a judge, but I didn’t believe it was really possible. I just reached that stage in my career where if I was ever going to apply for a judicial position the time was right. Then I began watching some of my friends get appointments which encouraged me. I felt that if I could get an appointment, it would be a very good career option for me. I submitted my name and luckily received an appointment. I have been very happy about it ever since.

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

A: I very much enjoy my current assignment. I’m on the general civil panel, which means there is a wide variety of cases that come before me. The challenge which the variety of cases creates makes the job interesting. I also enjoy talking to the attorneys and the interaction which the settlement process involves. I enjoy the challenge of finding compromises between different positions to reach a settlement.

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

A: There are aspects of the job that are very frustrating. The most frustrating aspect is that you never seem to have enough time to commit to a case as you would like. It’s the constant crush of getting to the next case. Judges need to develop a comfort level of making the

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best decision possible and moving on. Developing a comfort level with making decisions under these time constraints is the key to being effective. I think that managing a caseload is related to this decision making process.

Q: How would you describe your judicial philosophy?

A: I try to be understanding of the attorneys' presentations and of their role in the legal process. I perceive my role as giving each side a forum which is consistently fair and affords each an opportunity to be heard. I understand that I have the reputation for being formal in a courtroom. I believe consistent fairness requires a certain degree of formality. But, I'm not so far removed from practicing law to have forgotten what it's like. I have particular appreciation for the daily pressures which affect attorneys constantly. I try to incorporate an understanding of how difficult the daily pressure of practicing law can be while at the same time giving everyone a forum to present their case in a timely manner. I listen to the arguments and do the best job I can to rule on what is put before me. You may not always win but I at least hope that attorneys feel they had an opportunity to present their case and that the judge listened.

Q: What are your pet peeves?

A: The first would be unprofessional conduct. Professionalism requires adherence to certain standards. I believe that when attorneys come to the courthouse, they should to be prepared and know what it means to act like a professional. When making a presentation to the court, attorneys should address the court—not get into arguments with opposing counsel, interrupt and speak over each other, or waste the Court's time bickering as if attending a deposition. Occasionally, I hear lawyers, usually young lawyers, make oral arguments to the court which have the tone of a pool hall debate. My one thought on this is that language is our craft — develop it — don't debase it. If our profession doesn't maintain some standards who will. My second pet peeve is expert witnesses who, despite being paid

handsomely, never seem to have the time or availability to testify when they are needed.

Q: What advice would you give to lawyers appearing in your court for the first time?

A: Be prepared and act professionally. Attorneys should address the Court in a respectful manner and be prepared to clearly and concisely discuss each of the issues that have been briefed or that they want the Court to consider. I believe it is also important to dress professionally.

Q: Have state funding issues related to the recent economic crisis impacted your work, and if so, how?

A: One area that is affected is staffing. At least for the present, the civil courts do not have a bailiff assigned on a daily basis unless we are in trial. The absence of a bailiff really does change the courtroom in terms of workflow and dynamics. I also recently lost my courtroom assistant for several months. The Court does not have enough staffing to replace her. Now my courtroom is short two positions while the caseloads are increasing. The situation is not ideal, but you make due with what you have. I have to say that my clerk, Nga Quach, is doing a remarkable job keeping up with the workload. But, long-term it is certainly not a good situation. Court closure days also have a significant effect on case management. You might not think that one day a month would have much of an impact, but it does. Fortunately, it appears court closure days will soon be a thing of the past.

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

A: I enjoy outdoor activities. I'm a golfer and I recently took up bicycle riding.

Q: Why did you choose to be a member of the ABTL?

A: The ABTL is a very worthwhile organization that provides quality information and excellent programs for its members. It also provides an atmosphere within which the bench and the bar can stay in contact with each other. I believe that is important. I think we in Orange County are so fortunate to have the close

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and cordial relationship that we do between the bench and the bar. ABTL does a great job of promoting this close relationship.

♦ *Corbett H. Williams is an associate in the Trial Practice Group of Jones Day's Irvine office.*

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I. The Quon Decision

The facts in *Quon* are largely undisputed. In late 2001, Arch Wireless provided pagers with wireless text-messaging services to the City of Ontario. The City distributed the pagers to employees of the Ontario Police Department, including Sergeant Jeff Quon, a SWAT team member. The City had no official policy related to text-messaging via use of pagers, but it did have a general "Computer Usage, Internet and E-mail Policy" which limited the use of computers and all associated equipment, including e-mail, to City of Ontario-related business. The policy noted that access to websites on the internet would be recorded and periodically reviewed. The policy also provided that access to the internet and e-mail system was not confidential and information produced in electronic form was considered City property. Quon signed the policy in 2000. At a 2002 meeting, all officers present, including Quon, were informed messages sent using the pagers were considered e-mail and would be governed by the City's computer usage policy.

Under the City's contract with Arch Wireless, each pager was allotted 25,000 characters per month. Lieutenant Steven Duke, who oversaw the pager system for the police officers, initiated an informal practice whereby, if the 25,000 character allotment was exceeded, the police officer using the pager would personally pay for the overage. Quon went over the monthly character limit "three or four times" and paid for the overages. In August 2002, Quon again exceeded the 25,000 character limit, and transcripts of his text messages were requested by the City for auditing purposes. The police department contacted Arch Wireless, which provided the

transcripts. Quon was unaware that transcripts of his messages had been requested.

As a result of the audit, it was revealed that many of the text messages sent and received by Quon were personal in nature, and, "to say the least, sexually explicit." (See *Quon v. Arch Wireless Operating Co.*, 445 F. Supp. 2d 1116, 1126 (C.D. Cal. 2006).) *Quon*, along with certain senders and receivers of the text messages, brought suit, *inter alia*, for violations of their Fourth Amendment rights and the Stored Communications Act, 18 U.S.C. §§ 2701-2711. The district court ruled that Arch Wireless did not violate the Stored Communications Act when it disclosed the content of the text messages to its subscriber, the City of Ontario. After a jury trial on certain issues, the trial court also absolved all the public defendants of liability for the search.

The Ninth Circuit panel overturned the district court on both issues. With respect to Arch Wireless, the Ninth Circuit concluded Arch Wireless functioned as an "electronic communication service" under the Stored Communications Act, and therefore was prohibited from divulging the contents of the text messages to anyone other than an addressee or intended recipient of the text messages. In evaluating the Fourth Amendment claims, the Ninth Circuit acknowledged "[t]he recently minted standard of electronic communication via e-mails, text messages, and other means opens a new frontier in Fourth Amendment jurisprudence that has been little explored." It viewed the primary question of the case as whether "users of text messaging services such as those provided by Arch Wireless have a reasonable expectation of privacy in their text messages stored on the service provider's network."

Analogizing to precedent based on the privacy standards for the telephone and traditional ("snail") mail, the court concluded that "users do have a reasonable expectation of privacy in the content of their text messages vis-à-vis the service provider." The Ninth Circuit also found the police department's informal policy that text messages would not be audited if the user paid overages rendered the expectation of privacy in those messages reasonable, notwithstanding the City's official computer usage and e-mail policy. The Ninth

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Circuit concluded the search of the text messages was unreasonable, and violative of the Fourth Amendment. The court cautioned, however, that it was not “endors[ing] a monolithic view of text message users’ reasonable expectation of privacy, as this is necessarily a context-sensitive inquiry.”

Rehearing *en banc* of the decision was denied, although seven judges dissented in an opinion authored by Judge Ikuta. (See *Quon v. Arch Wireless Operating Co., Inc.*, 554 F.3d 769 (9th Cir. 2009).) The City of Ontario and the police department filed a petition for writ of *certiorari*, pressing solely the issue of whether the Ninth Circuit erred in its analysis of the Fourth Amendment claim. Arch Wireless filed a separate conditional cross-petition related to the court’s conclusions under the Stored Communications Act. While the Supreme Court granted review to assess the Fourth Amendment claims, the Court denied Arch Wireless’ petition. (See United States Supreme Court Docket Nos. 08-1332 and 08-1472.)

How far the Supreme Court’s ultimate decision in the case will go remains to be seen. The case is expected to be heard this Spring, with a decision in late June. The Court may limit its analysis to a fact-specific inquiry applicable only to public employers. The decision on its face seemingly involves a narrow issue: whether a city employee’s Fourth Amendment rights were violated when his supervisors accessed the content of personal text messages he sent and received on a city-provided pager. Alternatively, the Supreme Court may, like the district court who oversaw the trial aspects of the case, view the issue presented as far-reaching. For instance, the district court framed the issue as follows: “What are the legal boundaries of an employee’s privacy in this interconnected, electronic-communication age, one in which thoughts and ideas that would have been spoken personally and privately in ages past are now instantly text-messaged to friends and family *via* hand-held computer-assisted electronic devices?” (See *Quon*, 445 F. Supp. 2d at 1121.)

II. The Attorney-Client Privilege **Ramifications of *Quon***

Whatever the Court may ultimately conclude, its decision may shape the privacy expectations of employees in general and may pose significant ramifications beyond the factual setting of *Quon*. For example, what if Sergeant Quon’s text messages were with his attorney? Are employees’ communications to personal attorneys emanating from employer-owned and monitored devices protected by the attorney-client privilege? Take, for example, the high-level professional who is employed by Company A, and also sits on the Board of Directors for an unrelated entity, Company B. The professional, out of convenience and practicality, uses his BlackBerry issued by Company A and using Company A’s e-mail system (which has a non-privacy policy and is monitored) to send e-mails to an attorney related to the activities of Company B. The e-mails are labeled confidential, have not been disclosed other than via the e-mail exchange, and are solely between the professional and the attorney related to the activities of Company B. Are these e-mails privileged? If an action is filed against the professional and Company B, do the e-mails become discoverable via a subpoena to Company A? Is the attorney professionally responsible for ensuring that the professional only communicates with him through the professional’s personal e-mail address using a personal computer, so as to ensure that the privilege is maintained?

Today, the answers seem to depend on the court and the jurisdiction. Federal and state courts are divided on the issue of whether employees waive the attorney-client privilege when they utilize an employer-issued computer or employer-based e-mail system to transmit an otherwise privileged communication, and the courts utilize a variety of factors and tests to evaluate the extent to which the employee has a legitimate expectation of privacy with respect to such communications. Three cases are indicative of the various analytical approaches presently being applied by the courts.

Asia Global, a bankruptcy court decision issued in 2005, articulated the first test for examining whether an employee’s use of an employer’s e-mail system compromised the attorney-client privilege. (See *In re Asia Global Crossing, Ltd.*, 322 B.R. 247 (S.D.N.Y. 2005).)

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Five individuals were the principal officers and insiders of Asia Global, a debtor in bankruptcy. Following the appointment of a trustee for the debtor, counsel for the five insiders learned that certain e-mail communications by the insiders containing allegedly privileged attorney-client communications were maintained on the Asia Global e-mail servers, and requested that these e-mail communications be segregated. Subsequently, the trustee conducted an investigation into certain transactions by the five insiders, and sought all documents from the insiders, including the segregated e-mails. The insiders withheld production of these documents on the grounds of the attorney-client privilege.

The *Asia Global* court began its attorney-client privilege analysis by evaluating whether the privilege had been waived by virtue of the use of the debtor's e-mail system. The court recognized that "the prevailing view is that lawyers and clients may communicate confidential information through unencrypted e-mail with a reasonable expectation of confidentiality and privacy" and that both New York and California had enacted laws that provide some protection to e-mail communications (New York C.P.L.R. 458 and Cal. Evidence Code 917(b)). But, here, the insiders "used the debtor's e-mail system to communicate with their personal attorney, and the communications apparently concerned actual or potential disputes with the debtor, the owner of the e-mail system." The court outlined a four-factor test to measure whether the communications, despite being sent and stored on the debtor's e-mail system, maintained their privileged status on the basis of the insiders' reasonable expectation of privacy: (1) do the employer's policies ban personal or other objectionable use of its computers; (2) does the employer monitor the use of the employees' computer or e-mail; (3) do third parties have a right of access to the computer or e-mails; and (4) does the employer notify employees, or are employees aware, of the use of monitoring policies? The *Asia Global* court ultimately declined to rule on the waiver of the privilege based on the use of the debtor's e-mail system due to an insufficient factual record. The court's opinion reflects, however, the conclusion that, in the absence of a formal use or monitoring policy from the employer, an employee's use of a company's e-mail system to

communicate with personal counsel did not destroy the attorney-client privilege.

Other New York cases subsequent to *Asia Global* have also evaluated the applicability of the attorney-client privilege with regard to the employee's reasonable expectation of privacy in light of the employer's computer policies and practices. In *Scott*, a New York trial court applied the four *Asia Global* factors to conclude that a physician's e-mail communications with his attorneys, which were stored on his employer-hospital's e-mail server, were not confidential for purposes of the attorney-client privilege. (See *Scott v. Beth Israel Medical Center*, 847 N.Y.S. 2d 436 (2007); 2007 WL 3053351.) Scott sued the employer-hospital for breach of contract arising from his employment termination. During the course of the action, he moved for a protective order seeking to protect communications between himself and his counsel, Paul, Weiss, Rifkind, Wharton & Garrison, LLP ("PW"), which had been sent by Scott using his work e-mail address and sent over the employer-hospital's e-mail server. The court outlined the employer-hospital's e-mail policy, which generally stated that: (i) all computer systems, e-mails and the like should be used for business purposes only; (ii) all information and documents created, received or sent on the hospital-employer's computer or communications systems belonged to the hospital-employer; and (iii) employees would have no personal privacy rights in any such materials. The policy also reserved the hospital-employer's right to access and disclose such material at any time without prior notice. The court concluded "the effect of an employer e-mail policy, such as that of [the hospital] is to have the employer looking over your shoulder each time you send an e-mail. In other words, the otherwise privileged communications between Dr. Scott and PW would not have been made in confidence because of the [hospital's] policy."

Finally, the California Court of Appeal also has addressed the attorney-client privilege in the context of the use of an employer-issued computer. In *People v. Jiang*, the defendant was arrested and charged with committing a sexual offense. (See *People v. Jiang*, 131 Cal. App. 4th 1027 (2005).) Following his arrest, the defendant prepared certain documents for his counsel on a laptop issued by his employer. The docu-

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ments were stored in a folder on the laptop entitled "Attorney" and were password protected by the defendant. The defendant's employer had a general non-privacy policy with respect to its voice-mail, e-mail or any other property of the employer, which defendant had signed. Following the issuance of a subpoena by the prosecutor to the employer, the documents were turned over by the employer.

At issue before the court of appeal was whether the trial court erred in denying defendant's recusal and suppression motions based on the prosecutor's acquisition of the attorney-client communications. The court of appeal concluded the trial court erred, and the disclosed communications were protected by the attorney-client privilege. Using a burden-shifting analysis applicable under California Evidence Code section 917, the court found that by proffering evidence that the electronic documents were password-protected and stored in a folder entitled "Attorney," the defendant had satisfied his evidentiary burden of demonstrating the documents were privileged. The court highlighted that the employer's privacy policy did not bar personal use of employer-issued laptops, and was more directed towards the protection of intellectual property rights, "not the invasion of the privacy of its employees." Thus, the court found that "[u]nder the circumstances of this case, it was objectively reasonable for defendant to expect that attorney-client information in the password-protected documents he placed in a segregated folder marked 'Attorney' on his [employer]-issued laptop would remain confidential."

Courts are facing the questions presented in *Asia Crossing*, *Scott*, and *Jiang* with increasing frequency, and coming up with differing conclusions as to the maintenance of the attorney-client privilege. (See, e.g., *Leor Exploration & Production LLC v. Guma Aguiar*, Nos. 09-60136-CIV, 09-60683-civ, 2009 WL 3097207 (S.D. Fla. Sept. 23, 2009) (where an employer's handbook expressly provides employees should have no expectation of privacy with respect to communications made over the employer's system, the attorney-client privilege is inapplicable); *Convertino v. United States DOJ*,

No. 04-0236 (RCL), 2009 U.S. Dist. LEXIS 115050 (D.D.C. Dec. 10, 2009) (attorney-client privilege was not waived where the employee was unaware that his employer would regularly access and save e-mails because the employer maintained a policy that did not ban personal use of company e-mail); *Stengart v. Loving Care Agency, Inc.*, 408 N.J. Super. 54 (App. Div. 2009) (no waiver of the attorney-client privilege where the employee was using a personal password-protected web-based e-mail system on the employer's computer).

As more unique factual scenarios are presented, one can only expect a concomitant increase in the diversity of analytical frameworks issued by the courts. As noted at the outset, however, the Supreme Court's decision in *Quon*, depending on how broadly or narrowly the Court chooses to frame its decision, may streamline the analysis. This is because decisions interpreting and applying the Fourth and Fourteenth Amendments are influential in other privacy litigation. Should the Supreme Court take the *Quon* opportunity to outline the reasonable expectations of privacy in the workplace, this could provide a blueprint on the contours of the attorney-client privilege as applied to communications originating from an employer-controlled and monitored electronic device.

♦ *Hon. Jay C. Gandhi is a newly appointed United States Magistrate Judge of the Central District. Prior to his appointment and at the time this article was written, Judge Gandhi was a partner of Paul, Hastings, Janofsky & Walker LLP. Panteha Abdollahi is an associate in Paul, Hastings, Janofsky & Walker LLP Orange County office.*

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porting the Public Law Center through proceeds generated from the wine tasting/dinner program. In the first 10 years of this event, our Chapter raised over \$120,000 for the Public Law Center. This translates into hours upon hours of free legal services for those who need it most. This fundraiser will be accompanied by yet another excellent dinner program, with Joe Cotchett giving a presentation regarding his representation of the victims of the Bernie Madoff fraud cases.

This year's annual fundraiser takes on additional significance as our Chapter is being recognized by the Pub-

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lic Law Center as its Corporate Sponsor of the Year.

This honor will be bestowed on our Chapter at the Public Law Center's June 21, 2010, Volunteers for Justice dinner program. With the moniker of "Sponsor of the Year," we should all do our best to make the 2010 fundraiser the most successful one yet.

Thank you for your continued support of our Chapter, and I look forward to seeing you at the June 8 annual fundraiser for the Public Law Center.

♦ *Sean P. O'Connor is a litigation partner at the firm of Sheppard, Mullin, Richter & Hampton LLP.*

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Section 14 does not contain its own penalty provision, and Section 20, the Wage Order's only penalty provision, does not address seating claims but rather penalizes employers who underpay employees.

Typical Class Claims

These new class claims generally assert that employers who do not comply with Section 14 violate Labor Code § 1198, a provision that makes it illegal to employ an employee under conditions of labor that are prohibited by an IWC Wage Order. Plaintiffs have brought these seating claims under the Private Attorneys General Act of 2004 ("PAGA," Cal. Lab. Code § 2698 et seq.), which allows recovery for violations of "all provisions of [the Labor Code] *except those for which a civil penalty is specifically provided.*" PAGA § 2699(f) (emphasis added). PAGA penalties consist of \$100 for each aggrieved employee per pay period for the initial violation, and \$200 for each aggrieved employee per pay period for each subsequent violation. Cal. Lab. Code § 2699(f) (2).

Past Precedent: *Hamilton v. San Francisco Hilton*

For years, the only court opinion to specifically address a seating claim was *Hamilton v. San Francisco Hilton*, Case No. 04-431310 (S.F. Sup. Ct, 2005). In *Hamilton*, a guest service agent ("GSA") at the San Francisco Hilton filed a class action lawsuit on behalf of GSAs alleging that the hotel violated Wage Order 5-2001, Section 14 (containing a seating provision identical to Wage Order 7-2001)

by failing to provide GSAs with seats at the front desk. The complaint sought PAGA penalties among other damages. Hamilton presented an ergonomic expert who confirmed that GSA work required standing and stated that reconfiguration of the workspace would be necessary if stools were provided. The expert proposed the use of a "sit-stand saddle" as an alternative to reconfiguring the workspace.

The court granted Hilton's motion for summary judgment because it found that PAGA penalties did not apply and that Hilton was lawfully permitted to make a rational business decision to require GSAs to stand while at the front desk.

PAGA Claim. As an initial matter, the court found that Hamilton could not recover PAGA penalties because the Wage Order contained its own civil penalties provision. The court noted that the Wage Order was the only place where seats were mentioned, and therefore the only way Hamilton could bring her seating claim was to incorporate the entire Wage Order. Because Hamilton did not make a claim for underpayment, the penalty provisions of Section 20 were unavailable.

Employer's Business Judgment. The court also held that Hilton did not violate Section 14 because its requirement that employees stand behind the counter was a rational business decision that the hotel was entitled to make and because Hilton had otherwise complied with Section 14. The court read Sections (A) and (B) of Section 14 collectively rather than separately and found that if the "nature of the work" requires standing (Section B), then the "nature of the work" cannot reasonably permit the use of seats (Section A). Using that interpretation, the court concluded that "if standing is required for part or all of a job, Section A does not apply and the employer must comply with Section B." The court held that Hilton had complied with Section B by permitting GSAs to go into a back room to sit when it did not interfere with their work duties.

The court additionally noted its obligation to defer to Hilton's establishment of reasonable job requirements. The court found no requirement for reconfiguration in the Wage Order and refused to require Hilton to adopt the ergonomic expert's proposed "sit-stand saddle." Instead, the court found Hilton's standing requirement reasonable because: (1) Hilton considered standing and continual mobility throughout the front office area to be an essential function of the job; (2) the GSA's job description listed "standing and continual mobility" as essential functions; (3) many

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GSA duties required standing or walking; and (4) when seated, GSAs could not safely use a computer, fit their knees and legs in the workspace, or open a cash drawer without moving the seat. The court also held that SF Hilton was permitted to make a reasonable business judgment concerning its image and brand and that it should not “second guess” Hilton’s business judgment.

Hamilton Rejected—In Part

Much of the comfort that *Hamilton* had provided to employers for the past four years was recently eliminated when Judge Maxine Chesney issued her decision in *Currie-White v. Blockbuster Inc.*, Case No. 3:09-cv-2593 BZ (N.D. Cal. 2009). In the *Blockbuster* case, the plaintiffs brought claims similar to those in *Hamilton* on behalf of cashiers working at Blockbuster video rental stores. While granting Blockbuster’s motion to dismiss, Judge Chesney significantly undermined several of the key defenses that succeeded in *Hamilton*. First and most significantly, she ruled that plaintiffs *may* seek civil penalties under PAGA because the penalty provision of the Wage Order “does not provide a penalty for the violation alleged by plaintiff, specifically, a failure to provide seats for employees.” She also concluded that section 14 was properly promulgated by the IWC and that PAGA does not violate the state or federal Constitutions. Judge Chesney dismissed the complaint on the basis that the plaintiff had failed to plead sufficient facts but granted leave to file an amended complaint. The plaintiff filed an amended complaint on August 14, 2009, and further proceedings are pending.

One can expect that the conflict between *Hamilton* and *Blockbuster* will continue to be litigated in the several seating claim cases that have recently been filed. Their respective resolutions will likely determine whether seating claims fuel the next wave of class action litigation by the plaintiffs’ bar.

What Should an Employer Do?

- Evaluate employee tasks to determine whether the nature of the work reasonably permits the use of seats.
- Consider conducting an ergonomic study to determine the feasibility of adding seats.
- Document any efforts that have been made (such as task forces, joint study teams, focus groups) to determine whether seats are necessary.

- Evaluate job descriptions and customer service standards to determine whether they clearly identify jobs where continual mobility is an essential function of the job, and revise such descriptions appropriately to reflect the necessity of standing.
- Provide an adequate number of suitable seats in a nearby break room and allow employees to use such seats when it does not interfere with the performance of their duties.

♦ *Aaron L. Agenbroad and Steven M. Zadavec are Partners in Jones Day’s Labor and Employment Group.*

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briefs and the cases cited by the parties therein. Even hard to find mistakes will not go unnoticed. They certainly pay attention when they see ellipses (...) for what is missing, but were even more surprised to find words had been added!

Justice Fybel further noted that trial lawyers arguing on appeal tend to argue facts and extrinsic evidence instead of focusing on the alleged mistake of law made by the trial court, stating, “We’re not here to judge the witnesses. We’re here to see if there is a mistake of law.” Unfortunately, the Justices acknowledge that it is not easy to get any significant oral argument experience in the world of civil litigation, since most cases do not go to trial. Justice O’Leary recommended that attorneys consider alternate means of getting the oral argument experience they want, suggesting that arbitration is a good way to practice one’s oral advocacy skills and, even better, learn more about moving facts into evidence and objecting to evidence.

As Justice Aronson pointed out, it is also important to think about an appeal before your trial begins. He recommends talking to appellate lawyers about your case and involving them in your case strategy. These lawyers can help you avoid missing an important opportunity to set up an issue during trial for purposes of appeal. And, according to Justice O’Leary, it is also important to make a clear record in the trial court. If the appellate record does not include transcripts reflecting which party proposed which jury instructions or made certain objections or arguments relating to certain objections, it is more difficult for the Court to find error.

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The group then asked each Justice to state his or her opinion regarding the most common mistake at oral argument. Unanimously, the panel agreed that attorneys do not answer the question posed. This ties in to the “don’t ignore your case’s weaknesses” theme in that, if a difficult question is posed by the panel that focuses on a weakness in your case, do not ignore the question or simply give the rehearsed speech regarding the strengths of your case. Address the panel’s question and explain why it should not be concerned about the purported weakness. Justice Aronson adds, “Don’t try to figure out what the Justice is getting at when he or she asks a question. Just answer the question and do not mistrust the intent of the panelist.” He or she may be trying to obtain additional information that may help you.

When preparing for oral argument, Justice Fybel recommends that you prepare for the hardest question the panel can ask. He also recommends that you practice giving only a three-minute presentation to a Judge or attorney about why you are right. This forces you to emphasize certain points, instead of simply reciting your brief. Justice Aronson suggests that you sit down and write the opinion you want the Court to give. “This will force you to deal with issues and see the nuances the Judges see.”

Finally, at oral argument, there are certain things you just should not say. For example, do not lead with, “This is a breach of contract case...” The Judges know what the case is about, so it is ill-advised to start in this manner. Also, the Justices advise against reciting a “canned” speech. It is much more persuasive to engage in a conversation with the Justices about the merits of the appeal.

The ABTL certainly appreciates the time Justices O’Leary, Aronson and Fybel took from their busy schedules to show us around the courthouse and offer advice regarding effective oral argument and legal writing. We especially appreciate being invited to participate in the audience in the afternoon session of oral argument. Undoubtedly, the insights offered by the Justices will help each of us improve our practice of law.

♦ *Michelle A. Burr is an associate at Cummins & White LLP.*

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with common issues vastly predominating over any individualized issues. Defendants, on the other hand, routinely try to show that class certification is not appropriate and the case is not amenable to class-wide proof because individual issues overwhelm any supposed common questions of law or fact.

Historically, in addition to evidence from the parties (i.e., declarations and deposition testimony from the class representatives, defendant’s person most knowledgeable/qualified (“PMK/PMQ”), etc.), expert declarations and survey evidence have been widely used at the class certification stage. Gradually though, in addition to such evidence, parties have also utilized declarations from unnamed class members in support of or opposition to class certification. Unlike other witnesses (e.g., class representatives, the defendant’s PMK/PMQ, experts, etc.) the testimony from unnamed class members – who are most likely to be perceived as providing the most credible and unbiased testimony – is increasingly considered some of the most powerful evidence at the class certification stage. As such, it is important to understand the differing standards in state and federal court that govern the taking of depositions of unnamed class members.

Compared to the California state court standard, the burden on the party seeking to take depositions of unnamed class members in federal court is very *high*. In federal court, although “[t]he law on discovery directed to absent class members is flexible[,]” *Tierno v. Rite Aid Corp.*, 2008 WL 2705089, *6 (N.D. Cal. July 8, 2008), there are special procedural requirements that must be met. Generally speaking, “[t]he party seeking discovery by way of depositions of absent class members has the burden of demonstrating the merits of such discovery.” 6A Fed. Proc., L. Ed. § 12:353 (Westlaw 2009) (citing *Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir. 1974)). The general rule is that “[a]bsent class members are ordinarily not required to submit to discovery; requiring them to respond would undercut the purposes of class certification and effectively create an ‘opt in’ scheme for absent plaintiffs.” *Id.* (citing *McPhail v. First Command Fin. Planning, Inc.*, 2008 WL 216798, *2 (S.D. Cal. Apr. 3, 2008)). “However, such discovery has been permitted in certain circumstances, where the information sought is relevant, not readily obtainable from the representative parties or other sources, and the request is not unduly burdensome and [is] made in good faith.” *Id.* (citing *Cornn v. United Parcel Serv., Inc.*, 2006 WL 2642540, *2 (N.D. Cal. Sept. 14, 2006)).

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Federal courts have observed that “[i]t is fairly well settled that, where warranted, discovery may be taken of absent class members. . . .” *Easton & Co. v. Mut. Benefit Life Ins. Co.*, 1994 WL 248172, *3 (D. N.J. May 18, 2004). See also *Brennan v. Midwestern United Life*, 450 F.2d 999, 1005 (7th Cir. 1971) (“If discovery from the absent member is necessary or helpful to the proper presentation and correct adjudication of the principal suit, [there is] no reason why it should not be allowed so long as adequate precautionary measures are taken to ensure that the absent class member is not misled or confused.”); *In re Airline Ticket Comm’n Antitrust Litig.*, 918 F.Supp. 283, 285 (D. Minn. 1996) (“Discovery of absent class members is permissible when the desired information is relevant to an issue in the case); *Wright & Miller*, 7B Fed. Prac. & Proc. Civ. 3d § 1796.1 (noting that “most [courts] have recognized that discovery [of unnamed class members] is proper.”).

Significantly, in federal court, “[d]efendants must have leave of court to take depositions of members of a putative class, other than the named class members – after first showing that the discovery is both necessary and for a purpose other than taking undue advantage of class members.” *Baldwin & Flynn v. Nat’l Safety Assocs.*, 149 F.R.D. 598, 600 (N.D. Cal. 1993) (citing *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 340-41 (7th Cir. 1974)). More particularly, in *Cornn v. United Parcel Service*, 2006 WL 2642540 (N.D. Cal. Sept. 14, 2006), the court noted that four elements must be met in order to take discovery from absent class members, observing:

Where such discovery has been allowed, courts have required the proponent to demonstrate that (1) the discovery is not sought to take undue advantage of class members or with the purpose or effect of harassment or altering membership in the class; (2) the discovery is necessary at trial of issues common to the class; (3) responding to the discovery requests would not require the assistance of counsel; and (4) the discovery seeks information not already known by the proponent. (*Id.* at *2.)

“In addition, [federal] courts consider the need for efficiency and economy before ordering discovery.” *Id.* “Applying these principles,” some federal “courts have found the burden on the defendant to justify discovery of absent class members by means

of a deposition is particularly heavy.” *Id.* See also *Baldwin & Flynn*, 149 F.R.D. at 600 (noting that such depositions are appropriate only in “special circumstances.”). For example, in *Baldwin & Flynn*, the defendants sought pre-certification depositions of 12 to 20 unnamed class members in a putative consumer class action against the sellers of household air and water filtration systems involving claims of fraud, unfair competition and false advertising. See *id.* at 599-600. The defendants claimed that “they need[ed] to provide evidence for the court that the plaintiffs’ claims do not have common issues of fact and law[.]” *Id.* at 601. The defendants in *Baldwin & Flynn* “claim [ed] that th[e] case [wa]s not based on written materials, but on verbal inducements[.] and, thus, “each plaintiff may have relied on a different ‘pitch’ from a different person.” *Id.* The plaintiffs responded that “the allegations of the[ir] complaint and supporting declarations provide[d] enough information to permit the court to decide whether to certify the class.” *Id.* at 600 (citations omitted). Ultimately, the court concluded that the defendants “failed to demonstrate the need for depositions of unnamed class members.” *Id.* at 601. See also *In re FedEx Ground Package Sys., Inc. Emp. Prac. Litig.*, 2007 WL 733753, * (N.D. Ind. Mar. 5, 2007) (“FedEx contends that the discovery will be relevant to issues of commonality, typicality, and [adequacy]. While this Court agrees the discovery will certainly be relevant to issues of class certification,” the law “requires that the discovery be necessary” which requires an “actual need.”).

Other federal courts have similarly concluded that, “[a]bsent a strong showing of necessity, discovery of absent class members generally will be denied.” *In re Worlds of Wonder Sec. Litig.*, 1992 WL 330411, *2 (N.D. Cal. July 9, 1992) (quotations omitted). *In re Worlds of Wonder Sec. Litig.* involved a situation where the defendants sought to take the depositions of several unnamed class members because they felt that the depositions may reveal a lack of reliance and materiality in connection with fraud claims. *Id.* at *4. Noting that reliance was an element to one of the plaintiffs’ claims, the court also emphasized that there are instances in which reliance is presumed. *Id.* at *4-5. The court concluded that the “[d]efendants seek to misuse the rebuttable presumption as an excuse for absent class member discovery.” *Id.* at *5. According to the *In re Worlds of Wonder Sec. Litig.* court, “[e]vidence of non-reliance by individual class members could not yet be discerned by depositions” because “[s]uch evidence is a matter to be adjudicated after a trial of common issues of liability.” *Id.* at *6 (N.D. Cal. July 9, 1992) (citations omitted). Thus, because the defendants “failed to show the necessity for this

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highly irregular discovery” and because “[t]he information which they supposedly s[ought wa]s available elsewhere,” the defendants were not allowed to take the depositions of unnamed class members. *Id.*

Federal courts have also recognized that “discovery of anecdotal evidence bearing upon issues common to the class is not in itself an adequate justification for ordering depositions of absent class members.” *Cornn v. United Parcel Serv., Inc.*, 2006 WL 2642540, *4 (N.D. Cal. Sept. 14, 2006). As the *In re Worlds of Wonder Sec. Litig.* court explained, “[s]uch evidence is a matter to be adjudicated after a trial of common issues of liability.” 1992 WL 330411, *6 (N.D. Cal. July 9, 1992). As the Ninth Circuit has reasoned, “[t]he fact that a defendant may be able to defeat the showing of causation [or reliance, etc.] as to a few individuals does not transform the common question into a multitude of individual ones.” *Blackie v. Barrack*, 524 F.2d 891, 906 (9th Cir. 1975).

Furthermore, depositions of unnamed class members are not likely to be ordered “where it appears that interrogatories or a questionnaire would be suitable alternatives.” *Cornn v. United Parcel Service, Inc.*, 2006 WL 2642540, *4 (N.D. Cal. Sept. 14, 2006). In *Cornn*, the court refused to allow the defendant to take the depositions of absent class members because there were other suitable alternatives – such as interrogatories or a questionnaire – that were available. *See id.* at *2-3. Notwithstanding the heavy burden on parties seeking to take depositions of unnamed class members in federal court, such depositions are far more likely to be allowed where such unnamed class members have submitted declarations in support of motion for class certification or otherwise injected themselves into the action. *See, e.g., Moreno v. Autozone, Inc.*, 2007 WL 2288165, *1 (N.D. Cal. Aug. 3, 2007) (allowing depositions of class members who “injected themselves” into the litigation with declarations submitted in support of class certification); *Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Authority*, 2006 WL 2588710, *2-4 (D.D.C. 2006) (permitting depositions of class members who submitted declarations in support of discovery motion).

By contrast to the requirements applicable in federal court, the burden on parties seeking to take depositions of unnamed class members in state court is very low. Although it is necessary to obtain an order allowing interrogatories to be served, *see* Cal. R. Ct. 3.768(c), Rule 3.768(a) of the California Rules of Court specifically authorizes depositions of

unnamed class members. Cal. R. Ct. 3.768(a). *See also* Weil & Brown, Cal. Prac. Guide: Civ. Proc. Before Trial (The Rutter Group 2009), ¶¶ 8:463.1, 14:137-14.137.2. Depositions of absent class members can only be limited by a motion for a protective order. Cal. R. Ct. 3.768(b) (“A party representative or deponent or other affected person may move for an order prohibiting or limiting depositions of unnamed class members.”); *accord* Weil & Brown, *supra*, at ¶ 8:463.3; 27B Cal. Jur. 3d Discovery and Depositions § 302 (Westlaw 2009) (citing *So. Cal. Edison v. Superior Court*, 7 Cal.3d 832 (1972)).

In deciding whether to limit such discovery, California state courts “must consider” the “relevant factors,” including: “(1) the timing of the request; (2) the subject matter to be covered; (3) the materiality of the information being sought; (4) the likelihood that class members have such information; (5) the possibility of reaching factual stipulations that eliminate the need for such discovery; (6) whether class representatives are seeking discovery on the subject to be covered; and (7) whether discovery will result in annoyance, oppression, or undue burden or expense for the members of the class.” Cal. R. Ct. 3.768(d)(1)-(7). *See also Nat’l Solar Equip. Owners’ Ass’n, Inc. v. Grumman Corp.*, 235 Cal.App.3d 1273, 1284 (1991) (allowing a “reasonable” number of depositions from unnamed plaintiffs). From a practical standpoint, as long as it does not appear that the depositions are being taken for the purpose of harassing members of the class, such discovery is likely to be allowed in state court.

While the rules and requirements for class certification and class discovery are similar in both state and federal court, there are many significant distinctions, including the standards applicable to taking depositions of unnamed class members. Although such nuances will likely never dictate whether it is strategically more or less desirable to proceed in a particular forum opposed to another, it is important for any class action litigator to understand how and when depositions of unnamed class members may be taken in state and federal court as such evidence is increasingly critical to seeking or opposing class certification.

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