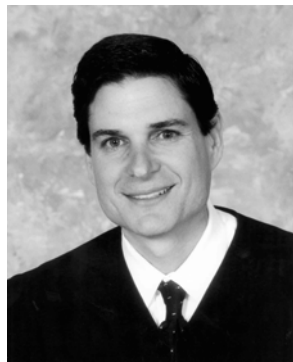


Q&A with the Hon. Peter J. Polos

by Linda A. Sampson



[Editors' Note: Linda Sampson met with Judge Peter J. Polos for this judicial interview. Judge Polos was appointed to the Orange County Superior Court by Governor Gray Davis in 2001 and, was, and is, the county's youngest sitting jurist. Judge Polos is a member of the ABTL Judicial Advisory Board -- one of many organizations to which he meaningfully contributes.]

Q: Why did you decide to become a Judge?

A: From the very beginning of my career, I knew I wanted to be a judge. I have always been able to see "both sides of the story," so it was more natural for me to be able to hear and consider both sides, rather than be a tough advocate for one side or the other.

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A Lawyer's Ethical Obligation Upon Receiving Inadvertently Disclosed Privileged Documents: Avoiding Malpractice, Sanctions, and Disqualification in the Face of Uncertain Rules

by Scott B. Garner and Isabelle M. Carrillo

Litigators preparing for trial often look for that smoking gun document that can turn the odds dramatically in their client's favor. But what if that smoking gun document arrives inadvertently from the other side's lawyer, and is patently or even arguably privileged and confidential? Existing case law does not provide clear guidelines on what a lawyer should do when he comes into possession of such a document. The California Supreme Court has taken up the issue in *Rico v. Mitsubishi* (4th App. Dist. 2004) 116 Cal. App. 4th 51 (*review granted*, June 9, 2004), a Fourth Appellate District case that discusses two seemingly divergent decisions of other districts. Until the Court renders a decision, however, and to the extent the Court does not resolve all of the troubling and inconsistent issues, litigators must rely on these two divergent cases and try to exercise sound moral judgment to avoid court ordered sanctions and/or disqualification, running into trouble with the State Bar, and subjecting themselves to potential malpractice liability to their clients.



Scott Garner



Isabelle Carrillo

• **Aerojet and the Risk of Not Using the Privileged Document**

The first case *Rico* addresses is *Aerojet-General Corp. v. Transport Indem. Ins.* (1st App. Dist.

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President's Message by Hon. Sheila B. Fell



Critical to your practice of law is the integrity of your word as an attorney. It is equally as important as the case studies in law school and your knowledge of the statutes. Some years ago, most of the bars in the United States added the separate Legal Ethics examination to the requirements for becoming licensed to practice law. There are few attorneys today who did not take the Professional Responsibilities Exam. Further, the continuing education requirements for re-licensing in the bar include certification of ethics hours.

An attorney's reputation is what allows the attorney's colleagues, and the judges (and juries) trying the cases, to rely (or not) on the word of that attorney. The professional courtesy is afforded initially because of the attorney's membership in the California State Bar, but that solid gold reputation can be lost through a number of bad choices, and once lost, indelibly marks the tarnished attorney and that attorney's firm.

The profession of law is governed by many rules, those inscribed and those that pass by word of mouth. They are equally the hallmarks of the legal profession. Within the strictures of affording full representation to a client is the binding obligation to proffer no evidence or theory that violates an attorney's ethical code. An attorney cannot take a shortcut or enter into an unauthorized (or illegal) activity in support of a client's case under the guise of vigorously supporting the client's legal rights. The temptation to "push" this rule foreshadows a lost reputation.

The standard for completing law school and then passing the bar is very high. So, too, should the standard be equally high for the daily practice of law. The information in a declaration, whether substantive facts or a proof of service, is representative of the law firm. If the declaration is impeached, both the integrity of the declarant and the law firm are demeaned. The proof of service illustration is merely an example of the fragility of one's reputation and integrity, and it is meant to show that each act performed in the practice of law has far reaching consequences.

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Federal Multidistrict Litigation: Pending Legislation and Some Thoughts on the Problem of Parallel MDL and State Court Proceedings

by Martha K. Gooding and Ryan E. Lindsey



Martha Gooding



Ryan Lindsey

The multidistrict litigation (“MDL”) mechanism was added to the federal procedural repertoire in 1968 with the enactment of 28 U.S.C. § 1407, which provides that “[w]hen civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.” The statute created the Judicial Panel on Multidistrict Litigation and empowered it to order the temporary transfer of cases to a single district court -- either on its own initiative or on the motion of a party -- when such a transfer “will be for the convenience of the parties and will promote the just and efficient conduct” of the action. The Panel, consisting of seven appellate and district judges appointed by the Chief Justice of the United States, both determines whether a transfer is appropriate and selects the transferee district.

On its face, the statute limits the purpose of the transfer to “pretrial proceedings.” (28 U.S.C. § 1407.) In 1978, however, Judge Friendly observed, “history has indicated that once the limited transfer has occurred, the transferor district is not likely to see the case again.” (*In re New York City Mun. Sec. Litig.* (2d Cir. 1978) 572 F.2d 49, 51.) That phenomenon presumably resulted from a number of factors, including settlements, summary judgment dispositions, and party stipulations to try the case before the transferee judge. But another factor -- “self-transfer” -- also played a role: for years, as coordinated pretrial proceedings drew to a close, MDL transferee courts simply transferred the cases to themselves for trial under 28 U.S.C. § 1404(a).

That approach had some practical appeal: after dealing with all manner of pretrial motions for years, the transferee court was

familiar with the case, the parties, and the issues, and it arguably was in a better position than the originally-assigned judge to efficiently try the case. But in 1998, the Supreme Court found the practice of “self-transfer” was inconsistent with the plain, unconditional command of Section 1407 that the transferred case “shall” be returned to the originating court. (*Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach* (1998) 523 U.S. 26.)

The issue of self-transfer has caught the attention of Congress. Representative James Sensenbrenner of Wisconsin, Chair of the House Judiciary Committee, has sponsored the Multidistrict Litigation Restoration Act of 2005, House Bill No. 1038 (2005) (“H.B. 1038”). As drafted, the bill would amend Section 1407 to effectively reverse the Supreme Court’s ruling in *Lexecon*. It would allow the transferee court to retain jurisdiction over a case for trial or to transfer the action to another district court “in the interest of justice and for the convenience of the parties and witnesses.” (H.B. 1038.) The bill passed the House of Representatives on April 19, 2005 on a voice vote and moved on to the Senate, where it currently awaits action by the Senate Judiciary Committee. Keep an eye out for future developments at www.senate.gov.

Another interesting issue posed by the MDL procedure comes in the form of parallel state court actions. By definition, federal MDL procedure applies only to federal actions. Yet, if an issue or claim is pervasive enough to generate multiple federal cases, it is likely to spawn a slew of state court actions, too. It is easy to see how a multitude of state cases pending in a variety of states, each with their peculiar procedural and substantive rules, could eliminate -- or at least seriously undermine -- the advantages gained by coordinating the federal actions before a single judge.

One solution is to seek a stay of the state court actions pending conclusion of the MDL proceedings. The rationale for a stay is to avoid duplication of effort, unnecessary expense and burden, and the potential for inconsistent rulings. In California, “[i]t is black letter law that, when a federal action has been filed covering the same subject matter as is involved in a California action, the California court has the discretion but not the obligation to stay the state court action.” (*Caiafa Professional Law Corp. v. State Farm Fire & Cas. Co.* (1993) 15 Cal. App. 4th 800, 804.)

Another approach is to ask the MDL court to enjoin the state court proceedings. As a general matter, “[a]

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transferee court has limited authority to enjoin proceedings in state tribunals when such proceedings could interfere with the transferee court's management of multidistrict litigation." (15 C. Wright, A. Miller and E. Cooper (2004 Supp.) *Federal Practice & Procedure* § 3866 at 326.) The Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." (28 U.S.C. § 2283; *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.* (3d Cir. 1998) 134 F.3d 133, 144 [affirming denial of injunction; Anti-Injunction Act is "an absolute prohibition against enjoining State Court proceedings, unless the injunction falls within one of three specifically defined exceptions" (internal citations omitted)].) The three statutory exceptions embodied in Section 2283 are strictly construed to avoid unduly expanding the power of federal courts over their state court counterparts. (*Id.*) That said, if a party can show that an injunction comes within one of the three exceptions, federal courts acknowledge that they have "positive authority to issue injunctions of state court proceedings" under the All-Writs Act. (*In re GMC Pick-Up Truck*, 134 F.3d at 143.) Indeed, in recent years, several federal courts have exercised this power to enjoin parallel state court proceedings. (*See e.g., In re Bridgestone/Firestone* (7th Cir. 2003) 333 F.3d 763; *In re Diet Drugs* (3d Cir. 2002) 282 F.3d 220; *Newby v. Enron Corp.* (5th Cir. 2002) 302 F.3d 295.)

Finally, if it is not possible to enjoin the state court actions, and the state courts are disinclined to stay the actions themselves, lawyers faced with duplicative federal and state actions should consider the possibility of invoking, for multiple state court actions in a single state, any applicable state "MDL" procedure. California law authorizes "consolidation" of multiple cases pending in the same county and "coordination" of cases pending in multiple counties -- assuming the actions share a common question of fact or law. (Cal. Civ. Proc. Code §§ 404-404.8, 1048.) Taking advantage of such state procedures would not, of course, eliminate the risks posed by simultaneous state and federal proceedings; but it could at least reduce the number of state courts simultaneously addressing the same issues.

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When Does a *Lis Pendens* Provide Constructive Notice? An Unresolved Issue



Most attorneys reasonably believe a properly recorded *lis pendens* provides constructive notice upon recording. Unfortunately, this issue is not clearly settled.

The Orange County Recorder's View of Recording a *Lis Pendens*

This author recently took the deposition of the person most knowledgeable from the Orange County Recorder's Office, who testified a *lis pendens* is deemed "recorded" (after proper presentation) immediately when the office's computer generates a record number and time for recording. The office's computer typically generates this information while the customer is standing at the recorder's filing window. Before the customer leaves, the recorder prints a label containing the recording information and places the label on the instrument. The recorder scans the instrument and returns the labeled instrument to the customer.

The California Courts of Appeal's View of Recording and Constructive Notice

There are two significant cases addressing when a *lis pendens* provides constructive notice: *Hochstein v. Romero* (1990) 219 Cal.App.3d 447 and *Lewis v. Folk-sam General Mutual Insurance Society* (1995) 30 Cal. App.4th 1850. Both opinions stand for the proposition that a properly recorded *lis pendens* does **not** provide constructive notice until the recorder "indexes" the *lis pendens*.

The following quotation from *Lewis* explains the court's opinion:

"It is a common misperception, which the trial court evidently shared, that a recorded document imparts constructive notice from the moment it is recorded. That is not the law. The operative event is actually the indexing of the document, and that did not occur until the day after the Lewises acquired title.

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The most recent in a long line of authorities stating this principle is *Hochstein v. Romero* (1990) 219 Cal.App.3d 447, 268 Cal.Rptr. 202: '[B]efore the constructive notice will be conclusively presumed, the document must be 'recorded as prescribed by law.' (Civ. Code § 1213.) A document not indexed as required by statute (see Gov. Code §§ 27230-27265), does not impart constructive notice because it has not been recorded 'as prescribed by law.' (*Id.* at p. 452, 268 Cal.Rptr. 202.) The court explained the principle, citing such authorities as Witkin and Miller & Starr: 'The policy of the law [requiring recordation and indexing] is to afford facilities for intending purchasers . . . in examining the records for the purpose of ascertaining whether there are any claims against [the land], and for this purpose it has prescribed the mode in which the recorder shall keep the records of the several instruments, and an instrument must be recorded as herein directed in order that it may be recorded as prescribed by law. If [improperly indexed], it is to be regarded the same as if not recorded at all.' [Citation.] Thus, it is not sufficient merely to record the document. 'California has an 'index system of recording,' and *correct indexing is essential to proper recordation.* [Citations.] [Citations.]" (Original emphasis.) (*Hochstein v. Romero, supra*, 219 Cal.App.3d at p. 452, 268 Cal.Rptr. 202.)

The reason for this rule is obvious. The courts have long recognized that constructive notice is a 'fiction' (*Richardson v. White, supra*, 18 Cal. at p. 106), so if a recorded document is going to affect title there must at least be a way for interested parties to find it: 'The California courts have consistently reasoned that the conclusive imputation of notice of recorded documents depends upon proper indexing because *a subsequent purchaser should be charged only with notice of those documents which are locatable by a search of the proper indexes.*' (Emphasis added.) (*Hochstein v. Romero, supra*, 219 Cal. App.3d at p. 452, 268 Cal.Rptr. 202.)" *Lewis v. Folksam General Mutual Insurance Society, supra*, 30 Cal.App.4th 1850, 1866-1867.

Interestingly, it can take several days (and in some counties several weeks) for the recorder to index a

properly recorded document. Accordingly, under the present case law, a party who properly records a *lis pendens* does not have any protection until the recorder indexes the *lis pendens*. The recording party has no ability to take any steps to increase the speed at which indexing takes place.

The Legislature's View of Recording and Constructive Notice

Code of Civil Procedure section 405.24 states as follows:

"Section 405.24. Constructive notice; time of recording; rights and interests relate back to date recording

FROM THE TIME OF RECORDING THE NOTICE OF PENDENCY OF ACTION, a purchaser, encumbrancer, or other transferee of the real property described in the notice ***shall be deemed to have constructive notice of the pendency of the noticed action*** as it relates to the real property and only of its pendency against parties not fictitiously named. The rights and interest of the claimant in the property, as ultimately determined in the pending noticed action, ***SHALL RELATE BACK TO THE DATE OF THE RECORDING OF THE NOTICE.***" (Emphasis added.)

Hochstein and *Lewis* held a *lis pendens* does not impart constructive notice upon recording. *Code of Civil Procedure* section 405.24 states just the opposite. Surprisingly, neither *Hochstein* nor *Lewis* cite to *Code of Civil Procedure* section 405.24. Accordingly, until an appellate court resolves this issue, practitioners are left with no clear answer to when a properly recorded *lis pendens* provides constructive notice.

Arguably, Code of Civil Procedure Section 405.24 Controls

To the extent there is a conflict between case law and a specific *Code of Civil Procedure* section, *Code of Civil Procedure* should control. *Code of Civil Procedure* section 4 provides as follows:

"Establishment of law; liberal construction

RULE OF CONSTRUCTION OF CODE. ***The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. THE CODE ES-***

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TABLISHES THE LAW OF THIS STATE RESPECTING THE SUBJECTS TO WHICH IT RELATES, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice.” (Emphasis added.)

Neither *Hochstein* nor *Lewis* cited to or interpreted *Code of Civil Procedure* section 405.24. Accordingly, these cases may not be binding because section 405.24 establishes the law as to when a *lis pendens* provides constructive notice.

There are several annotations to *Code of Civil Procedure* section 405.24 which state “recording” is the significant date for providing constructive notice, and “indexing” is not even mentioned in those annotations. See, *Moore v. Schneider* (1925) 196 Cal. 380, 392 [“**The filing for record with the recorder of a notice of the pendency of an action is the mode substituted by statute for constructive notice to all the world of the pendency of such action . . .**”].

It is important to note the comments to *Code of Civil Procedure* section 405.24 (which were added to the *Code of Civil Procedure* in 1992) state: “[t]he **second sentence of this section is new to the lis pendens statute.**” (Emphasis added.)

The second sentence of section 405.24 provides: “The rights and interest of the claimant in the property, as ultimately determined in the pending noticed action, **SHALL RELATE BACK TO THE DATE OF THE RECORDING OF THE NOTICE.**” (Emphasis added.) Accordingly, *Code of Civil Procedure* section 405.24 probably supersedes the holding in *Hochstein v. Romero, supra*, 219 Cal.App.3d 447, because *Code of Civil Procedure* section 405.24 was amended after the opinion was decided.

Although *Lewis v. Folsam General Mutual Insurance Society, supra*, 30 Cal.App.4th 1850 was decided after section 405.24 was added to the *Code of Civil Procedure*, apparently none of the attorneys in that case (or the court) were aware of section 405.24 or its additional language regarding recording. In fact, the *Lewis* opinion is based entirely on pre-1992 case citations (see, analysis of indexing issue on pages 1866 through 1868 of the opinion) and may have been decided incorrectly.

Hochstein and *Lewis* both rely on *Civil Code* section 1213, which states that before a conveyance provides constructive notice it must be “recorded as prescribed by law.” Then, without analysis, both courts held that a *lis pendens* which is not indexed as required by statute does not impart constructive notice because it has not been recorded “as prescribed by law.” See, *Hochstein v. Romero, supra*, 219 Cal.App.3d 447, 452 and *Lewis v. Folsam General Mutual Insurance Society, supra*, 30 Cal.App.4th 1850, 1866. These opinions failed to apply the rule that specific statutes prevail over general statutes. *Medical Board of California v. Superior Court* (2001) 88 Cal.App.4th 1001, 1013. *Code of Civil Procedure* section 405.24 specifically addresses when a *lis pendens* provides constructive notice -- **UPON RECORDATION**. Accordingly, *Code of Civil Procedure* section 405.24 should prevail over *Civil Code* section 1213.

Public Policy Considerations

According to *Code of Civil Procedure* section 405.24, constructive notice occurs upon **recording** a *lis pendens*. This law (and the presence of title insurance) ensures: (1) everyone can be protected; and (2) there is certainty and predictability. People can control when they record a *lis pendens*. Upon recording, the recorder’s office labels the *lis pendens*, indicating the date and time the instrument was recorded. There is no confusion as to its effective date. People know that once they properly record a *lis pendens*, the world has constructive notice of whatever the *lis pendens* references. Constructive notice is imputed by law; it is not designed to be actual notice. *Civil Code* section 18. *Code of Civil Procedure* section 405.24, therefore, provides protection to the person who properly records a *lis pendens*.

If a *lis pendens* does not provide constructive notice until a county recorder *indexes* it, people recording a *lis pendens* have no certainty or protection. The public has no control over when the county recorder indexes a *lis pendens*. And a county recorder can take days, even weeks, to index a document, leaving the recording party in jeopardy of losing his place in the race to the record, depending on the workload of the county recorder on any particular day. If indexing, instead of recording, provided constructive notice, there would be no certainty regarding priority in the real estate industry, and parties’ rights would vary from county to county. A comparison of “recorded” documents would not reveal which document had priority; instead, parties would have to weed through the complicated process of deter-

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A WORD FROM OUR SPONSOR

Understanding CPA Reports on Financial Statements

by Claudia Berglund

One of the many challenges attorneys face in conducting business litigation is sorting through the mountains of financial data that is presented by both sides. Much of this data is “internally produced” by the accounting departments of the plaintiff and defendant, but frequently some of it is prepared by independent CPAs. Determining the value of CPA-prepared information requires an understanding of the services provided by the CPA, and the level of responsibility the CPA has taken for the work.

CPAs perform a wide variety of services including tax return preparation, accounting analysis and consulting, serving as expert witnesses on financial matters, and reporting on financial statements. Many non-CPAs perform these services, with the exception of reporting on financial statements. Reporting on financial statements is the unique franchise of the CPA.

The professional standards that govern the financial statement work performed by CPAs are promulgated by the American Institute of Certified Public Accountants (“AICPA”). These standards require CPAs to state the level of responsibility they are taking when they are associated with financial statements. This statement is called the “report” and takes the form of a letter, usually to the board of directors of a company. The report will state the level of services performed, briefly describe the procedures performed, and the conclusion, if any, resulting from those procedures.

The CPA Audit

CPAs are required by the AICPA to report on the highest level of procedures performed, and the highest possible level is an audit in accordance with Generally Accepted Auditing Standards (“GAAS”). All publicly-held companies and many privately owned companies with significant outside financing are required to have annual audits. Many privately owned companies will choose to have an audit performed each year as a matter of good corporate governance.

While many people will use the word “audit” to describe a variety of procedures ranging from casual checking to extensive examination, when a CPA performs an audit, a specified set of procedures must be

performed as required by GAAS. These procedures can take hundreds (or thousands) of hours depending upon the size of the company under audit. Regardless of the result of these procedures, the CPA must issue a report on the audit.

- *“Clean” Opinion*

The hoped for, and most common, result of an audit is a “clean” (also known as “unqualified”) opinion on the financial statements. A “clean” opinion concludes *“In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of (the company) at December 31, 200X and the results of its operations and its cash flows for the year then ended in accordance with accounting principles generally accepted in the United States.”*

The audit opinion is as close as CPAs ever get to expressing positive, unqualified assurance that the financial statements covered by the audit are right. It means that the auditor has tested the financial information prepared by the company by comparing it to supporting documents (bank statements and invoices, for example), by corresponding with banks, lenders, customers and attorneys, and performed other work required by the auditing standards. The auditor evaluates the client’s accounting methods for compliance with Generally Accepted Accounting Principles (“GAAP”). The auditor determines that the financial statements include all of the information required under GAAP, either in the statements themselves, or in the footnotes.

- *Qualified Opinion*

On some occasions auditors express opinions that are not “clean”. These opinions can be either qualified or adverse. Qualified opinions will occur when the auditor identifies a departure from GAAP (or some other error in the financial statements) that the company *does not correct*. The qualified opinion will state the nature of the departure or error, and usually will describe the impact of the problem. The qualified opinion is expressed as *“except for the effects of [the departure] ...”* allowing the user of the financial statements to rely on the rest of the information in the financial statements.

- *Adverse Opinion*

Very rarely an auditor will conclude that the impact of an error or departure from GAAP is so material or pervasive that the financial statements cannot be relied upon. In this circumstance, the auditor will issue an adverse opinion, that states, *“the financial statements re-*

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ferred to above do not fairly present...” In such cases, the auditor takes no responsibility for the financial statements.

- **Disclaimer of Opinion (No Opinion)**

Another very unusual report that can result from an audit is a disclaimer of opinion. Auditors will disclaim an opinion when limitations on the scope of their audit work preclude them from performing the procedures required by GAAS. These limitations may arise from the company’s failure to produce necessary documentation, or representations, or from a lack of necessary evidence from any source. In a disclaimer, the auditor states that they *“cannot and do not express any opinion on the financial statements referred to above.”* As in the case of adverse opinions, the auditor takes no responsibility for the financial statements.

Other CPA Reports on Financial Data

CPAs also perform reviews and compilations of financial statements. These services are governed by the AICPA’s Statements on Standards for Accounting and Review Services (the “SSARs”). These services are usually significantly less costly than audits, and many closely-held businesses will opt for a review or compilation since they are less costly and less intrusive and still yield a “CPA-prepared” financial statement.

- **Financial Statement Review**

When a CPA performs a review of financial statements, the professional standards require that they make inquiries of management and perform analytical procedures on the financial information. The object of these procedures is to obtain sufficient information to permit the CPA to express negative assurance on the financial statements. A typical review report will conclude:

“A review consists principally of inquiries of company personnel and analytical procedures applied to financial data. It is substantially less in scope than an audit in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, we do not express such an opinion.

Based on our review, we are not aware of any material modifications that should be made to the accompanying financial statements in order for them to be in conformity with generally accepted accounting principles.”

Since the CPA has expressed only limited assurance on the financial statements, the user should place only limited reliance on them. Given the everyday use of the word “review,” a statement by a CPA that information has been “reviewed” should be clarified.

- **Financial Statement Compilation**

When a CPA compiles financial statements for a company, they perform no procedures to determine if the underlying financial information is correct. A CPA must correct obvious errors if they are aware of them, but has no obligation to determine if errors exist. A compilation is simply the organization of company provided information in the form of financial statements. Compilations frequently lack the footnotes and cash flow statements required by GAAP. A CPA need not even be independent to perform a compilation, but if they are not independent, they must so state in the compilation report.

A compilation report typically concludes:

“A compilation is limited to presenting in the form of financial statements information that is the representation of management. We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them.”

Companies will often choose compilations because they are relatively inexpensive and because they lack the in-house expertise to prepare a financial statement. Users of compilations, or other unaudited data, may only rely on those statements to the extent they feel they can rely on the management of the company. The CPA takes no responsibility for the reliability of compiled financial statements.

- **Other Non-Audit Services**

Beyond their roles in preparing financial statements, CPAs can perform *agreed upon procedures* (also referred to as “AUP”). These usually involve performance of specific steps or tests, and will result in a report on the results of those procedures, with a *disclaimer* of opinion because a complete audit was not performed. CPAs (and others) prepare and sign tax returns, without the responsibility to verify any of the information presented on the return.

CPAs (and others) can serve as financial consultants and will frequently prepare reports for their clients. A CPA prepared consulting report will usually be re-

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A WORD FROM OUR SPONSOR

Electronic Media in the Modern Trial

by Charles Wright - The Data Company

In the wake of Hurricane Katrina, records management takes on a whole new light. Many firms employ backup and safeguard measures for their data, but few ever take catastrophe into consideration when planning. There are only a few places in the United States that are free from natural disasters. The West Coast has earthquake concerns, the Coastal areas have hurricanes, and much of the Central and Mid-West US face tornados. In addition to natural disasters, there is also the growing threat of terrorism. While most of us never think the worst could happen, it is imperative to prepare.

What is records management?

Records management is a process of safeguarding and protecting firm and client records. Fortunately for law firms, technology allows us to preserve most records in an electronic manner. Most attorneys equate documents to records management. While most files in a law firm are comprised of documents, there are other files which need safeguarding as well.



A law Firm in Slidell, LA

Documents.

Paper documents are the most logical and easy records to preserve electronically. After Hurricane Katrina, many New Orleans and MS Gulf Coast firms lost all their files. While some had contingency plans, most were not prepared for this type of devastation. Once paper files are destroyed, it is nearly impossible to recover or restore them. Losing files permanently is probably the greatest fear of law firms. By implementing an electronic document management program, you can avoid losing important documents. Electronic

document management is not as difficult as some perceive it to be. There are basically two systems that I recommend to firms for preserving documents -- day-to-day file management and discovery/case file management. Setting up a management program for day-to-day files is fairly easy. By day-to-day files, I am referring to files produced in-house on a daily basis (e.g. letters, pleadings, email, etc.) There are several programs on the market designed specifically for law firms and document management. Programs such as Worldox, Prolaw, etc., are excellent for managing day-to-day documents. Typed documents such as pleadings, emails, correspondence, etc., can easily be saved directly into these programs. Small to medium paper files can be imported into these programs via a document scanner. A medium duty scanner can be purchased at a reasonable cost and work well for managing daily files. Once files are imported into the document management system, they then can be indexed and easily retrieved when needed.

Larger case files, such as boxes of documents produced in discovery, are usually too large for a law firm to handle in-house. These larger files can be outsourced to a document management vendor and then imported into a dedicated document management program such as Summation or Concordance. Using Summation or Concordance not only allows you to manage your large exhibit/document files, but also allows others working on the case instant access to case material.

Video/Audio Files.

Very few attorneys think of video files when it comes to records management. Most firms store their video depositions in boxes located in a file room. Videotapes are extremely vulnerable to destruction -- they can easily be destroyed by water, humidity, heat, VCR's, human error, etc. Once a videotape is destroyed or lost, it is usually impossible to replace. Most legal video service companies only archive tapes (if they archive at all) for a certain period of time and then they are disposed of. Losing a key deposition or video file can be detrimental to a case. Fortunately, converting video files to electronic files is easier and less expensive than it used to be. Video files can be converted to digital MPEG files and stored on CD-ROM, DVD-ROM, a data server, or even an on-line video repository. Digital video files preserve not only the file itself, but the quality of the video at the time of conversion.

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Photographs and X-Rays.

As mentioned earlier, there is little evidence that cannot be preserved digitally. Not only can photographs be scanned and converted to digital image, but also medical X-Rays. Due to the cost of quality X-Ray scanners, not many firms specialize in X-Ray scanning. However, since medical records are highly sensitive and protected by HIPAA, there is a great need to preserve these records and such firms do exist.

Storage.

Once data is digitally converted, the issue of storage then arises. The most common place to store digital files is on the firm's data server. This is a great "first line of defense." Storing electronic records on a server is better than your local hard drive due the chance of your computer crashing. Servers are safe places to store files, but should not be the only place they are stored. Law firms should and need to employ a "second line of defense." Many firms back up their data onto data tapes and then store the tapes on-site. This is much like having a spare key to your car and keeping it in your car! Data back-up plans should incorporate either an off-site storage facility or an on-line system. Your data back-up storage facility should be located somewhere outside your office, preferably in a different geographic location. The primary purpose of your back-up facility is to have your data located separately from its host location where it will be secure.

Law firms with bigger IT departments can also set up systems which replicate data to an off-site location. An advantage of this system is the data is replicated in real-time to a back-up facility, however the biggest drawback to a system like this is cost and availability.

Another common back-up solution is using a vendor which houses data. This solution is easier to set up than a replication system, and is cheaper to implement as well. As files are created, they are sent to the vendor for storage. From that point on, you can send them your data via CD-ROM, DVD-ROM, hard drives, or it can be uploaded directly to the vendor if they have that capability. This solution also allows counsel, co-counsel, or staff members' full access to their files and gives them the ability to retrieve data remotely in case of catastrophe.

Final Thoughts.

We all get caught up in busy day-to-day activities, and don't think about the worst happening to us -- it

usually doesn't, but we MUST be prepared. Records management is a commitment -- a life-long commitment that could save your firm even in the worst catastrophe.

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-Interview: Continued from page 1-

Q: Do you have any regrets about leaving the practice of law and becoming a judge?

A: None. Being a judge is everything that I had hoped for, and more.

Q: What do you like about being a judge?

A: I love all aspects of it. The attorneys and their clients who appear before me are looking to me to administer justice. That is a great responsibility but also a great honor and privilege to do so. I also enjoy presiding over a variety of different types of cases and hearing various types of arguments. Although each case is different in and of itself, most lawyers don't get the opportunity to participate in a wide array of cases, from criminal cases, to drug cases, to patent and trademark cases. The variety is exciting. Also, I am a very decisive person and enjoy the ability to hear the evidence, make a decision and stand by that decision. Finally, I really enjoy working with the parties to try to find an amicable solution that works for everyone. I know that every case can't settle, but I feel like I somehow failed if I can't "de-personalize" the case for the clients and introduce a solution.

Q: Have you developed any particular preference for matters and arguments before you?

A: I really enjoy civil business litigation. When I was practicing law, most of the attorneys I knew were tort attorneys. Now as I judge, I have the opportunity to hear many complex commercial cases and I find them to be very interesting. Although I also enjoyed my time in the criminal division and in drug court, my main interest is in the civil arena.

Q: Do you have any pet peeves?

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A: I think most people would agree that I am pretty easygoing. I do, however, get annoyed at attorneys who do not seem to value the jury's time. Although I recognize that emergencies happen, I have very little tolerance for lawyers who are late -- particularly when they make it a recurring habit. I respect the jury system and I recognize that these men and women are giving up their free time to perform this service. What they do not need (and what the entire judicial system does not need) is to have jurors sitting around waiting. Toward that end, I try to minimize delays to the juries. For instance, although I acknowledge the occasional need for a side-bar during trial, most of the time, I am right with the attorneys and already know what they plan on telling me. In those instances, I will make a note on the record and deny the request for a side-bar. If the requesting attorney still believes that one is necessary, we can revisit the issue when the jury has left for the day or for lunch.

Q: You are given many accolades for your ability to creatively settle cases. To what do you attribute your success in settling cases?

A: Often the parties can get very emotional over their case. To overcome this hurdle, it is often important for me, the parties, and their respective attorneys, to de-personalize the case and look at it from a more logical viewpoint. Usually there is some middle ground if the parties are open to exploring options. I also try to do my best to streamline the process. If I can propose something that alleviates additional time and expense to the parties, I try to do so. For instance, I presided over a partition action, which involved dividing the assets of a gay couple. The parties were contentious and there were a lot of emotions involved. The parties certainly could have spent a lot of time and money creating an inventory of all of their belongings and hiring appraisers to review this list, but it seemed much more efficient for me to preside over this part of the case as well. So my bailiff, my court reporter, and I traveled to the parties' residence and divided all of their possessions right then and there. If there was a dispute over a particular item, I would listen to both sides, their positions would be noted on the record, and I would make a decision. It really worked well.

Q: What qualities do you believe are important to make a good judge?

A: To be a good judge one must be fair and impartial.

A good judge should not tend to lean one way or the other based upon the role he or she played while acting in the capacity of an advocate. I also think a good judge owes it to the parties to attempt to resolve their differences without the necessity of a trial. To do so, a good judge should work at de-personalizing litigation and help the parties reach a resolution. I personally am disappointed when a case goes to trial, not because I don't like trying cases (I do), but because in some way I feel like I let down the parties and their counsel.

Q: Do you miss trying your own cases?

A: I am glad I had the opportunity to try cases as an attorney. I was fortunate; I was given the opportunity to try approximately 15 cases in my 11 years of practice. But trying cases -- both before and during the trial -- took me away from my family for substantial periods of time and that certainly took a toll. Also, while I was advocating for my client, I could always see the other side's position and, for the most part, felt bad for their predicament. Of course, I had to zealously represent my client, but sometimes that made me uncomfortable.

Q: I understand that you are going to be a speaker at the ABTL Annual Seminar this October. Can you share with us a preview of what the seminar and your presentation will entail?

A: As usual, this year's seminar promises to be great. It is entitled "Masters of the Art: Building to the Close," and the fact pattern involves a controversy over patent infringement and trade secret misappropriation. I am actually not a speaker, per se, but rather part of a panel providing guidance and thoughts regarding the closing arguments that will be presented near the end of the seminar. It should be great. I am looking forward to it.

Q: What do you enjoy doing when you are not working?

A: A lot of people know that I am an avid golfer. Besides that, in my free time, I just love to spend time with my wife, Kristie, and my two children, doing everything from participating in Indian Guides camping trips with my son to traveling with my family. This year we traveled to Montana to visit a friend's private dude ranch and spent some time at Bruin Woods, UCLA Alumni Association's family resort in Lake Arrowhead.

Q: If you could choose any job in the world other than a
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judge or lawyer, what job would you choose?

A: As a dream job, I would love to be a professional golfer. Unfortunately, that isn't really in the cards. Besides that, I think I would really enjoy being the Judicial Appointment Secretary. I would love to have a role in helping to pick fair judges. As it is, we have such great judges (especially in Orange County) that I would like to make sure that the tradition continues.

Thank you Judge Polos for your time.

▪ *Linda A. Sampson is Of Counsel in the litigation department in the Orange County office of Morrison & Foerster LLP.*

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The evolution of computerized technology and word processing has spawned an opportunity for the initiation of "paper wars" that can exhibit the character of legal harassment, or possibly, hidden within the reams of paperwork, a legal "gotcha." The "gotcha" author may possibly win the day, but at a serious price to reputation and integrity. The trust and confidence in the lawyer is gone.

The practice of law is an honorable profession. Because of this, we do not look kindly on those few who abuse and demean the collective reputation. Sharp dealing may be the standard for certain high profile salesmen, but it has no place in the practice of law. Even though our number of legal practitioners has burgeoned over the last twenty five years, it must be the common goal to promote and maintain the highest integrity throughout the legal system.

Those of us associated with this most honorable of professions must insure that we leave a professional legacy of honor, civility and integrity. Not only must the experienced lawyers assure that their integrity is maintained, but also they must pass along this important goal to those they mentor. Newer attorneys learn from those who are senior; the senior attorney is naturally the mentor. It is the obligation of each of us to assure that those we teach learn only the highest standards of the profession. Truly the goal of our legacy is to establish and maintain our word as our bond.

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1993) 18 Cal. App. 4th 996. In *Aerojet*, an Aerojet employee inadvertently sent a packet of materials -- which included a memo drafted by an Aerojet attorney describing a witness interview and assessing the witness' potential -- to appellant's counsel. (*Id.* at 1000.) The memo was on plain paper and was not marked privileged or confidential. (*Id.* at 1003.) Based on what he learned from the materials he received, appellant's counsel contacted and then deposed the witness discussed in the Aerojet attorney's memo. (*Id.* at 1000.) When Aerojet's counsel subsequently learned how appellant's counsel discovered the identity of the witness, he moved for sanctions under California Civil Procedure Code section 128.5, which authorizes sanctions for "bad faith actions." (*Id.* at 1005.) Tasked with determining "the duty of an attorney who, without misconduct or fault, obtains or learns of a confidential communication . . .," the court reversed the trial court's order imposing sanctions against appellant's counsel. (*Id.* at 1002.) The First Appellate District court found that appellant's counsel had not acted inappropriately, especially "in the absence of any clear statutory, regulatory or decisional authority imposing a duty of immediate disclosure of the inadvertent receipt of privileged information." (*Id.* at 1006-7.)

The court's decision is based at least in part on a finding that the inadvertently disclosed material was not actually privileged, and that, eventually, Aerojet's attorney would have had to disclose the identity of the witness in any event. (*Id.* at 1004.) Yet the court's language goes farther than just a discussion of whether the documents at issue are privileged. It states that "[t]he attorney-client privilege is a shield against deliberate intrusion; it is not an insurer against inadvertent disclosure." (*Id.*) In addition, in language quoted by later courts, the court characterized appellant counsel's obligations such that: "Once he had acquired the information in a manner that was not due to his own fault or wrongdoing, he cannot purge it from his mind. Indeed, his professional obligation demands that he utilize his knowledge about the case on his client's behalf." (*Id.* at 1006.) So, under *Aerojet*, not only is an attorney not bound to return an inadvertently produced document to the other side, he may have an obligation to his client **not** to return the document, and instead to use it to his client's benefit.

While certainly there is room to argue that the holding of *Aerojet* is narrower than the language quoted above suggests, *Rico* indeed describes the above-quoted language as the **holding** of *Aerojet*. (116 Cal. App. 4th

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at 67.) *Rico*, however, ultimately distinguishes the approach taken in *Aerojet* in favor of one taken by the Second Appellate District in *State Compensation Ins. Fund v. WPS, Inc.* (2nd App. Dist. 1999) 70 Cal. App. 4th 644.

• **State Fund and the Risk of Not Notifying Opposing Counsel**

In *State Fund*, plaintiff's counsel inadvertently produced to defendant's counsel 273 pages of "Civil Litigation Claims Summary" forms, which were marked "Attorney-Client Communication/Attorney Work Product" and were patently privileged. (*Id.* at 648.) Upon receiving the documents, defendant's counsel called plaintiff's counsel inquiring about what materials were included in the boxes. (*Id.*) Plaintiff's counsel informed defendant's counsel that they were documents for use at trial. (*Id.*) Only later did plaintiff's counsel realize what the documents were and demand their return. (*Id.* at 649.) At this point, defendant's counsel refused to return the documents, and plaintiff's counsel sought ex parte relief and sanctions under Section 128.5. (*Id.*) Although defendant's counsel did not look at the documents, the trial court nonetheless sanctioned him for refusing to return the documents in violation of his ethical obligations, as stated in an ABA Opinion relying on the ABA Model Rules of Professional Conduct. (*Id.* at 651.) The Court of Appeal reversed the sanction order on the grounds that the Model Rules have not been adopted in California and, thus, "have no legal force of their own." (*Id.* at 655-6.)

In its decision, the Second Appellate District framed the issue as "what is a lawyer to do when he or she receives through the inadvertence of opposing counsel documents plainly subject to the attorney-client privilege?" (*Id.* at 651.) The court did not expressly disapprove *Aerojet*, but distinguished and limited its holding on several factual grounds, including that no prejudice was shown in that case from the attorney's receipt and use of the inadvertently disclosed documents, and that the alleged confidential materials were not marked and were primarily nonprivileged discoverable information. (*Id.* at 655.) By contrast, in *State Fund* the court did find prejudice, and the documents were marked and patently privileged.

Even aside from these factual distinctions, however, the court's holding in *State Fund* is plainly different from that of *Aerojet*. Specifically, the Second Appellate District in *State Fund* held that "the obligation of an attorney receiving privileged documents due to the inadvertence of another is as follows: When a lawyer who receives materials that obviously appear to be subject to

an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged." (70 Cal. App. 4th at 656.)

• **Rico's Attempted Clarification**

Given what seems to be fairly divergent views of a lawyer's ethical and professional obligation upon receiving what appears to be an inadvertently produced, privileged document, what guidelines should a practitioner follow? In *Rico*, the Fourth Appellate District addressed this very issue, engaging in a lengthy discussion of both *Aerojet* and *State Fund*. In *Rico*, the document in question was a summary that defense counsel prepared about his conference with defense experts at which they discussed the strengths and weaknesses of defendants' technical evidence. (116 Cal. App. 4th at 57.) After obtaining this obviously work product document (either through the accidental dissemination by a court reporter or through some more nefarious manner), plaintiff's counsel used the document to impeach the defense experts' testimony at deposition. (*Id.* at 57-8.) As a result, the trial court ordered the disqualification of plaintiff's counsel. (*Id.* at 58.) The Fourth Appellate District affirmed the order. (*Id.* at 74.) Plaintiff's counsel argued for application of the holding in *Aerojet*, while defendants argued for application of *State Fund*. (*Id.* at 65-6.) The court ultimately adopted the reasoning and holding of *State Fund*, but not before going through pains to distinguish *Aerojet*. First, however, the court reiterated the holding of *Aerojet*, which it stated as: "[A]n attorney who inadvertently discovers a privileged document has no duty to inform opposing counsel, but instead has a duty to use any unprivileged information contained in the document that would be advantageous to his client." (*Id.* at 67.) It then distinguished *Aerojet* by reasoning that, unlike in *State Fund*, the document at issue was not necessarily privileged and there was no evidence of prejudice. (*Id.* at 69.) It then agreed with *Aerojet*'s "narrow application" to a situation where the information at issue is not privileged. (*Id.*)

Although the court gave lip service to *Aerojet*, and attempted to distinguish it rather than disagree with it, it is difficult to read *Rico* and *State Fund* as anything but a repudiation of *Aerojet*. One only needs to look at *Rico*'s own characterization of *Aerojet*'s holding (*i.e.*, that an attorney is ethically bound to use information

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that comes into his possession, even if inadvertently) to realize that *Aerojet*, on the one hand, and *Rico* and *State Fund*, on the other, are incompatible. Either a lawyer has a duty to return and not use a privileged document he receives by mistake, or he does not. Indeed, reliance on *Aerojet* resulted in the disqualification of plaintiff's counsel in *Rico*. Following the conclusion reached in *State Fund* that "[i]n an appropriate case, disqualification might be justified if an attorney inadvertently receives confidential materials and fails to conduct himself or herself in the manner specified above, assuming other facts compel disqualification" [70 Cal. App. 4th at 657], the trial court determined, and the Fourth Appellate District agreed, that disqualification was the only proper remedy in light of the "irreversible" and "unmitigable damage caused by [plaintiff's] dissemination and use of the document." (*Rico*, 116 Cal. App. 4th at 71-73.)

• **Practical Approach To Avoiding Malpractice, Sanctions, and Disqualification**

Pending a decision by the California Supreme Court in *Rico*, and given the state of the law in light of *Aerojet* and *State Fund*, what should an attorney do if he receives a document that he suspects may have been inadvertently produced? First, he must decide whether he actually is dealing with a situation like in *Aerojet*, *State Fund*, and/or *Rico* -- something we call "in the *Rico* zone." That is, he must determine whether he actually received a privileged document by mistake. To make this determination, he must review the document, but only just enough to determine if it appears to be privileged. A stamp saying "attorney-client privilege/work product" may be a good indication, but by no means is the absence of such a stamp the end of the story. If, after looking at the document, it appears to be privileged, and if there is a reasonable likelihood that the document was produced inadvertently, the attorney will find himself in the *Rico* zone. Then the hard part begins.

What would appear to be the more professional and upfront approach would be to follow the Fourth Appellate District and Second Appellate District, in *Rico* and *State Fund* respectively, and immediately stop reading the document, put it aside, and notify opposing counsel. Indeed, failure to follow this approach could lead to disqualification. By the same token, this very approach could land an attorney in hot water with his client if a court opted to follow *Aerojet*, which at least arguably demands that the attorney use the document to his client's advantage. Thus, no matter what the attorney does, he could find himself in trouble. Certainly, for example, taking action that leads an attorney to be disqualified from a pending matter could subject an attorney

to malpractice liability. On the other hand, *Aerojet* suggests that *not* using a document could be a breach of the attorney's duty to his client, which also could subject him to malpractice liability.

In short, then, the attorney who finds himself in the unfortunate position of having received, possibly inadvertently, a document that appears to be privileged is caught between a rock and a hard place. As is often the case, however, the upfront approach is the one that is most likely to minimize potential malpractice exposure and ethical violations. Even with *Aerojet* looming out there, it seems that an attorney is more likely to run afoul of the law -- and wind up getting disqualified and maybe sued by his client -- if he fails to notify opposing counsel of his discovery of an inadvertently produced, privileged document than if he takes the high road and immediately notifies opposing counsel. At a minimum, after notifying opposing counsel, he can hold onto the document -- without looking at it further -- and bring the issue to the court's attention. Then, if the court is inclined to follow *Aerojet*, counsel will find that out at the onset, and will have the court's blessing to use the document for his client's benefit.

The California Supreme Court's decision to take up *Rico* gives hope that the Court will unambiguously overturn either *Aerojet* or *State Fund* and clarify the rule. Any decision that attempts to distinguish *Aerojet* from *State Fund* only will contribute to the current uncertainty regarding an attorney's responsibilities in these circumstances. In the meantime, attorneys must continue to do what they are paid to do -- that is, to exercise good judgment so as to minimize any harm to their client and, accordingly, any potential malpractice exposure. In this case, it just so happens that the more upfront and professional approach -- that is, immediately notifying opposing counsel of the inadvertently disclosed document -- is the one least likely to get an attorney into trouble with the court, the State Bar, or his client.

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-Lis Pendens: Continued from page 6-

mining when a document was indexed to conclude “who was first.”

Conclusion

Until the appellate courts resolve this issue, practitioners on the published opinion side of this issue will continue to argue the cases were decided correctly. Opposing counsel will have to argue the cases were decided incorrectly and that *Code of Civil Procedure* section 405.24 is clear on its face – recording, not indexing, imparts constructive notice. This argument becomes even more attractive when considering the language of *Code of Civil Procedure* section 1858 which provides:

“Construction of statutes or instruments; duty of judge CONSTRUCTION OF STATUTES AND INSTRUMENTS, GENERAL RULE. In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, ***not to insert what has been omitted***, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.” (Emphasis added.)

If the legislature wanted “indexing” to impart constructive notice, it could have done so. But the legislature used the term “recording.” Therefore, courts should not “insert what has been omitted” and apply *Code of Civil Procedure* section 405.24 as drafted.

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stricted as to its use, and will often contain the statement that the work performed was not an audit, and that an opinion is not being issued. These reports can nonetheless be very useful.

Using Information Prepared by CPAs

A significant difference between CPAs and other financial professionals is that CPAs are governed by a national set of professional standards. While these standards frequently result in complicated reports, they will always describe the level of service performed with respect to the financial statements, and the CPA’s report on those procedures. The user of CPA prepared financial statements therefore knows how much assurance the CPA is providing on the statements. The level of assurance can range from *no assurance* up to the *positive assurance* provided on audited financial statements that they are “*fairly presented, in all material respects.*”

As business litigators, especially in complex cases, it is important to understand the nature of the financial information that you are either providing to or receiving from the other party during discovery. A proper understanding of the level of assurance expressed on the financial data in your dispute can be critical to the success of your case.

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Would you like to write an article for the ABTL report.

If you are interested, please contact the ABTL at abtl@abtl.org or 323.939.1999.



Hon. Sheila Fell, ABTL President &
Ken Babcock, Director of PLC

Thank you to everyone that supported this year's Wine Tasting and Fundraiser for the Public Law Center.

The ABTL is pleased to announce that this year we were able to make a contribution to the PLC in the amount of *\$16,750.00*.

This is our largest contribution to date.

This event would not be success without the support of our members and our sponsors.

Thank you and we look forward to seeing you in June 2006 at the next fundraiser.

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