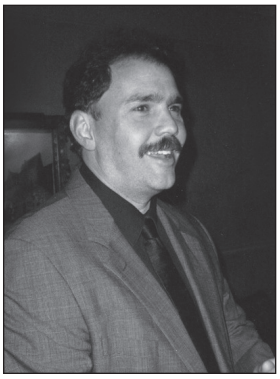
ASSOCIATION OF BUSINESS TRIAL LAWYERS
SAN DIEGO

abtl REPORT

Volume XVIII No. 1 *Spring 2011*

The Dangerous Client: Protecting Your Practice From Current and Former "Problem People"

By Dr. Steve Albrecht, PHR, CPP



Dr. Steve Albrecht, PHR, CPP

Lawyers put at lethal risk by angry current or former clients is not a new concern. Whether you work as a sole practitioner out of a small office with just a paralegal, or for a multinational firm in a downtown high-rise with security guards and evacuation procedures, the need for increased security to protect you from irrational or dangerous people should not be an afterthought. We don't have to wait for the "Big Event" to make small or bold changes. Some of the ideas that follow are operational; some of them are informational. Choose what works best for your practice areas, type of clients, office culture, and building environment.

Improve Your Access Control Equipment, Policies, and Practices

You don't need to give every attorney or staffer a photo ID badge, but it should not be easy to enter your office through a side door or without going through a designated reception area. Ideally, this reception area should

(see "Client" on page 5)

Supreme Court's Most Recent Prop. 64 Decision Provides Guidance On Standing To Proceed With A Private Action Under the UCL

By Alan M. Mansfield, Esq.

Alan M. Mansfield, Esq.

On January 27, 2011, the California Supreme Court issued its opinion in *Kwikset v. Superior Court (Benson),*[1] the most recent in a line of Supreme Court decisions interpreting the parameters of California's Unfair Competition Law, Cal. Bus. & Prof. Code Section 17200 *et seq.* ("UCL") in light of the 2004 amendments adopted by the passage of Proposition 64.

(see "Prop. 64" on page 10)

Inside

The Association of Business Trial Lawyers of San Diego

Proudly Presents

"Proposition 8: The Hot Debate"

Featuring

Brian W. Raum
Alliance Defense Fund

Christopher D. Dusseault
Gibson, Dunn & Crutcher, LLP

From the ballot box to the Ninth Circuit to the California Supreme Court, the Proposition 8 controversy continues to be one of the most publicized political, moral and legal dilemmas of our time. In November 2008, California voters approved a constitutional amendment providing that "only marriage between a man and a woman is valid or recognized in California." Brian Raum of the Alliance Defense Fund defends the voter's choice while Christopher D. Dusseault of Gibson Dunn & Crutcher argues its unconstitutionality. Join ABTL for an inside look and discussion about the case that, once finally decided, will most certainly make history.

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President's Letter

By Anna Roppo, Esq., President ABTL San Diego

Anna Roppo, Esq.

As I thought about writing my first President's Letter, I struggled to find the right topic and of course, the perfect inspirational words. Then, I said to myself, who am I kidding? I'm Anna Roppo, and while I may have the title of President of the San Diego Chapter of the Association of Business Trial Lawyers, I'm still Anna Roppo.

For those of you that have not had the pleasure (or some could argue pain) of knowing me, I am known for being blunt and saying what I think, oftentimes criticized and complimented for both. I could certainly try to be philosophical and wax poetic in this letter, but it would be too short and I have a minimum number of words that I have to provide to our tireless yet relentless editor, Lois Kosch.

So, here goes. ABTL San Diego needs your help. As loyal members, I ask that you use your e-mail, your PDA, your iPAD, your IM, your Twitter, Facebook and any other form of non-face to face means of communication that has now taken over your life to tell everyone about this great organization. This group offers a unique opportunity to socialize (yes, in person and face to face – a unique concept anymore) with both federal and superior court judges in a collegial and fun environment. We are so fortunate to have the participation and commitment of many of San Diego's finest currently serving on the bench and in private alternative dispute resolution – tell your colleagues to join and take advantage of it.

For example, where else do you have the opportunity to complain to Judge Kevin Enright about the fact that your motion hearings are being set four to five months out and receive an empathetic ear? ABTL San Diego dinner programs!!

By the way, why are our motions being set so far out? Because the court system is horribly underfunded and overtaxed. Its judges, administrative staff and clerical personnel are underpaid and stretched beyond tolerable limits. Nonetheless and despite the foregoing, San Diego judges find the time to support ABTL. Yet another reason for you to talk to your partners, associates and colleagues about joining ABTL.

The dinner programs are one-of-a-kind – well, maybe not the food, but the speakers. Controversial, informative, and sometimes enraging, the dinner programs are always incredible. Thanks to Superior Court Judge Joan Lewis, the last dinner program of 2010 offered a presentation by renowned cardiologist and integrative medicine specialist, Dr. Mimi Guarnieri. As she talked about what stress does to your physical and emotional well being, ABTL dinner program attendees put their dessert forks down and listened. Bill Lerach, one of the nation's most respected and feared securities litigation experts started off 2011 with a perspective on the next financial crisis that will dwarf those of the past! The crowd of attorneys in the room was silent (except for a brief cell phone event that allowed every one of the 170 attendees to eavesdrop on the conversation) and awestruck by his analysis.

On March 21, 2011, Jack Leer and Tom Egler, dinner program chairs (the guys behind the scenes working the phones and connections to bring you these events) have arranged a spirited discussion by the lawyers involved in the hotly contested and intensely political Proposition 8 debate.

On June 20, 2011, Ninth Circuit Court of Appeals Judge Margaret McKeown will moderate a panel of distinguished federal circuit court judges. Judge McKeown is an officer of ABTL San Diego and instrumental in bringing some of the most interesting speakers to the dinner programs, like Harry Schneider, trial counsel to Salim Hamdan (Osama Bin Laden's driver) and most recently, Judge Alex Kozinski, Chief Judge of the Ninth Circuit Court of Appeals.

There is more. ABTL has a Leadership Development Committee (LDC) that is headed up by Brian Foster and Colin Murray. The LDC is made up of some of the brightest young lawyers in our community. They put on "nuts and bolts" programs that even those practicing for many years will benefit from by attending. Recent programs have demystified the mysteries of technology and

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Brown Bag Lunch: Inside the Courtroom of Magistrate Judge Bernard Skomal

By Dessi P. Nintcheva, Esq.

Judge Bernard Skomal

On November 17, 2010, U.S. Magistrate Judge Bernard Skomal met with a group of local attorneys at the federal courthouse for a brown bag lunch presented by ABTL-San Diego, the Federal Bar Association and the Litigation Section of the State Bar of California. Judge Skomal, who is a former long-term criminal defense lawyer with significant trial experience, shared helpful tips on what you can expect in his courtroom in terms of courtroom processes and procedures, and effective tools for resolving cases.

Discovery Disputes

When Judge Skomal joined the bench he had limited civil litigation experience. He had been a criminal defense attorney for more than 25 years handling a wide spectrum of complex criminal matters. As such, handling discovery in the civil arena was one of the areas he had to learn upon joining the bench. Judge Skomal's no-nonsense, pragmatic approach to resolving discovery disputes is described in his Chambers' Rules on the Southern District's web site. The rules provide detailed guidance on the step-by-step procedures for handling discovery issues.

First, before filing discovery motions counsel must meet and confer with opposing counsel *in person*, if Counsel are located in the same district, or over the phone, if they are located

(see "Skomal" on page 16)

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Client

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be self-contained, that is, separated from the rest of the office(s) by a locked inner door, whose access is controlled electronically by the receptionist. No client, visitor, vendor, or ex-employee – current, former, happy, unhappy, or otherwise – should be allowed to barge in and wander down your hallways unchecked.

This access control improvement concept should also lead you to create and enforce smart security policies in general: no unescorted visitors or vendors; side or exit doors should be kept locked from the inside; mail and packages should be screened in a central location; file drawers, file rooms, and all computer server, telephone, or utility rooms should be kept locked when not in use; and desk and mass shredders should be an important part of your information protection practices.

Train Your Gatekeepers and Pay Them Well for Their High-Risk "Client Management" Skills

Lots of businesses place a huge amount of responsibility on their receptionists. When it comes to handling difficult people, these overworked and underpaid folks are supposed to be psychologists, security guards, hall pass monitors, information providers, and apologizing soothers of bad feelings. Give these front-line foot soldiers your support, handsome pay, praise, training, and guidance when it comes to their successful handling of high-risk clients. (Making sure you have your best and brightest people in these positions goes without saying; they are the literal and physical face of your office.)

Create an "emergency procedures" notebook for the reception staff. This binder should include laminated pages with emergency numbers, phone extensions, and steps to take when confronted with a hostile person: call 9-911 or 911, disengage and leave, change the ratio of confrontation by getting more help, or find a supervisor. The secondary purpose of the front desk notebook is also to familiarize other staffers or temps who cover for the primary receptionist.

Similarly, the receptionist should be able to use his/her telephone, intercom, or even inter-office e-mail or instant messaging system to put out a message that says, "I need immediate help here" or "Call 911." The use of code words can help them alert you or other staff when they need help because an overly-demanding or threatening client is in their work area. (Consider using "Call Mr. Blue" or "Page Dr. Blue" as your code words, with blue being the usual symbol for the police.)

Don't Ignore Threats from Current or Former Clients, Ex-Employees, or Other Non-Authorized Office Visitors, Including Direct, Indirect, Conditional, or Implausible Statements or Behaviors

It's easy to rationalize a threatening client as, "he's just blowing off steam" or, "she's not really serious." Every threat, whether it comes in over the phone, in an e-mail, or through face-to-face contact, has a meaning for the threat-

(see "Client" on page 6)

Welcome

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New members of the ABTL Board of Governors

Hon. Anthony J. Battaglia
Rob Borthwick
Hon. William S. Dato
Bob Howard
Matt Marino
Guillermo Marrero
Jill Sullivan
Hon. Timothy Taylor

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ener. Some people use loud tones, bluster, and direct threats to intimidate others to get their way. We can label these people as "howlers."

Others don't make threats to a potential target because they know if they do, there will be actions taken against them, interference, or consequences. So while they may not threaten directly, they are more likely to say, "This isn't over" and start to move from ideas about using violence to preparatory actions. We can label these people as "hunters."

While threats-only "howlers" are much more common and less prone to violence than action-oriented "hunters," sometimes we may miss the more menacing tone of the latter because they work in stealth, as opposed to direct threat to the target. Two paradoxical issues are at work here: the presence of threats is *not* a good predictor of future violence, i.e., many people make threats but few people actually carry them out, and, we should be more concerned with people who *don't* threaten us directly, but who make *third-party threats* through others.

"While threats-only "howlers" are much more common and less prone to violence than action-oriented "hunters," sometimes we may miss the more menacing tone of the latter because they work in stealth, as opposed to direct threat to the target."

If you hear a former client threatening you or your office by proxy, that is, via someone else, you should be more concerned. These types of incidents will demand continued monitoring, increased security measures, an office (and even a home) safety plan, and may require contact with the police or other security professionals. Threat management is *not* about predicting violence; it is about *assessing dangerousness*.

Don't Give Out Personal Information to Clients

There's no need to be unsocial with clients, but you should also be aware of professional boundaries and not reveal information (either verbally or what you have posted on your web site or social media sites) about your family, home or neighborhood, hobbies, finances, the groups or associations you belong to (including church, kids' schools, or charities), travel schedules or vacation plans.

Angry clients with good social engineering skills and Internet access can gather a lot of personal data from you or about you online, or from your unwittingly helpful staff, or by manipulating information from others outside your office. Be pleasantly vague with potentially problematic clients about what you do, personally and professionally. You don't want an unsatisfied current or former client showing up at your kid's school play, looking to talk with you.

Watch for Boundary Probing Behavior

This includes numerous e-mails, chronic phone calls, and more disturbingly, unannounced office visits. You should have significant safety and security concerns about irrational clients who have no further or legitimate business with you showing up without appointments, demanding to see you, or contacting you in the parking garage, your favorite restaurant, or worse, at home. This behavior may require a call to the police for a response and enforcement, including the need for a civil protection order for you, your staff, or your family.

Be Aware of Any Pro Per Actions, Malpractice Threats, or Civil Orders Involving Clients

Does this client have a history of vexatious litigation? Have you heard of them "lawyer shopping" and making frequent substitutions? Is this person on a first-name basis with the

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Client

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State Bar's Complaint Department? Is the client named in one or more protective orders? Keep your eyes and ears open for references to these types of clients, from media sources, courthouse conversations, or from your interactions with peers. Some of these problem people have a lot of "frequent flier miles" with many attorneys around town.

Track the Comments, Actions, or Behaviors of Irrational or Threatening Former Clients

Pay attention to stories or media accounts of antisocial behavior involving former clients. Don't underestimate the value of gossip; it often has merit, at least as a partial truth. Scan the local newspapers, talk to your colleagues, and pay attention to your surroundings as you go through your daily home and work routines. Was this person just arrested for a drug, alcohol, weapons, trespassing, or TRO violation? Have they been placed in a mental health facility for treatment? Have they threatened you indirectly or through other people? Have they targeted or harassed other attorneys or their staffs? Is there growing evidence of a mental illness issue? Did you learn of a "triggering event," like a divorce, domestic violence, or a court decision against them? Have they just been hit with a termination of employment or benefits?

Evaluate Every Problem Client Contact for the Threat Potential

If you have had a problem client and he or she went away angry, instruct your staff to bring all of this person's future contacts directly to you, not just put them in a file or throw them away. This includes letters, photos, packages, or "gifts" (one attorney received a bedpan from an angry former client, because, as the client so gently put it, "You're so full of crap").

Pay attention to anonymous e-mails or attachments, sent from Hotmail, G-mail, Yahoo, or similar easy-to-create sites. Do the person's

(see "Client" on page 8)

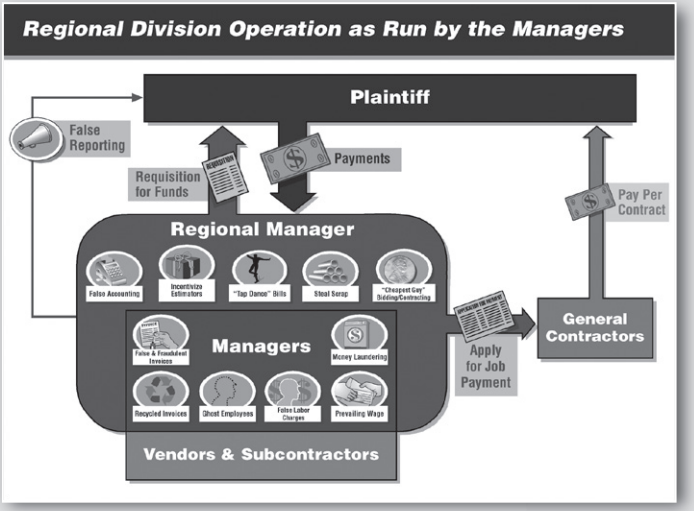
Visual Evidence Archive: Demonstratives That Made a Difference

Practice Area: Insurance Coverage and Bad Faith

Background: A manager of a company regularly submitted requisitions for fabricated expenses and previously paid expenses. His scheme involved shifting on paper the costs associated with one job to other jobs, so as to make the older jobs appear profitable. The insurance company contended that plainiff's commercial fidelity policy indemnified the insured only for the amounts it could prove were embezzled and not for the full monetary loss due to the employee's misconduct.

A Demonstrative That Made a Difference: A flow chart of the complicated, multi-year fraud scheme demonstrated the connection among numerous subplots (with each plot in turn illustrated) and how the employee acted with manifest intent to benefit himself and his cronies and to harm his employer, thereby causing multi-million dollar losses payable by the fidelity insurance policy.

Outcome: After a summary judgment decision rejecting defendant's defenses regarding coverage, the case settled favorably for plaintiff.



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words or language seem hyper-aggressive or overly-depressed? Is there a sense of needing "conditional closure," i.e., "You had better get me my money by Friday or else . . ." Do the current or former client's e-mails seem angry, rage-filled, and hostile, or are they morose, seething, and bleak? Do phone calls come in only during business hours or do you receive messages at 2:07 a.m., 2:11 a.m., and 2:13 a.m., all on the same day?

Is there a spate of calls, messages, or e-mails and then months with no contact? Is the former client issuing a demand, creating a cause, or making a threat? Do you see evidence of escalating behavior or comments, where the person is using self-created deadlines which you are supposed to meet or there will be consequences?

The *context* of these messages is just as important as the content. Leaving a threatening message on your office phone at 4:00 a.m. on a Sunday, so there is no chance you'll actually be there to answer it, or sending a series of anonymous e-mails is much different than the client who shows up demanding a meeting, makes harassing calls during the business day, or seeks to meet outside the office.

The Best Predictor of Future Client Bad Behavior is Past Client Bad Behavior

People rarely undergo personality transplants. If the client is hostile, difficult, and entitled at the onset of the case, you can expect that pattern to persist throughout the middle of it, and on into the bitter end. You have to be willing to turn down cases or fire clients where the longterm pain is not worth the monetary gain. As one sole practitioner puts it, "At this stage of my career, I refuse to work with any client whose goal is to make me miserable."

Get Law Enforcement Help Early

Intuition is a good thing. If you or your office staff feels concerned, afraid, or anxious about the behavior of a current or former client, call the police and discuss the issues with a responding patrol officer or deputy. He or she may have good advice about getting a restraining order, writing a "criminal threats" report (CA 422 PC), writing a CA 653m PC "harassing phone calls" report, putting extra patrols in your area, or helping to create a security plan for your office, facility, or home. You can also get good advice from DA investigators as well; many of them have been trained in threat assessment and threat management, due to their protection work with elected officials and judges.

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Article Submission

If you are interested in writing an article for the ABTL Report, please submit your idea or completed article to Lois Kosch at lkosch@wilsonturnerkosmo.com.

We reserve the right to edit articles for reasons of space or for other reasons, to decline to submit articles that are submitted, or to invite responses from those with other points of view.

Authors are responsible for Shephardizing and proofreading their submissions.

Articles should be no more than 2500 words with citations in end notes.

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Create a "Safe Room" for Emergency Situations

Hollywood movie stars and politicians have the benefit of fortified safe rooms in their home or work areas; you should create one for yourself and staff as well. A safe room is a place where the members of your office can go in a life-threatening, people-problem emergency (an armed ex-client, ready for targeted, lethal violence), where you can lock and barricade the door, call 911, and wait for law enforcement to arrive. Since you won't usually have the luxury of a bullet-resistant fortress, any securable, windowless room will have to do. This includes break rooms, restrooms, file rooms, conference rooms, or any large office with a good lock. (Consider installing a peephole and a phone in any "safe room" you designate.) You may never need to use your safe room, or you could have to rush there tomorrow.

Perhaps two equations can help us understand how current or former clients can turn homicidal toward attorneys:

Legal Issues + Courthouse or Law Office Visits + Emotional People = The Potential For Lethal Violence

and

Economic Stress + Mental Illness + The Need for Revenge = The Potential For Lethal Violence

In these uncertain times, where angry clients think you are absolutely responsible for all their life problems, it helps to think and plan for the unthinkable. Don't wait for escalating behaviors or a "Big Event" to start talking, planning, and implementing good office security solutions. ▲

Dr. Steve Albrecht, PHR, CPP, is a San Diego-based HR consultant. He is internationally known for his efforts in workplace violence prevention. He worked for the San Diego Police Department from 1984-1999. He can be reached at www.drstevealbrecht.com.

President

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e-discovery so that even those that were still perplexed by these topics walked away feeling more equipped to deal with modern day practice.

Federal District Court Judge Janis L. Sammartino chairs ABTL's Judicial Advisory Board (JAB). Judge Sammartino runs a federal district courtroom with all the pressures that accompany it by day and still manages to find time to contribute to ABTL San Diego. The JAB is comprised of distinguished members of the bench, both active and retired, that continue to provide their wisdom, insight and support to ABTL San Diego. It is 15 members strong. Tap into this brain trust while enjoying an ABTL dinner program cocktail.

The pressure and strain of the billable hour, client demands, account receivable collection and life balance will always be part of the practice of law. ABTL provides an oasis that will continue to enhance the profession. Please continue to support ABTL and do your colleagues a favor by getting them to join today. ▲

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Prop. 64

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The Supreme Court was called upon to answer whether a plaintiff's allegation that he purchased a product in reliance on a product label's misrepresentation about a characteristic of the product alone satisfied the requirement that the plaintiff allege "a loss of money or property" to bring suit under section 17204 of the UCL, or whether such an allegation was precluded because Plaintiff obtained the "benefit of the bargain" by receiving an otherwise functional product in exchange for payment.

This article summarizes the labyrinthine background of the underlying action that led to this decision, the parties' relative positions, how the Supreme Court reconciled those positions, and the implications for those still faced with questions over the scope of the UCL's new standing provisions.

"The Long and Winding Road" -- *Kwikset's* Procedural History

Benson v. Kwikset Corp. was originally filed 11 years ago, raising a simple but important issue. Defendants Kwikset and Black & Decker Corp. (collectively, "Kwikset") manufactured various types of locks. They labeled their products as "Made In USA" or "All American Made" based on the location of its manufacturing facility in Anaheim, California. Several years prior to suit, Kwikset had decided to reduce costs by outsourcing some of the manufacturing processes to Mexico and using component parts made there and elsewhere and eventually closed its plant in Anaheim altogether.

Notwithstanding the foreign aspects of the manufacturing process, Kwikset continued to label its products as being "Made in USA." However, under Cal. Bus. & Prof. Code section 17533.7, it is unlawful "to sell or offer for sale … any merchandise on which … there appears the words 'Made in U.S.A.' … or similar words when the merchandise or any article, unit, or part thereof, has been entirely or substantially made, manufactured, or produced outside of

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the United States."

Plaintiff, who had purchased Kwikset locks, filed a lawsuit in 2000 under the then-broad standing provisions of the UCL, claiming that because Kwikset's products were made with substantially foreign labor and parts, Kwikset's labels violated, *inter alia*, section 17533.7, and thus had committed an "unlawful" business practice under the UCL. In response to the lawsuit, Kwikset stopped using the allegedly unlawful labels, but did not remove already-packaged products from the chain of distribution. The trial judge ruled in May 2002 that Kwikset had violated the "Made In the USA" statute and the UCL with respect to 25 of its products and issued an injunction prohibiting Kwikset from using the offending labels, ordered Kwikset to implement a program allowing retailers and distributors to return mislabeled locks for refund or replacement, and awarded plaintiff attorneys' fees. The trial court did not, however, award restitution to end-users – the retail purchasers of the locks.

Thereafter, the case made the first of several appearances in the court of appeal. In June 2004, the Fourth District Court of Appeal issued its first decision upholding the trial court's judgment on the merits.[2] However, before the judgment became final, the court of appeal granted rehearing *sua sponte* to review a non-merits ruling relating to certain litigation costs that neither party had challenged. While that issue was under consideration, in November 2004 – more than two years after the original judgment – California voters passed Proposition 64, requiring that any person bringing a private suit under the UCL needed to show they suffered "injury in fact and lost money or property as a result of" the alleged violation. Because judgment was not yet final, Kwikset sought to vacate it on the ground that Proposition 64 applied to pending actions, and plaintiff did not satisfy the new

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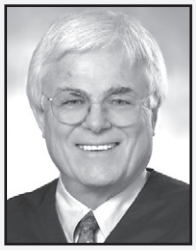

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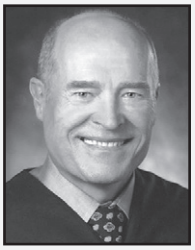

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standing requirements.

After further briefing the court of appeal issued a new decision in February 2005, again affirming the trial court's judgment on the merits, but concluding that the initiative applied to pending actions, and allowing plaintiff leave to amend in order to meet the new standing requirements.[3] In April 2005, the California Supreme Court granted review and put the case on hold pending the outcome of *Californians for Disability Rights v. Mervyn's, LLC,* 39 Cal. 4th 223 (2006), and *Branick v. Downey Savings & Loan Assn.*, 39 Cal.4th 235 (2006).

After ruling that Proposition 64 applied to pending actions and that the trial courts in those actions could permit amendment to meet the initiative's new standards, the Supreme Court remanded *Kwikset* to the court of appeal. In June 2007 that court reinstated its earlier decision on the merits, but remanded the case to the trial court to determine whether plaintiff could meet the new standing requirements. The court specifically instructed that if plaintiff could satisfy those requirements, liability issues would not need to be retried, and the original judgment would be reimposed.[4]

> ***"Notwithstanding the foreign aspects of the manufacturing process, Kwikset continued to label its products as being "Made in USA."***

Thereafter, plaintiff sought and was given leave to amend the complaint to add new standing allegations and several new plaintiffs. All plaintiffs alleged that they had purchased Kwikset locks in reliance upon the "Made In USA" label. Kwikset challenged the order allowing amendment, but its writ petition was summarily denied. It then demurred to plaintiffs' new allegations, but the trial court overruled that demurrer. Kwikset

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again sought interlocutory appellate review, and again it was summarily rebuffed. Back in the trial court, Kwikset filed a motion for judgment on the pleadings, asserting that plaintiffs had not alleged "injury in fact" as required by Proposition 64. To address any remaining concerns about the sufficiency of the allegations, plaintiffs sought and obtained leave to file a second amended complaint adding additional detail to the standing allegations. Kwikset again unsuccessfully demurred, and thereafter filed its third post-Proposition 64 writ petition. In August 2008, the same panel that had considered and rejected Kwikset's prior attempts to undo the judgment agreed to consider that petition.

In February 2009, that panel reversed the order overruling Kwikset's demurrer.[5] The court held that the "injury in fact" test was satisfied by the purchase of the locks based on Kwikset's false advertising. But it ruled that plaintiffs had failed to allege that they "lost money or property" because of the proven misrepresentations. The panel found that plaintiffs had received locksets in return for their money, and they had no complaints about the price, quality or functionality of the locks, and thus had received "the benefit of their bargain." Furthermore, to obtain UCL standing, private plaintiffs had to establish that they are "eligible for restitution," but the trial court already had ruled that plaintiffs were not entitled to receive restitution. The panel went one step further, and ruled the demurrer should have been sustained without leave to amend. The court of appeal ordered the trial court's ruling vacated and the entire matter dismissed. Having issued its first significant ruling on Proposition 64 standing just a month earlier (*In Re Tobacco II Cases,* 46 Cal. 4th 298 (2009)), the Supreme Court granted plaintiffs' petition for review in *Kwikset* on June 10, 2009, to address

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for the first time the meaning and scope of the "lost money or property" language.

Thus, after ten years of litigation, this matter was before the California Supreme Court a second time, but in a strange procedural posture. The matter was before the Court on a writ proceeding reversing the trial court's overruling of a demurrer on a standing issue, even though the underlying case had already proceeded to trial, defendant had been found to have violated the underlying statute, relief had been ordered, and the merits of the judgment that a statutory violation had occurred had already been reviewed and upheld.

"We Can Work It Out" -- The Supreme Court's Ruling

The Supreme Court held oral argument in November 2010, with the justices raising two competing concerns. The first concern was that assuming (because it was a demurrer) that both the locks had been labeled in violation of the "Made In the USA" statute and plaintiffs had relied on those labels in deciding to purchase the locks, was that enough for standing purposes, or did plaintiffs essentially get what they paid for -- a working lock? Plaintiffs' counsel agreed that they were not alleging the locks were overpriced, of inferior quality or defective -- only that had the true facts been revealed they would not have purchased the locks.

The second concern was if Kwikset was correct, would imposing such additional requirements make it more difficult to bring a UCL claim than other state law claims, which would be contrary to the legislature's intent in enacting the broad protections available under the UCL? Defendant's counsel agreed that other claims, even for fraud and misrepresentation, did not require plaintiff to prove at the outset of the action that the product received was worth less than the amount paid for it simply to have standing to bring the claim.

The second concern turned out to be of greater import than the first to the Court. In its January 27 decision (*Kwikset IV*), Justice Werdegar, writing for five of the seven justices, found, "While Proposition 64 clearly was intended to abolish the portions of the UCL and false advertising law that made suing under them *easier* than under other comparable statutory and common law torts, it was not intended to make their standing requirements comparatively *more* onerous." The Supreme Court reversed the court of appeal and found "plaintiffs who can truthfully allege they were deceived by a product's label into spending money to purchase the product, and would not have purchased it otherwise, have "lost money or property" within the meaning of Proposition 64 and have standing to sue."

Relying in part on *Tobacco II*, the Court emphasized "Simply stated: labels matter." It discussed a variety of scenarios where someone would pay the same amount for a particular product no matter how it was labeled but others would not, and then concluded: "For each consumer who relies on the truth and accuracy of a label and is deceived by misrepresentations into making a purchase, the economic harm is the same: the consumer has purchased a product that he or she *paid more for* than he or she otherwise might have been willing to pay if the product had been labeled accurately. This economic harm—the loss of real dollars from a consumer's pocket—is the same whether or not a court might objectively view the products as functionally equivalent."

In response to Kwikset's "benefit of the bargain" argument, after an extensive analysis of what that phrase meant in both legal and practical terms, Justice Werdegar wrote that such an argument conflated the standing requirements with the eligibility for restitution requirements, which are wholly distinct from each other: "The observant Jew who purchases food represented to be, but not in fact, kosher; the Muslim who purchases food represented to be, but not in fact, halal; the parent who purchases food for his or her child represented to be, but not in fact, organic, has in each instance not received the benefit of his or her bargain."

Overruling several decisions that had

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reached a contrary result, the Court concluded plaintiffs' allegations that (1) they had purchased a lock labeled "Made In the USA;" (2) those representations were false; (3) they had read and relied on such statements, and (4) plaintiffs would not have bought the locks otherwise, were sufficient for UCL standing purposes.

"Let It Be"
-- The Implications Of Kwikset IV

The key point of the Supreme Court's decision is that simply purchasing a product based on a material misrepresentation is enough to show a "loss of money or property." A plaintiff does not need to prove or allege a product defect, overpricing, or anything similar. "Benefit of the bargain" is not the test, and neither is the need to be "eligible for restitution."

Is this the end of the discussion on UCL standing under Prop. 64? Not likely. The Court again made clear it was only addressing direct misrepresentation-based claims, and in footnote 9 stated it was not addressing what type of causation was needed for a non-misrepresentation based UCL claim. Nor did the Court directly address (though it gave some guidance on) a partial or omissions-only based UCL claim, where nothing may have been specifically read or relied upon by a consumer other than the label generally, but a material fact was either partially or not disclosed on the label or advertisement that allegedly would have made a difference.

> ***"The key point of the Supreme Court's decision is that simply purchasing a product based on a material misrepresentation is enough to show a "loss of money or property." A plaintiff does not need to prove or allege a product defect, overpricing, or anything similar."***

The Supreme Court, however, again emphasized the need for the private plaintiff provisions of the UCL to be construed broadly in a manner that protects consumers and encourages private actions. It will thus be important in the complaint and throughout the case to focus on and make clear exactly what a private plaintiff reviewed and why it was material to them. It will also be important for the parties to make clear what type of UCL claim is being alleged. For example, a claim that has some material misrepresentation or omission at its core may be guided by *Kwikset IV*, while a claim based on an non-misrepresentation-based "unlawful" or "unfair" business practice may require a different analysis that does not impose standing requirements more onerous than *Kwikset IV,* perhaps focusing more generally on the causation between the alleged wrong and the "injury in fact."

Kwikset IV answers at least one significant question and will make it less complicated at the initial stages of a proceeding to determine who has standing to bring claims under the UCL and what needs to be initially plead to satisfy the UCL's standing requirements. ▲

Alan M. Mansfield is with the Consumer Law Group of California and a member of the Editorial Board of the ABTL Report.

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1. 51 Cal. 4th 310 (2011)
2. *Benson v. Kwikset Corp*., 120 Cal.App.4th 301 (2005), *depublished by grant of rehearing*.
3. *Benson v. Kwikset Corp*., 126 Cal. App. 4th 887 (2005), *depublished by grant of review.*
4. *Benson v. Kwikset Corp*., 152 Cal.App.4th 1254, 1264 (2007).
5. *Kwikset Corp. v. Superior Court,* 171 Cal.App.4th 645 (2009).

Skomal

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in different districts. If the parties are unable to resolve the dispute through the meet and confer process, counsel must contact Judge Skomal's research attorney promptly and *jointly* to explain the nature of the dispute. Judge Skomal's research attorneys would then coordinate a telephonic discovery conference between counsel and the judge or would advise counsel to file a joint discovery motion using a form outlined in the Chambers' Rules.

Judge Skomal looks for the most efficient and expeditious ways to handle discovery disputes, which is why he requires the parties to bring the disputes to his attention within 30 days "after the date upon which the event giving rise to the dispute occurred." (Chambers' Rule No. 4.) You can find more details about the timing and procedures of discovery motions including a sample format in the Chambers' Rules.

Judge Skomal has a knack for simplifying things and getting back to the basics. He disfavors protracted discovery battles, which have the tendency to inflate the cost of litigation and achieve very little as far as advancing the case toward resolution. In ruling on discovery motions, he first examines the discovery requests to determine if they are tailored to the facts and issues in the case. In his opinion, both the requests and the responses should be in "plain English" and understandable. Although he does not shy away from controlling the scope of discovery, Judge Skomal considers cookie-cutter boilerplate objections unacceptable. Counsel should be prepared to provide facts explaining the basis for each objection.

As a former criminal defense lawyer with a wealth of trial experience, Judge Skomal is well versed in the Federal Rules of Evidence and has substantial experience in analyzing evidentiary issues, which has proven to be very helpful in resolving discovery disputes. He believes discovery boils down to "what is relevant and admissible and not tangential," and disfavors the scorched-earth approach of overwhelming the other side with discovery requests.

Early Neutral Evaluation Conferences

Judge Skomal takes the Early Neutral Evaluation Conference (ENE) seriously and expects to settle the case. As a result, he requires all named parties, the primary counsel for each party and any decision-maker whose authority is required to settle the case to attend the ENE. Judge Skomal does not routinely grant requests for telephonic appearances and requires the parties to submit any such requests via joint motion to be granted only upon a showing of "extraordinary circumstances" (distance alone is not enough).

Judge Skomal also made clear that he would not grant requests for continuance of the ENE without good cause shown. He requires the parties to confer before submitting such requests, which must in writing via an ex parte application or a joint motion.

Since ENEs occur early in the case, Judge Skomal understands the parties are unlikely to have fully investigated all claims and allegations in the complaint. However, he expects counsel to know the basic facts of the case and be prepared to discuss litigation strategies and key defenses. He also requires the parties to submit an ENE brief (five pages or less) outlining the elements of each claim or defense, and any important factual disputes. Judge Skomal believes it is very helpful when the parties cite to the source of various facts stated in the brief. Although he encourages the parties to exchange their briefs, he is willing to allow them to submit a confidential version of the brief which he hopes would share both the strengths and weaknesses of each parties' position, as well as any settlement figures.

Consent to Trial by Magistrate and Motion Practice

Judge Skomal welcomes the opportunity to handle motion practice and trials, and where appropriate, would agree to handle the matter unless he has had extensive involvement in the settlement negotiations. He noted that this

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Mediation Confidentiality Reigns Supreme in California

by Monty A. McIntyre, Esq.

On January 13, 2011, the California Supreme Court reversed the decision of the Second District Court of Appeal in *Cassel v. Superior Court* (2011) - Cal.4th - , 2011 WL 102710 (Cal.), and ruled that "absent an express statutory exception, all discussions conducted in preparation for a mediation, as well as all mediation-related communications that take place during the mediation itself are protected from disclosure." (*Id*., p. 8.)

Earlier Supreme Court decisions in *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, *Rojas v. Superior Court* (2004) 33 Cal.4th 407, *Fair v. Bakhtiari* (2006) 40 Cal.4th 189 and *Simmons v. Ghaderi* (2008) 44 Cal.4th 570 had affirmed that the legislature "intended the unambiguous provisions of the mediation confidentiality statues to be applied broadly." (*Id*., p. 7.)

The Supreme Court held that California Evidence Code:

> Section 1119, subdivision (a) clearly provides that "[n]o evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation ... is admissible or subject to discovery...." As we noted in *Simmons,* section 1119, adopted in 1997, "is more expansive than its predecessor, former section 1152.5. Section 1119, subdivision (a), extends to oral communications made for the purpose of or pursuant to a mediation, not just to oral communications made in the course of the mediation."
>
> (*Id*., p. 8.)

The Court held that judicially crafted exceptions are permitted only where due process is implicated, and absent a due process issue only the Legislature could decide how to resolve competing policy considerations:

> As noted above, the purpose of these provisions is to encourage the mediation of disputes by eliminating a concern that things said or written in connection with such a proceeding will later be used against a participant. "Toward that end, 'the statutory scheme ... unqualifiedly bars disclosure of communications made during mediation absent an express

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Confidentiality

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> statutory exception.' "(*Fair, supra,* 40 Cal.4th 189, 194, quoting *Foxgate, supra,* 26 Cal.4th 1, 15.) Judicial construction, and judicially crafted exceptions, are permitted only where due process is implicated, or where literal construction would produce absurd results, thus clearly violating the Legislature's presumed intent. Otherwise, the mediation confidentiality statutes must be applied in strict accordance with their plain terms. Where competing policy concerns are present, it is for the Legislature to resolve them. (*Simmons, supra*, 44 Cal .4th at pp. 582-583; *Foxgate, supra,* at pp. 14-17.)
>
> (*Id*., p. 5.)

The Supreme Court observed that the "Legislature decided that the encouragement of mediation to resolve disputes requires broad protection for the confidentiality of communications exchanged in relation to that process, even where this protection may sometimes result in the unavailability of valuable civil evidence." (*Id.*, p. 13.)

The Supreme Court expressed no view about whether the statutory language ideally balances competing concerns. "Such is not our responsibility or our province." (*Id*., p. 14.)

The ruling in *Cassel* precluded a plaintiff from disclosing pre-mediation and mediation conversations with his counsel in a subsequent legal malpractice case against his counsel. Contrary to the court of appeal, the Supreme Court found that "neither the language nor the purpose of the mediation confidentiality statutes supports a conclusion that they are subject to an exception, similar to that provided for the attorney-client privilege, for lawsuits between attorney and client." (*Id*., p. 11.)

Under *Cassel* mediation confidentiality will reign supreme in California. ▲

Skomal

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would depend upon the district judge and his or her calendar. For instance, if the district judge is unable to hear a motion within the requested timeframe due to calendaring issues, Judge Skomal would be willing to do so with approval from the district judge and the parties' consent.

Deadline Extensions

Judge Skomal cautioned counsel to avoid waiting until the last minute to request an extension for an upcoming deadline. It is best to request any extensions ahead of time, at least two weeks or earlier depending upon the deadline. Judge Skomal requires detailed declarations outlining step by step the efforts taken to comply with the deadline and the reasons for inability to meet it. The judge cautioned counsel to be reasonable and rather than asking for a blanket 60 or 90-day extension, to tailor their requests to the specific circumstances.

Judge Skomal's Chambers' Rules may be obtained at http://www.casd.uscourts.gov/uploads/Rules/Chambers%20Rules/Magistrate%20Judge/Bernard_Skomal_Chamber_Rules.pdf ▲

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