Semiannual Guide to Expert Witnesses

Los Angeles Lawyer

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EARN MCLE CREDIT

Special Jury Instructions
page 25

PLUS

Legality of Wiretaps
page 30

Audits of Attorney Tax Returns
page 12

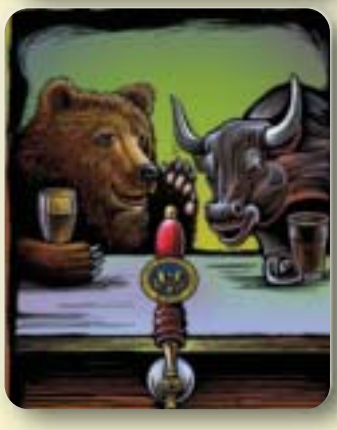
Sentencing Realignment
page 15

Contempt Proceedings
page 18

Price and Privilege

Los Angeles lawyer Elisha E. Weiner examines the potential waiver of privileges in litigation financing page 20

CONTENTS



FEATURES

20 Price and Privilege
BY ELISHA E. WEINER
Courts are divided on whether an exchange of confidential information with third-party litigation financers waives the attorney-client privilege

25 Special Instructions CLE
BY ELISABETH FRATER
Attorneys should consider proposing a neutral, nonargumentative set of jury instructions that pinpoint the specifics of the case

Plus: Earn MCLE credit. MCLE Test No. 213 appears on page 27.

30 On Tap
BY KENNETH HERZINGER AND MARK MERMELSTEIN
Federal courts are scrutinizing the increased use of wiretaps in insider trading investigations

39 Special Section
Semiannual Guide to Expert Witnesses

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DEPARTMENTS

10 Barristers Tips
Learning to differentiate between judicial and obiter dicta
BY DAMON THAYER

12 Tax Tips
IRS audits of attorneys' tax returns
BY LACEY STRACHAN AND DENNIS PEREZ

15 Practice Tips
Realignment of California's criminal justice policies
BY ALBERT CAMACHO AND MARK HARVIS

18 Practice Tips
Vindicating the judicial process through contempt proceedings
BY JEFFREY R. MAKIN

68 Closing Argument
How PIPA can be effective at combating Internet piracy
BY OWEN J. SLOANE AND RACHEL STILWELL

65 Classifieds
66 Index to Advertisers
67 CLE Preview

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by Elisha E. Weiner

Price and Privilege

While litigation financing offers hope to plaintiffs with limited resources, an exchange of confidential information with the financer may waive the attorney-client privilege

LITIGATION FINANCING is a rapidly expanding industry that employs a variety of creative business models. Regardless of the exact litigation financing approach used, attorneys and clients must be wary of inadvertently waiving the attorney-client and attorney work-product privileges by sharing privileged information with a litigation finance provider.

In general, a litigation finance provider, or financer, funds part of a claim—a lawsuit or arbitration—in return for a portion of the proceeds, if any, from the resulting judgment or settlement. If the claim results in insufficient proceeds, the financer loses its investment. The exact model varies depending on the type of claim (most commonly, commercial, personal injury, patent infringement, price fixing, or antitrust disputes or lawsuits), whether the funded party is the plaintiff or defendant, and whether the funds go directly to the client or to the client's lawyer.

All litigation financing models have one thing in common: The financer needs to evaluate the strength of a client's claim or claims in order to gauge the potential risks and benefits of its investment. To minimize the potential risks, financers should have access to the most accurate and complete information about a claim as possible. There are several categories of information a financer can analyze: 1) publicly available documents already filed with the court, such as pleadings, motions, hearing transcripts, and court orders, 2) discoverable documents and sources of information, and 3) nondiscoverable, privileged documents and information. By providing privileged documents and information to a potential financer, however, the client or his attorney may inadvertently waive the attorney-client privilege or the attorney work-product privilege, thus making the documents and information discoverable.

A confidential disclosure of information between a client and an attorney made in order to obtain or give legal advice is privileged.[1] Likewise, a writing reflecting an attorney's impressions, conclusions, or theories is privileged as attorney work product.[2] Generally, disclosure of privileged information to a third party waives the privilege.[3] There are situations, however, in which disclosure of privileged information to a third party would not waive the privilege.

Under federal law, there is no waiver of the attorney-client privilege if the common-interest privilege applies. However, the only district court decision analyzing the attorney-client privilege in the context of litigation financing held that the common-interest privilege does not apply when privileged com-

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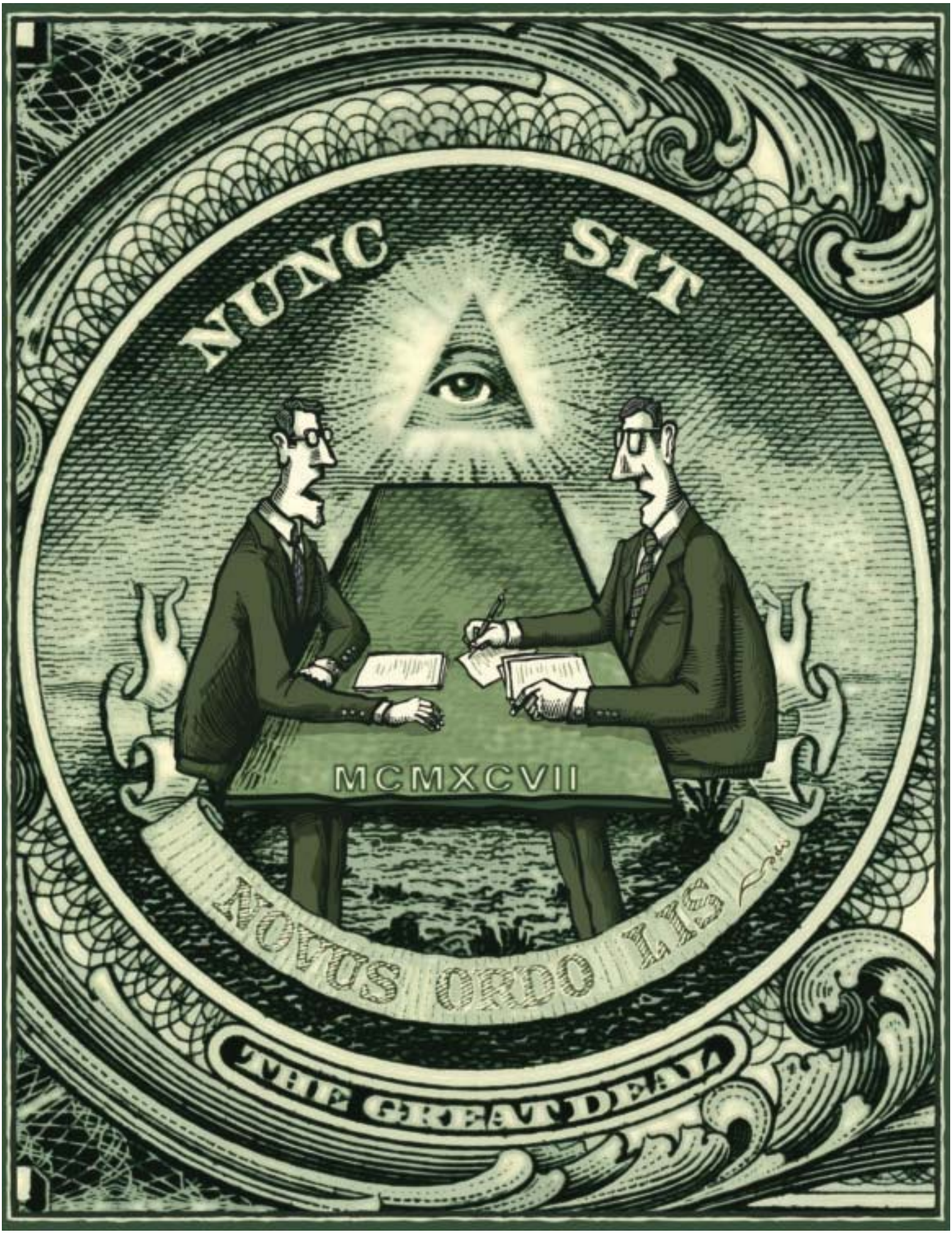
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munications are disclosed to a potential financer. Financers are finding that, under federal law, the work-product doctrine may afford more protection. Indeed, there is no waiver of the work-product privilege under federal law if the disclosure to the third party does not substantially increase the likelihood that an adversary would come into possession of the materials.

Under California law, waiver of both the attorney-client privilege and the work-product privilege are analyzed together using common law waiver principles. Despite the fact that there are no published decisions on point, California appears to be amenable to maintaining the privilege of documents transmitted to third parties during negotiations if the parties did not intend to waive the privilege and made efforts to maintain the confidentiality of the communications.

Due to the unsettled nature of the law, financers, attorneys, and clients are, and reasonably should be, wary of injuring a client's case by sharing privileged information. However, as the understanding and appreciation of the value of alternative litigation financing increases, legislators and courts would do well to adopt statutes or create legal precedent for protecting documents and information shared between client and financer during the financer's evaluation of a client's legal claim.

Federal Privileges

"Generally, voluntary disclosure of a privileged attorney-client communication to a third-party waives the privilege."[4] In *Union-Carbide Corporation v. Dow Chemical Company*, the Delaware District Court, quoting the Third Circuit Court of Appeal, enunciated an exception to the general rule, which has been followed by many federal courts across the United States. Privileged information communicated to third parties may "retain a protective shield if the parties have a *common legal* interest, such as where they are co-defendants or are involved in or anticipate joint litigation.…[T]he key consideration is that the nature of the legal interest be identical, not similar, and be legal, not solely commercial."[5]

Despite the *Union-Carbide* court's attempt to clarify the doctrine, trial courts remain unclear as to how common the interests need to be and what is meant by a legal as opposed to a commercial interest. Will a court find that a client and financer have sufficiently similar interests? Are the interests of the client and financer sufficiently legal, or merely commercial?

A developing line of cases suggests privilege is waived when otherwise privileged communications are used for a commercial purpose, such as to negotiate the sale of goods or a company.[6] However, some courts take a more flexible approach suggesting that the common interest need only be similar, and that once a communication is legal in substance, it does not lose that status and somehow become commercial by mere communication to a third party.[7]

The case that has caused the most sleepless nights among members of the litigation financing industry is *Leader Technologies, Inc. v. Facebook, Inc.*,[8] which involved a discovery dispute over access to documents transmitted to potential financers. The case involved a patent infringement dispute, in which Facebook sought to compel production of documents that Leader had shared with potential litigation financers. Leader asserted that the documents remained privileged under the common-interest privilege.[9]

After giving a thorough analysis of the common-interest privilege, the federal magistrate concluded that the law was unsettled and unclear on how common or legal the interest needed to be. While the magistrate noted that the trend was in favor of allowing discovery and that ethical guidelines published by the Pennsylvania and New Jersey state bar associations suggested the potential of waiver, he also noted policy considerations such as the "need for litigation financing companies and the truth-seeking function of litigation."[10] Ultimately, the magistrate allowed for the discovery because Leader failed to satisfy its burden to establish a common interest privilege between itself and the litigation financing companies but noted that the documents would not necessarily be admissible at trial.[11]

Two decisions in the Northern District of California exemplify the extent of the division among federal courts. What does it mean for the interests between the client and financer to be "legal?" Must the communication be related to litigation or merely require analysis of legal doctrine?

In *Hewlett-Packard Company v. Bausch & Lomb Inc.*,[12] the plaintiff sought discovery of an attorney opinion letter that Bausch & Lomb had transmitted to GEC during negotiations for GEC to purchase Bausch & Lomb.[13] The court noted the *Union-Carbide* statement of the common-interest privilege and analyzed various policy considerations. The court stated, "Unless it serves some significant interest courts should not create procedural doctrine that restricts communication between buyers and sellers, erects barriers to business deals, and increases the risk that prospective buyers will not have access to important information that could play key roles in assessing the value of the business or product they are considering buying."[14]

The *Hewlett-Packard* court found that GEC and Bausch & Lomb had a potential common interest in the outcome of patent litigation, because it would affect the value of the business GEC was interested in purchasing. Therefore, the legal advice contained in the opinion letter was privileged and remained so despite communication to a third party. The third party's own interest in maintaining the confidentiality of the document also played a role in the court's decision. Because the court held that the attorney-client privilege was not waived, it declined to address the argument that the documents would have also been protected under the work-product privilege.[15]

In *Nidec Corporation v. Victor Company of Japan*,[16] the plaintiff subpoenaed documents from third-party bidders of Victor Company of Japan (JVC). The court quashed the subpoena, because the documents were available from a more direct, convenient, and less burdensome source (i.e., the defendants). The court also offered the parties guidance regarding discovery of those documents from JVC that had been transmitted to the third-party bidders.[17]

The court explained that *Hewlett-Packard*, "properly read," only found a common interest because of the clearly anticipated joint litigation regarding the validity of the patent. Whereas in *Nidec*, the third party was "simply considering buying a majority share of JVC." The *Nidec* court specifically disagreed with a more expansive reading of *Hewlett-Packard* and noted, "While the JVC litigation abstract might have been helpful to facilitate the potential commercial transaction, it did not further a common legal strategy in connection with the instant litigation." Consequently, the *Nidec* court found that the common interest had to be directly related to litigation in order to be sufficiently "legal." The court, however, did note that waiver of attorney work-product is not as easily found.[18]

Though few courts seem to address the distinction, it is well settled that the federal work-product privilege is more difficult to waive than the attorney-client privilege.[19] The relevant question, though, is, How much more difficult?

Work product protection only applies to materials "prepared in anticipation of litigation or for trial."[20] Depending on the jurisdiction, the litigation for which the materials were prepared may need to be more imminent than in others in order to benefit from the protection.[21] The burden then shifts to the party attempting to compel discovery to prove that the discovery is necessary.[22]

As a Central District of California court has explained, "[T]he work product protection is waived where the disclosure of an otherwise privileged document is made to a

third party and that disclosure enables an adversary to gain access to the information."[23] Furthermore, "[t]he purpose of the work product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship."[24] On this basis, a district court denied a motion to compel discovery in a case involving patent litigation a document to a third party without a common legal interest, the disclosure would not necessarily make the communication available to an adversary. If the communication at issue is also protected by the attorney work-product privilege, then an advocate should always argue that the more stringent protection remains. When attempting to maintain the privilege shield, attorneys should able to the attorney-client privilege and the work product doctrine."[31] Work product protection may be waived "by the attorney's disclosure or consent to disclosure to a person, other than the client, who has no interest in maintaining the confidentiality…of a significant part of the work product."[32] This standard arguably could provide less protection from discovery than the federal work

funding, because the documents were protected by the work-product privilege after the parties had entered into a confidentiality agreement so that disclosure to the third-party financer did not substantially increase the likelihood that an adversary would gain access to the information.[25]

All the federal courts operate with the understanding that federal privilege doctrines are "governed by the principles of the common law…in the light of reason and experience."[26] This means "federal courts have the flexibility to develop rules of privilege on a case-by-case basis."[27] But, federal courts should exercise this discretion to expand the rules of privilege only when it would protect "a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."[28]

While the *Leader* court found that balancing these considerations permitted discovery, a federal court would be well within its discretion to follow the *Hewlett-Packard* decision in denying discovery of privileged information communicated to a financer. Even the *Leader* court recognized some of the important public benefits of the litigation financing industry. In light of the highly deferential "clear error" standard of review, a decision denying discovery would likely be affirmed.

Even if the attorney-client privilege is found to have been waived by disclosure of argue the public benefits of litigation financing, the prejudice to the client from disclosure, the applicability of the work-product privilege, and the prejudice to the client from admissibility.

California Waiver Doctrine

While there are no cases directly on point, analysis of privilege laws in California provides some guidance for how state courts will approach litigation financing arrangements. The federal court in *Hewlett-Packard* suggests that "legal" is meant to refer to the type of advice sought from the attorney, rather than the use to which the knowledge is put. California courts agree that the attorney-client privilege is not limited to litigation-related communications.

The California Evidence Code provides that disclosure to a third party, *in confidence*, of a communication that is protected by the attorney-client privilege, "when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer…was consulted, is *not* a waiver of the privilege."[29] This is an expressly broader protection than under federal law.

The common-interest privilege has not been recognized by statute in California.[30] Instead, "the common interest doctrine is more appropriately characterized under California law as a nonwaiver doctrine, analyzed under standard waiver principles applic-

product protection because the interest is in maintaining confidentiality generally, not merely protecting the document from discovery by an adversary. In California, both the attorney-client privilege and the attorney work product protection are usually analyzed together, and waiver of one privilege waives the other.

While the procedural posture of *STI Outdoor LLC v. Superior Court*[33] is complicated, it set out a favorable rule and broad standard in California. The *STI* court explained that the attorney-client privilege is not limited to litigation-related communications. Indeed, in that case, the court found that disclosure of privileged communications to a third party with whom STI was negotiating did not waive the attorney-client privilege, because it was reasonably necessary to further the interest of both parties in finalizing negotiations.[34]

In *OXY Resources California LLC v. Superior Court*,[35] the court applied the *STI* ruling to a more procedurally analogous situation. OXY sought to protect communications made to a third party in the course of negotiations that eventually gave rise to a lawsuit. The court held that a confidentiality agreement provides evidence of a reasonable expectation of confidentiality but is not dispositive. Because the documents did not become privileged solely on the basis of the confidentiality agreement, the court remanded to the

trial court to determine whether the documents were privileged, and then to determine whether that privilege had been waived.[36] When analyzing whether the privilege was waived, the court must "determine whether the disclosures were reasonably necessary to accomplish the purpose for which the parties consulted their attorneys in finalizing the negotiations."[37]

California appellate courts have not yet confronted the issue of litigation financing. However, based on the reasoning of *STI* and *OXY*, courts could hold that disclosure of privileged information to a financer does not waive the privilege. Disclosure to the financer must be made in confidence and must be reasonably necessary to accomplish the goal of finalizing negotiations between the client and financer. A confidentiality agreement is recommended to formalize the parties' intent to maintain confidentiality.

Toward a Financer's Privilege

Financers, of course, are risk averse.[38] To encourage third-party litigation financing, it would be beneficial for California to enact legislation to formalize a financer's privilege and allow financers to conduct necessary due diligence without fear of waiving privileges and injuring the case in which they may want to invest.[39] Privileged information could provide for a more accurate evaluation of the strength and value of a case. Examples of privileged information may include an opinion letter from the attorney regarding the strengths and weaknesses of the client's or opposing side's claims, a discussion with the client or his or her attorney concerning the client's motives and goals regarding the lawsuit, and the attorney's notes from witness interviews or depositions.

Opponents of litigation financing argue that it will increase the amount of frivolous litigation.[40] Of course, given an attorney's ethical duty not to file frivolous lawsuits,[41] the real concern is probably more accurately stated that they believe litigation financing will increase the number of weak cases filed and litigated.[42] However, weak cases are still entitled to their day in court. Parties should not be able to use the exorbitant cost of litigation as an opportunity to do others harm.

While it is has been suggested that clients may be more likely to litigate when they do not have their own skin in the game,[43] a client still has to find a financer willing to invest in a lawsuit. If the financer does not have available all the information that a client possesses with which to evaluate a case, a client may be able to convince a financer that the lawsuit is stronger than it is, thus securing financing for a weak case. The more information, including privileged information, that the financer has, the better it will be able to weed out weak cases.

Opponents also argue that the increase in litigation of weak cases will result because financers are willing to invest in a weak case if the potential payoff is high enough.[44] Financers, though, would rather invest in two strong cases than one weak case. Similarly, greater accuracy on the amount at issue will reduce the number of weak cases worth "gambling" on.

If a financer is better able to evaluate how risky an investment is, the cost of making the money available can be lower.[45] This is similar to the reason why the interest on a loan increases as the term of the loan lengthens: The longer it takes to pay back the principal, the less likely the lender is to recover that principal. And similarly, as in the insurance industry, the more likely the insurer is to lose money on the insured, the higher the premium charged. If financers have more certainty regarding the strength of cases, there is not as much need to see as high of a return on each investment.

Litigation financing is not a new concept. Contingency fee agreements and insurance are common ways to finance litigation beyond the traditional model in which the client pays. An attorney who is about to invest time, energy, and money into a case for only the potential of recovery, though, has access to significant privileged information before deciding to enter into a contingency fee arrangement. Likewise, an insurer also has access, without fear of waiver, to privileged information in deciding whether to defend an insured. This access to information is what allows a contingency-fee lawyer or an insurer to weed out weak cases and accurately evaluate the value of a case. Financers have the power to affect the amount and type of cases that reach the courts. How could it possibly be a good idea to handicap them by limiting the amount and type of information they have available to inform their investment decision?

The litigation financing industry is an exciting opportunity for creative investors. There are strong legal and policy arguments that courts could use to support the emerging industry. Financers, clients, and their attorneys, however, need to be aware of the current unsettled nature of privilege and waiver law as it relates to third-party disclosures of privileged information. ■

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[1] Fisher v. United States, 425 U.S. 391, 403 (1976); EVID. CODE §952.
[2] CODE CIV. PROC. §§2018.010 *et. seq.*; Hickman v. Taylor, 329 U.S. 495, 509-12 (1947).
[3] Union Carbide Corp. v. Dow Chem. Co., 619 F. Supp. 1036, 1047 (D. Del. 1985) (citing In re Grand Jury Investigation, 599 F. 2d 1224, 1235 (3rd Cir. 1979)); *see also* OXY Res. Cal. LLC v. Superior Court, 115 Cal. App. 4th 874, 890 (2004).

Continued on page 29.

Court of Appeal recently acknowledged the necessity for trial courts to properly instruct the jury on dispositive issues not covered by CACI jury instructions, stating:

> As the court recognized, California Rules of Court, rule 2.1050(e) provides in relevant part: "[w]henever the latest edition of the Judicial Council jury instructions does not contain an instruction on a subject on which the trial judge determines that the jury should be instructed, or when a Judicial Council instruction cannot be modified to submit the issue properly, the instruction given on that subject should be accurate, brief, understandable, impartial, and free from argument."[35]

In *Mize-Kurzman,* an employee alleged retaliation by a community college district and its board of trustees after she made four disclosures of what she believed to be violations of law and regulations. Her case came to trial alleging violations of two California whistle-blower protection statutes. The trial court gave two special instructions on what constituted protected disclosures, acknowledging the absence of CACI jury instructions on that necessary element. The trial court relied on the federal law standards in constructing the special instructions, but in doing so misstated the applicable California law. The court of appeal reversed the judgment for the employer and remanded the case for retrial.[36]

Attorneys can be the most effective advocates for their clients in trial when they are poised to take advantage of the opportunity to use special instructions especially in new areas of law, while attentive to the potential for instructional error on appeal. ■

[1] Soule v. General Motors Corp., 8 Cal. 4th 548, 572 (1994).
[2] Fish v. Los Angeles Dodgers Baseball Club, 56 Cal. App. 3d 620, 633 (1976).
[3] A defendant is entitled to jury instructions that "pinpoint" his or her theory of the case. *See* People v. Saille, 54 Cal. 3d 1103, 1119 (1991); People v. Wright, 45 Cal. 3d 1126, 1135-36 (1988); People v. Wharton, 53 Cal. 3d 522, 570 (1991).
[4] CAL. R. CT. 2.1055.
[5] People v. Wright, 45 Cal. 3d 1126, 1141 (1988).
[6] *Id.*
[7] *Id.* at n.6 (citing People v. Lyons, 50 Cal. 2d 245, 271 (1958); People v. Smith, 67 Cal. App. 3d 45, 49-50 (1977); People v. Whittaker, 41 Cal. App. 3d 303, 308 (1974)).
[8] *Id.*
[9] Munoz v. City of Union City, 120 Cal. App. 4th 1077 (2004).
[10] Taha v. Finegold, 81 Cal. App. 2d 536 (1947).
[11] *Id.*
[12] People v. Coffman, 34 Cal. 4th 1, 99 (2004).
[13] Levy-Zentner Co. v. Southern Pac. Transp. Co., 74 Cal. App. 3d 762 (1977).
[14] Pantoja v. Anton, 198 Cal. App. 4th 87 (2011).
[15] Lyle v. Warner Bros. Television Prod., 38 Cal. 4th 264 (2006).
[16] People v. Garvin, 110 Cal. App. 4th 484 (2003).
[17] City of Pleasant Hill v. First Baptist Church, 1 Cal. App. 3d 384 (1969).
[18] Taylor v. Roseville Toyota, Inc., 138 Cal. App. 4th 994 (2006).
[19] Logacz v. Limansky, 71 Cal. App. 4th 1149, 1159 (1999).
[20] *See* BAJI 3.77.
[21] Logacz, 71 Cal. App. 4th at 1159.
[22] Gdowski v. Louie, 84 Cal. App. 4th 1395 (2000).
[23] *Id.*
[24] Soule v. General Motors Corp., 8 Cal. 4th 548, 580 (1994).
[25] CAL. CONST. art. VI, §13.
[26] LeMons v. Regents of Univ. of Cal., 21 Cal. 3d 869, 875 (1978).
[27] Soule, 8 Cal. 4th 548.
[28] Bowman v. Wyatt, 186 Cal. App. 4th 286 (2010).
[29] People v. Moore, 51 Cal. 4th 1104 (2011).
[30] People v. Watson, 46 Cal. 2d 818 (1956).
[31] Stevens v. Owens-Corning Fiberglas Corp., 49 Cal. App. 4th 1645 (1996).
[32] Lynch v. Birdwell, 44 Cal. 2d 839 (1955).
[33] Suman v. BMW of N. Am., Inc., 23 Cal. App. 4th 1(1994).
[34] Mize-Kurzman v. Marin Cmty. Coll. Dist., 2012 Cal. App. LEXIS 14 (Cal. App. 1st Dist. Jan. 10, 2012).
[35] CAL R. CT. 2.1050.
[36] Mize-Kurzman, 2012 Cal. App. LEXIS 14.

LITIGATION FINANCING

Continued from page 24.

[4] In re Syncor ERISA Litig., 229 F.R.D. 636, 643 (C.D. Cal. 2005) (citing United States v. Plache, 913 F. 2d 1375, 1379 (9th Cir. 1990)).
[5] Union Carbide, 619 F. Supp 1036, 1047 (citing DuPlan Corp. v. Deering Milliken, 397 F. Supp. 1146 (D. S.C. 1974).
[6] In re John Doe Corp., 675 F. 2d 482, 489 (2nd Cir. 1982); Nidec Corp. v. Victor Co. of Japan, 249 F.R.D. 575 (N.D. Cal. 2007).
[7] Hewlett-Packard Co. v. Bausch & Lomb Inc., 115 F.R.D. 308 (N.D. Cal. 1987).
[8] Leader Techs., Inc. v. Facebook, Inc., 719 F. Supp. 2d 373 (D. Del. 2010).
[9] *Id.* at 376.
[10] *Id.* at 377.
[11] *Id.* at 376.
[12] Hewlett-Packard Co., 115 F.R.D. 308.
[13] *Id.* at 309.
[14] *Id.* at 311.
[15] *Id.* at 309-312.
[16] Nidec Corp. v. Victor Co. of Japan, 249 F.R.D. 575 (N.D. Cal. 2007).
[17] *Id.* at 577-78.
[18] *Id.* at 579-80.
[19] United States v. Massachusetts Inst. of Tech., 129 F. 3d 681, 687 (1st Cir. 1997).
[20] FED. R. CIV. P. 26(b)(3).
[21] Smithkline Beecham Corp. v. Apotex Corp., 232 F.R.D. 467, 473 (E.D. Pa. 2005) ("Generally, a reasonable anticipation of litigation requires existence of an identifiable specific claim or impending litigation at the time the materials were prepared."); *c.f.* Gutman v. United States Dept. of Justice, 238 F. Supp. 2d 284, 294 (D. D.C. 2003) ("The D.C. Circuit has explained that this privilege 'extends to documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated.'") *and* Fox v. California Sierra Fin. Servs., 120 F.R.D. 520, 524 (N.D. Cal. 1988) ("There is no requirement that the litigation have already commenced in order for the work-product doctrine to be operative, however, there must be more than a remote possibility of litigation.).
[22] *See* FED. R. CIV. P. 26(b)(3).
[23] In re Syncor ERISA Litig., 229 F.R.D. 636, 643 (C.D. Cal. 2005) (citing United States v. Massachusetts Inst. of Tech., 129 F. 3d 681, 687 (1st Cir. 1997)).
[24] United States v. AT&T, 642 F. 2d 185, 192 (D.C. Cir. 1980).
[25] Mondis Tech., Ltd. v. LG Elecs., Inc., 2011 U.S. Dist. LEXIS 47807, at *5, 2011 WL 1714304, at *5 (E.D. Tex. May 4, 2011).
[26] United States v. Zolin, 491 U.S. 554, 562 (1989); FED. RULE EVID. 501.
[27] Trammel v. United States, 445 U.S. 40, 47 (1980); *see also* Dickerson v. Superior Court, 135 Cal. App. 3d 93, 99 (1982).
[28] Trammel, 445 U.S. 40, 47 (suggesting that a privilege "excluding relevant evidence" will only be established when "a public good transcend[s] the normally predominant principle of utilizing all rational means for ascertaining truth").
[29] EVID. CODE §912(d).
[30] OXY Res. Cal. L.L.C. v. Superior Court, 115 Cal. App. 4th 874, 899 (2004).
[31] *Id.*
[32] BP Alaska Exploration, Inc. v. Superior Court, 199 Cal. App. 3d 1240, 1261 (1988).
[33] STI Outdoor LLC v. Superior Court, 91 Cal. App. 4th 334 (2001).
[34] *Id.* at 340-41.
[35] OXY Res., 115 Cal. App. 4th 874.
[36] *Id.* at 879-99.
[37] *Id.* at 899.
[38] Juridica Capital Management (US) Inc., Comments to ABA Commission on Ethics 20/20, Alternative Litigation Financing Working Group Issues Paper at 62-70, 64.
[39] *E.g., see* NEB. REV. STAT. §25-3306: "No communication between the attorney and the civil litigation funding company as it pertains to the nonrecourse civil litigation funding contract shall limit, waive, or abrogate the scope or nature of any statutory or common-law privilege, including the work-product doctrine and the attorney-client privilege." This law is a great start, but financers should be aware that it may only protect against disclosure of documents and information related to the financing contract rather than information related to the claim as well.
[40] U.S. Chamber Institute for Legal Reform, *Selling Lawsuits, Buying Trouble: Third Party Litigation Financing in the United States* 3, 5-7 (Oct. 2009).
[41] CODE CIV. PROC. §128.7; FED. R. CIV. PROC. 11.
[42] U.S. Chamber Institute for Legal Reform, Comments to ABA Commission on Ethics 20/20, Alternative Litigation Financing Working Group Issues Paper at 132-162, 164 (slightly rephrasing the concern stated in the October 2009 paper).
[43] U.S. Chamber Institute for Legal Reform, *Selling Lawsuits, supra* note 40, at 3, 5-7.
[44] U.S. Chamber Institute for Legal Reform, Comments to ABA Commission on Ethics 20/20, *supra* note 42, at 132-162, 164 n.3 ("There is a price for everything.").
[45] Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W. 3d 87, 96-101 (Tex. App. 2006); *see also* U.S. Chamber Institute for Legal Reform, *Selling Lawsuits*, *supra* note 40, at 3.