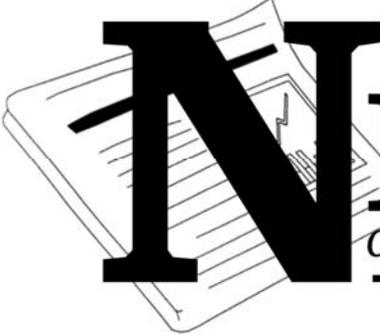


September 2018



NEWcases

of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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S T A T E

Attorneys—Conflicts Between Clients—Advanced Conflict Waivers

The California Supreme Court's decision in *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.*, 2018 WL 4137013 (2018) is a must-read regarding conflicts of interest between law firm clients. When J-M Manufacturing approached Sheppard Mullin to represent it in a large qui tam action brought on behalf of a number of public entities, the firm ran a conflict check, which revealed that one of its attorneys had represented one of the public entities—South Tahoe—on and off for a number of years. Nonetheless, the firm determined that it could represent J-M because South Tahoe had signed an advance conflict waiver. Thereafter, Sheppard Mullin and J-M signed an engagement letter that also contained a conflict waiver, though the firm did not inform J-M of its representation of South Tahoe. Over the next year, Sheppard Mullin billed South Tahoe for only 12 hours of work. By contrast, during its representation of J-M in the qui tam action, Sheppard Mullin attorneys performed approximately 10,000 hours of work. South Tahoe eventually learned of Sheppard Mullin's representation of J-M and moved to disqualify the firm from the qui tam action. The district court granted the motion to disqualify, resulting in a dispute between Sheppard Mullin and J-M over more than \$3 million in fees incurred in that action. That dispute went to arbitration

under the terms of the parties' engagement, and an arbitrator awarded Sheppard Mullin its fees. On appeal from the judgment confirming the award, however, the court of appeal reversed. The court of appeal held that the matter should not have been arbitrated because, notwithstanding the advanced conflict waiver, the firm's undisclosed conflict was an ethical violation that rendered the parties' agreement unenforceable. The court also held that Sheppard Mullin was not entitled to any of the fees incurred during the representation. The Supreme Court granted review and agreed with the court of appeal that "the law firm's conflict of interest rendered the agreement with [J-M], including its arbitration clause, unenforceable as against public policy." The court held that the conflicts waiver was not effective "because the law firm failed to disclose a known conflict with a current client." The court disagreed with the court of appeal, however, that the conflict disentitled the law firm from receiving any compensation for its services, and remanded for the trial court to determine "whether principles of equity entitle the law firm to some measure of compensation"

Attorneys—Disqualification—
Change in Circumstances—
Remand

The trial court disqualified an entire firm when the firm hired a lawyer who, as an employee of an outside vendor, had managed discovery for the adversary in a lawsuit the firm was currently handling. Despite that the hiring firm erected an ethical wall and notified its adversary of the hire, the trial court disqualified the firm. *Fluidmaster, Inc. v. Fireman's Fund Ins. Co.*, 25 Cal.App.5th 545, 235 Cal.Rptr.3d 889 (2018). The firm appealed. While the case was on the appeal, the conflicted lawyer left the firm and the question became whether that had any effect on the appeal. The court of appeal held that it did. Relying on *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776 (2010), the court held that the disqualification order should be reconsidered by the trial court in light of these new circumstances with the focus on whether the lawyer's stay at the firm "actually resulted in the improper transmission, directly or indirectly, of confidential information."

Damages—Intentional Tort—
Comparative Fault

Civil Code section 1431.2 mandates that “[e]ach defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant’s percentage of fault.” In *B.B. v. County of Los Angeles*, 25 Cal.App.5th 115, 235 Cal.Rptr.3d 457 (2018), the jury in a wrongful death action awarded \$8 million in noneconomic damages after finding the deceased 40% at fault, each of two individual deputies 20% at fault, and the remaining deputies 20% at fault. The trial court entered judgment for the full \$8 million dollar award against one of the deputies, relying on an appellate decision that held that section 1431.2 did not apply to an intentional tortfeasor’s liability. The appellate court recognized that the trial court was obligated to follow that precedent, but declined to do the same. Noting that there is no horizontal stare decisis in California’s courts, the court of appeal thus held that section 1431.2 applies even where a defendant is found liable for an intentional tort.

Defamation—Immunity—Section
230 Protection for Service
Providers

The Communications Decency Act, also known as Section 230, immunizes “providers of interactive computer services against liability arising from content created by third parties” and bars lawsuits “seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.” In *Hassell v. Bird*, 5 Cal.5th 522, 234 Cal.Rptr.3d 867 (2018), plaintiff law firm sued its former client for allegedly defamatory Yelp reviews, but intentionally avoided naming Yelp as defendant, knowing that Yelp could assert immunity under Section 230. After the trial court entered default judgment and ordered Yelp to remove certain reviews, Yelp intervened. The California Supreme Court reversed, holding that Section 230 immunity applies even when the service provider is a non-party. The Supreme Court emphasized the breadth of Section 230’s immunity provisions, which reflect the legislature’s “commitment to the value of maintaining a free market for expression.” Unsurprisingly, this case brought out many of the big names in tech, including Google, Facebook, Craigslist, Reddit, Twitter, Wikimedia, along with organizations like the ACLU, all of whom filed amici briefs on behalf of Yelp.

Litigation—Discovery—
Timeliness of Motion to Compel

CCP § 2025.480(b) provides that a motion to compel further production of documents relating to a deposition subpoena “shall be made no later than 60 days after the completion of the record of the deposition” In *Weinstein v. Blumberg*, 25 Cal.App.5th 316, 235 Cal.Rptr.3d 658 (2018), the court held that a motion to compel is not “made” until all supporting papers are filed and served. There, the defendant served a notice of motion and motion to compel within the 60-day deadline, but did not serve the supporting papers until 15 days before the hearing. The trial court nonetheless granted discovery sanctions based on the motion, but the court of appeal reversed. The court of appeal applied CCP § 1010, which states that any notice must state, among other things, the papers upon which the motion is based and “[i]f any such paper has not previously been served upon the party to be notified and was not filed by him, a copy of such paper must accompany the notice.” Because defendant served the notice of motion and motion to compel without the supporting papers identified therein, the motion was untimely, and the trial court could not properly award sanctions on that motion.

Litigation—Trial—
Continuance—Writ Proceedings

A trial court has wide discretion to decide whether to continue a trial, and normally, a court of appeal will not intervene to vacate the denial of a continuance. But *Padda v. Superior Court*, 25 Cal.App.5th 25, 235 Cal.Rptr.3d 379 (2018) is a case to hold in your back pocket should you need to seek writ relief. There, the court of appeal issued a writ to overturn the denial of a continuance, finding that the trial court abused its discretion. Due to medical problems, a party’s expert witness became unavailable on the eve of trial. The real parties had not really objected to the continuance, but the trial court insisted that the trial start on time, only to be suspended to allow defendant to find a new expert. This plan would disrupt the trial and the juror as much as, if not more than, a continuance. Recognizing the prejudice to defendants to proceeding without an expert, the court of appeal vacated the order denying the continuance.