

CALIFORNIA COURTS EASE HARDSHIP DISCOVERY IMPOSES ON THIRD PARTIES

By Richard A. Jackson and John S. Throckmorton

In two recent cases, California courts of appeal have reduced the burden that litigants can impose on third parties, particularly with respect to protecting the third party's own privileged information. These decisions recognize the burdens that third parties face when forced to participate in litigation between other parties.

In *Monarch Healthcare v. Cassidenti*, 00 C.D.O.S. 2027 (2000), a third-party health care provider was served with a records-only subpoena. Rather than file a motion to quash, the healthcare provider raised objections when it produced documents. When the subpoenaing party served a motion to compel, the trial court ruled that a nonparty can preserve its objections only by filing a formal motion to quash.

The Fourth District reversed, holding that Section 1987.1 of the Code of Civil Procedure *permits* a nonparty to file a motion to quash, but does not *mandate* such action. The court of appeal looked to section 2025(m)(1) of the Code of Civil Procedure, which states that objections are "waived unless a specific objection to its disclosure is timely made during the deposition." Thus, a nonparty need only object during a deposition, or beforehand, in order to preserve any privilege.

The court of appeal based its opinion on two fundamental principles

of discovery -- the burdens imposed on non-parties should be less onerous than those imposed upon litigants, and privileges are preserved unless the holders of the privilege fail to object in a proceeding where they have standing and an opportunity to claim them. The court of appeal thus shifted the burdens of discovery on the demanding party, stating,

Proponents [of the discovery] have the burden to move to compel answers that are not forthcoming. While the other side may seek a protective order to excuse response[,] as a practical matter this is rarely done . . . because simply objecting raises the issue and shifts the burden of going to court to the other party!

00 C.D.O.S. at 2028 [citations omitted].

In *Mylan Laboratories, Inc. v. Soon-Shiong*, 76 Cal. App. 4th 71 (1999), the court went even further, ruling that a nonparty need not (in fact, could not) actually intervene in a case to preserve his claim of attorney-client and work-product privilege as to a document.

In *Mylan*, the third-party had filed a motion to intervene to assert attorney-client and work product privileges concerning a document that a party in the litigation had attached to the

complaint. The trial court denied the request to intervene.

The Second District agreed that the third party could not intervene, holding that the third-party's claim of privilege was not the kind of "interest relating to the property or transaction at issue" which was needed for him to have an unconditional right to intervene in the action pursuant to section 387(b) of the Code of Civil Procedure. *Id.* at 78-79.

The court of appeal went on to rule, however, that the third-party holder of the attorney-client and work-product privileges had standing to assert those privileges under section 954 of the Evidence Code. *Id.* at 80. In so ruling, the court embraced a less burdensome method for third parties to assert privilege claims and opined that "[t]he Evidence Code envisions that privileges can be asserted by non-parties without the cumbersome and expensive process of [formal] intervention." *Id.* at 78.

Monarch Healthcare and *Mylan* are consistent with the earlier opinion in *Calcor Space Facility, Inc. v. Superior Court*, 53 Cal. App. 4th 216 (1997), in which the Fourth District stated that "[t]he concerns for avoiding undue burdens to the 'adversary' in the litigation . . . apply with even more weight to a non-party." These cases reflect a willingness by the courts to

lessen the burden on third-parties seeking to protect their interests.

In assessing how to properly protect a client's interest in protecting privileged information when that information is requested in some other party's litigation, the attorney representing the non-party client should consider the full array of options given by the Code of Civil Procedure. When presented with a subpoena seeking protected information, serving timely objections in response is an inexpensive way to protect your client's interests. Similarly, when a nonparty's privileged information is being misused by a party in litigation, the attorney representing the nonparty may file a simple motion under section 954 of the Evidence Code to stop the abuse.

RECENT CASE NOTES

By Merri A. Baldwin

Law firm not liable for failing to disclose its intended employment of law clerk

In *First Interstate Bank of Arizona, N.A. v. Murphy, Weir & Butler*, 00 C.D.O.S. 3012 (April 20, 2000), the Ninth Circuit held that a law firm owes no duty to inform its client that a law clerk employed by a judge before whom the client's litigation is pending accepted an offer of future employment with the law firm.

In *First Interstate*, Murphy, Weir & Butler handled a matter which was pending before Judge Tchaikovsky of the United States Bankruptcy Court. In November 1993, the Murphy firm extended an employment offer to the judge's only law clerk, to begin after the clerkship ended in September 1994. The Murphy firm's hiring committee told the clerk that if she accepted the employment offer, she could not work on any matters handled by the Murphy firm for the duration of her clerkship. Once the clerk accepted the offer,

Judge Tchaikovsky instructed the clerk to refrain from doing any more substantive work on any matters in which the Murphy firm represented a party in interest.

Despite these multiple warnings, the clerk handled several matters relating to the case -- fielding telephone calls relating to procedural matters, observing courtroom proceedings, editing a memorandum relating to an earlier plan of reorganization and discussing with the judge the intended decision on the final plan.

On August 12, 1994, Judge Tchaikovsky entered final orders, one very favorable to the Murphy firm's client, First Interstate Bank. The order granted the bank's motion for relief from the automatic stay and valued its claim at \$4.75 million. In September 1994, the debtor learned of the clerk's new employment with the Murphy firm and moved to recuse the judge and vacate her orders. The judge acknowledged she had violated 28 U.S.C. § 455(a) by failing to completely insulate the clerk from the proceeding, and recused herself. Ultimately, the new judge ordered a new trial and refused First Interstate relief from the automatic stay, which prevented foreclosure. First Interstate then sued Murphy, Weir & Butler for negligence, breach of fiduciary duty and breach of contract.

In upholding the district court's summary judgment in favor of the Murphy firm, the Ninth Circuit held that the harm suffered by First Interstate -- a new trial -- was not foreseeable by the Murphy firm nor preventable by it. Judges and law clerks bear the burden of maintaining impartiality. "Lawyers are entitled to assume that judges (and law clerks) will perform their duty." Accordingly, the Murphy firm did *not* bear the blame for the judge's ultimate recusal.

While this decision offers some comfort to law firms which hire judicial

clerks, it is important that the law firm protect itself as much as possible. As the Murphy firm did in this case, the hiring firm should remind the judicial clerk at the time the offer is made to refrain completely from working on any matters handled by the firm, including even minor procedural matters. Beyond that, the responsibility lies with the judges and law clerks -- a rule that clearly makes sense.

DISCLAIMER: The material contained in this newsletter is for informational purposes only and does not constitute legal advice. For specific advice, you are advised to contact your legal counsel.

ROGERS, JOSEPH, O'DONNELL & QUINN

RJOQ's Professional Liability Practice Group specializes in representing lawyers and law firms throughout California.

Pamela Phillips (Chair)
Michele K. Trausch
J. Michael Matthews
Suzanne M. Mellard
Merri A. Baldwin
Connie M. Teevan
Sean M. SeLegue
Phyllis A. Jaudes
Richard A. Jackson
John S. Throckmorton
Allison Morse

311 California Street, 10th Floor
San Francisco, CA 94104
Telephone: (415) 956-2828
Facsimile: (415) 956-6457
E-Mail: rjoq@rjoq.com