CALIFORNIA ACADEMY OF APPELLATE LAWYERS

January 9, 2008

Honorable Ronald M. George, Chief Justice
Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Re: *Reid v. Google, Inc.*, No. S158965
Letter supporting review (Rule 8.500(g))

Dear Chief Justice George and Associate Justices:

The California Academy of Appellate Lawyers urges the Court to grant the petition for review on the second issue it raises, concerning the law that governs appellate consideration of evidence when a trial court fails to rule on objections. The Academy takes no position on the substantive merits of the litigation and does not, at this point, urge any particular resolution to the issue presented. Rather, it seeks to highlight the need for *some* resolution that will provide sorely-needed guidance to trial courts, appellate courts, and the lawyers who practice before them.

This is at least the fourth time the Court has been asked to review the matter.[1] As we demonstrate below, the passage of time has not yielded a solution. A review of several years of published and nonpublished opinions—including a deeply divided decision from the very court that rendered the current opinion—confirms the problem's intractability. We cannot describe the situation better than Presiding Justice Conrad Rushing did as a dissenter in that prior decision, which preceded this one by just two weeks:

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[1] In addition to the two cases described in the petition at p. 16, fn. 3, the issue was raised in *Gallant v. City of Carson*, No. S134196, in which the Academy filed a letter supporting review on this point.

> "I think it is time for the courts, or the Legislature if necessary, to drain the festering procedural swamp that has formed around the treatment of objections to evidence offered in support of and opposition to a motion for summary judgment." (*Lawal v. 501(c) Insurance Programs, Inc.* (2007) 2007 WL 2751782, *35 (dis. opn. of Rushing, P.J.) (*Lawal*).)

The present opinion represents a commendable effort to lead the bench and bar out of the "festering procedural swamp." Unfortunately, however, it raises as many questions as it answers. More than anything else, it demonstrates the overwhelming need for this Court's guidance.

Interest of the California Academy of Appellate Lawyers

The California Academy of Appellate Lawyers is a non-profit elective organization of experienced appellate practitioners. Its goals include promoting and encouraging sound appellate procedures designed to insure proper and effective representation of appellate litigants, efficient administration of justice at the appellate level, and improvements in the law affecting appellate litigation. It has participated as amicus curiae in many cases before this Court, including, most recently, *Silverbrand v. County of Los Angeles*, No. S143929 (not yet argued) and *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894.

The Academy seeks clear and consistent rules not only in the appellate courts but also in the trial courts, since without consistent trial rules there can be no consistent appellate results.

Statement of the Issue

The petition for review properly states its second issue in narrow terms tailored to the facts of the case. But the manifold problems underlying the issue prompt us to urge the Court to address the issue more broadly:

> When a party has made timely evidentiary objections but the trial court fails to rule on them, under what circumstances, if any, are the objections preserved for appeal?

Confusion and Conflict in the Law

Genesis of the conflict. The confusion in the law flows from two distinct tributaries.

• In *Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1420 (*Biljac*), Division Two of the First District stated that a trial court need not rule on evidentiary objections because "it is presumed on appeal that a judge has not relied on irrelevant or incompetent evidence." This principle has been the express or implied basis for countless trial court refusals to rule on evidentiary objections.

Biljac has followed a tortuous path. Although trial courts have frequently relied on it—according to our members, many still do—the appellate courts have almost universally disagreed with it, leading Division Two to overrule the decision in April 2007. (*Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564, 566, 578 (*Demps*).)

• In 1993, this Court stated that when a trial court fails to rule on evidentiary objections, those undecided objections are waived. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1 (*Ann M.*) ["Because counsel failed to obtain rulings (on objections to summary judgment evidence), the objections are waived and are not preserved for appeal"]; accord, *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1186, fn. 1, disapproved on other grounds in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854 (*Sharon P.*).) As several courts have observed, the waiver rule that *Ann M.* and *Sharon P.* articulated has long been applied in both trials and motion practice. (See *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 784 (*City of Long Beach*); *Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 712-713 (*Gallant*).)

The potentially harsh consequences of rigid adherence to the waiver rule—especially where the responsibility for the absence of a ruling rests with the trial court rather than counsel—have led courts to fashion exceptions and remedies. For example, several courts have held that a request for rulings during oral argument may suffice to preserve objections even if the trial court fails to rule. (*City of Long Beach*, *supra*, 81 Cal.App.4th at pp. 782-785); *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 234- 238). However, as one justice observed, this approach places lawyers "in the position of haranguing the very judges whose favorable rulings they seek, [who may] frown upon the lawyer who presumes to tell the court how to do its job . . . ." (*Gallant*, *supra*, 128 Cal.App.4th at pp. 714-715 (dis. opn. of Vogel, J.) [noting that "the objector

must yell and scream and stamp his feet, or do whatever else it takes to force the trial court to rule on those objections"].)

Another court, also referring to the trial court's obligation to rule on objections, granted writ relief compelling the trial court to act. (*Vineyard Springs Estates, LLC v. Superior Court* (2004) 120 Cal.App.4th 633, 643.)

These responses to the waiver rule recognize the problem that Justice Rushing articulated in his unpublished dissent in *Lawal*: "To impose a forfeiture on a party based upon a court's violation of its supposed duties marks in my view an extravagant departure from the core principles on which we rely for a sound jurisprudence. Most broadly, it is not the practice in our society, or in any civilized society, to punish one actor for another's defalcations." (*Lawal*, *supra*, 2007 WL 2751782 at p. 36 (dis. opn. of Rushing, P.J.).)

Things get worse. Decisional conflicts often settle down over time, so that both lawyers and judges know reasonably well what is expected of them. That hasn't happened here. In fact, the situation is actually getting worse.

For example, one might think that by overruling *Biljac* the First District put to rest the controversy that the decision generated. Not so. Although the court said that it was following the waiver rule "dictated" by *Ann M.* and *Sharon P.* (*Demps*, *supra*, 149 Cal.App.4th at pp. 566, 578), it ended up holding "that a trial judge's failure to rule on properly presented objections results in their being impliedly *overruled*" (*id*. at p. 566, emphasis added). But unlike *overruled* objections, objections that are *waived*—which is what *Ann M.* and *Sharon P.* "dictate"—"are not preserved for appeal." (*Ann M.*, *supra*, 6 Cal.4th at p. 670, fn. 1; see *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727, 736 [like *Demps*, stating that *Ann M.* required treating absence of ruling as implied overruling of objections, but then treating objections as waived]; see also *Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 140-141 [failure to rule on objections is implied overruling].)

The present opinion compounds the problem. It not only fails to address either *Ann M.* or *Sharon P.* and their apparently unyielding waiver rule (it doesn't cite either case), but it also purports to revive *Biljac* and to adopt *Demps*' view that a failure to rule on an objection results in an implied *overruling*:

> "[W]e believe the *Biljac* decision was substantially correct,
> and was surely more nearly correct than its critics have been.

> Indeed, based on *Biljac*, in the absence of express rulings by the trial court, as in the present case, we presume either that the trial court ruled correctly on evidentiary objections, or that the court *overruled* all objections it did not expressly sustain." (Slip Opn., p. 14, emphasis added.)

It is hard to square this result with the dictate that a failure to rule means waiver rather than overruling.

Further complicating the application of these irreconcilable holdings are conflicts in the governing standard of review. Courts that insist on trial court rulings sometimes do so on the basis that evidentiary rulings are reviewed for abuse of discretion. (E.g., *Sambrano v. City of San Diego*, *supra*, 94 Cal.App.4th at p. 235.) The present case, in contrast, finds little need for deference to trial court discretion, at least in the summary judgment context: "Because summary judgment is decided entirely on the papers, and presents only a question of law, it affords very few occasions, if any, for truly discretionary rulings on questions of evidence." (Slip Opn., p. 16.)

And there's still another conflict: Just when does the waiver rule apply? Some courts find its basis in summary judgment law, implying it should not apply elsewhere. (E.g., *City of Long Beach*, *supra*, 81 Cal.App.4th at pp. 782-783; see *Gallant*, *supra*, 128 Cal.App.4th at pp. 715-718 (dis. opn. of Vogel, J.).) Others, noting that it is a settled rule in many contexts, recognize no such limitation. (E.g., *Gallant*, *supra*, 128 Cal.App.4th at pp. 709-713 [applying waiver rule to SLAPP case].)

In short, the "procedural swamp" is getting deeper:

- In some courts, undecided objections are always waived. In others, they are not waived as long as a party makes an attempt—how much is necessary is never clear—to obtain rulings. In still others, including the present case, rulings are unnecessary, and the objections are preserved through the mechanism of implied overruling.

- In some courts, the trial court has an affirmative duty to rule on all objections. In others, such as here, if there is such a duty the trial court is essentially free to ignore it.

- In courts that apply an abuse of discretion standard of review, rulings will be necessary. In courts that do not, rulings are irrelevant.

- In some courts, the waiver rule may apply only in summary judgment proceedings. In others, it may apply universally.

Importance of the Issue

It is not even a slight exaggeration to say that the problems we describe potentially affect every single case litigated in California's courts. Any evidence-based motion is likely to trigger objections, and the rules that govern undecided objections may well be dispositive in any appeal. And since only this Court's decisions are universally controlling in all California courts, it is impossible for lawyers or judges to be sure they are following the proper course, or for appellate counsel to properly assess what happened in the trial court.

The sheer volume of reported decisions addressing the subject is one indication of its importance. Another is the fact that despite nearly universal criticism of *Biljac*, trial courts continue to rely on it. Academy members' anecdotal experience is confirmed by the fifteen published and nonpublished Court of Appeal decisions filed in 2007, which reflect multiple instances of trial court reliance on *Biljac*. Indeed, that is exactly what the trial court did in the present case in mid-2005. (Petition, pp. 4-5; Slip Opn., p. 13.)

Finally, as the decisions reveal and as Academy members' experience confirms, both lawyers and judges are frequently unaware of the waiver rule and therefore of the need for express rulings. One likely reason is that this Court's pronouncements have only appeared in footnotes in decisions that address other topics.

Conclusion

Trial judges' reluctance to rule on perhaps hundreds of objections is more than understandable. So is a winning lawyer's reluctance to irritate a judge—particularly one facing a long motion calendar—by asking for rulings. (See *Gallant*, *supra*, 128 Cal.App.4th at p. 715 ["[L]awyers ought not to be put in the position of haranguing the very judges whose favorable rulings they seek"] (dis. opn. of Vogel, J.); see also Turner

& Meadow, Objections: The Moment of Truth, ABTL Report, June 1999.) The absence of clear rules makes it easy for both bench and bar to err, sometimes irremediably.

This Court is the only realistic source of a solution. We urge the Court—as both we and others have urged it before—to finally take up and resolve the matter.

Very truly yours,

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Charity Kenyon
First Vice-President
Chair, Amicus Committee

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Robin Meadow
President, 2005-2006