

# CALIFORNIA ACADEMY OF APPELLATE LAWYERS

## President

**David S. Ettinger**  
Horvitz & Levy LLP  
15760 Ventura Blvd., 18th Fl.  
Encino, CA 94136-3000

## First Vice-President

**Jan T. Chilton**  
Severson & Werson  
1 Embarcadero Center, 26th Fl.  
San Francisco, CA 94111

## Second Vice-President

**Robert A. Olson**  
Greines, Martin, Stein &  
Richland LLP  
5900 Wilshire Blvd., 12th Fl.  
Los Angeles, CA 90036

## Secretary-Treasurer

**Steven L. Mayer**  
Howard Rice  
Three Embarcadero Center  
Seventh Floor  
San Francisco, CA 94111-4024

## Former Presidents

Gideon Kanner  
Edward L. Lascher  
Cyril Viadro  
Ellis J. Horvitz  
Robert A. Seligson  
Paul P. Selvin  
M. Reed Hunter  
Michael M. Berger  
Jerome I. Braun  
Edward J. Horowitz  
Raoul D. Kennedy  
Arthur E. Schwimmer  
Gerald Z. Marer  
Wendy C. Lascher  
Peter W. Davis  
Robert E. Hinerfeld  
Marc J. Poster  
Gerald F. Uelmen  
Irving H. Greines  
Victoria J. De Goff  
Dennis A. Fischer  
Jerome B. Falk, Jr.  
Kent L. Richland  
Douglas R. Young  
Barry R. Levy  
Jay-Allen Eisen  
Robert S. Gerstein  
Ephraim Margolin  
Richard A. Derevan  
Elliot L. Bien  
James C. Martin  
Richard Sherman  
Robin Meadow  
Paul D. Fogel  
Charles A. Bird  
Charity Kenyon  
Jonathan B. Steiner  
Kevin M. Fong

July 28, 2011

VIA FEDEX

Presiding Justice Joan D. Klein  
Associate Justice H. Walter Croskey  
Associate Justice Patti S. Kitching  
California Court of Appeal  
Second Appellate District, Division Three  
300 S. Spring Street, Second Floor, North Tower  
Los Angeles, CA 90013-1213

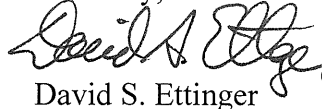
Re: *Fairbanks v. Farmers New World Life Ins. Co.*,  
Case No. B216742  
Request To Partially Depublish Or Amend Section 5  
Of The Opinion

Dear Presiding Justice Klein and Associate Justices Croskey  
and Kitching:

The California Academy of Appellate Lawyers today submitted a  
letter concerning Section 5 of the court's opinion in the above case. In  
transferring the letter onto Academy letterhead, I inadvertently omitted  
four paragraphs. I therefore enclose a complete letter which I ask be  
substituted for the earlier letter.

I apologize for the mistake and hope it does not cause too much  
inconvenience for the court.

Sincerely,



David S. Ettinger

cc w/enclosure:

John A. Girardi  
Scott A. Marks  
Robert S. Gerstein  
John Theodore Nockleby  
David B. Parker  
Peter H. Mason

# CALIFORNIA ACADEMY OF APPELLATE LAWYERS

## President

**David S. Ettinger**  
Horvitz & Levy LLP  
15760 Ventura Blvd., 18th Fl.  
Encino, CA 94136-3000

## First Vice-President

**Jan T. Chilton**  
Severson & Werson  
1 Embarcadero Center, 26th Fl.  
San Francisco, CA 94111

## Second Vice-President

**Robert A. Olson**  
Greines, Martin, Stein &  
Richland LLP  
5900 Wilshire Blvd., 12th Fl.  
Los Angeles, CA 90036

## Secretary-Treasurer

**Steven L. Mayer**  
Howard Rice  
Three Embarcadero Center  
Seventh Floor  
San Francisco, CA 94111-4024

## Former Presidents

Gideon Kanner  
Edward L. Lascher  
Cyril Viadro  
Ellis J. Horvitz  
Robert A. Seligson  
Paul P. Selvin  
M. Reed Hunter  
Michael M. Berger  
Jerome I. Braun  
Edward J. Horowitz  
Raoul D. Kennedy  
Arthur E. Schwimmer  
Gerald Z. Marer  
Wendy C. Lascher  
Peter W. Davis  
Robert E. Hinerfeld  
Marc J. Poster  
Gerald F. Uelmen  
Irving H. Greines  
Victoria J. De Goff  
Dennis A. Fischer  
Jerome B. Falk, Jr.  
Kent L. Richland  
Douglas R. Young  
Barry R. Levy  
Jay-Allen Eisen  
Robert S. Gerstein  
Ephraim Margolin  
Richard A. Derevan  
Elliot L. Bien  
James C. Martin  
Richard Sherman  
Robin Meadow  
Paul D. Fogel  
Charles A. Bird  
Charity Kenyon  
Jonathan B. Steiner  
Kevin M. Fong

July 28, 2011

## VIA FEDEX

Presiding Justice Joan D. Klein  
Associate Justice H. Walter Croskey  
Associate Justice Patti S. Kitching  
California Court of Appeal  
Second Appellate District, Division Three  
300 S. Spring Street, Second Floor, North Tower  
Los Angeles, CA 90013-1213

Re: *Fairbanks v. Farmers New World Life Ins. Co.*,  
Case No. B216742  
Request To Partially Depublish Or Amend Section 5  
Of The Opinion

Dear Presiding Justice Klein and Associate Justices Croskey  
and Kitching:

On behalf of the California Academy of Appellate Lawyers, I write to request that the Court exclude Section 5 of its opinion in this case from publication or amend the section in the manner described below so as to avoid potentially harmful misinterpretations or misuses of that portion of the opinion while emphasizing that similar problems may be avoided in the future by cooperation between opposing counsel as encouraged by rule 8.124(a)(3).

### Section 5 May Be Misinterpreted

Section 5 of the Court's opinion is subject to misinterpretation because it says only that sanctions of costs and attorney fees incurred in preparing the respondent's appendix are awarded because the appellant's appendix "omitted several of the items required by the rules of court. (Cal. Rules of Court, rules 8.124(b)(1)(A), 8.122(b)(1).)" The opinion does not state what documents were omitted, how voluminous they were, or why their omission posed any significant burden on the respondent.

The cited rules (8.124(b)(1)(A), 8.122(b)(1)) require inclusion of only a very few documents: the notice of appeal, the judgment or appealed order, any new trial or JNOV motion or motion to vacate, and the register of actions. Had the appellant's appendix omitted only some of these few documents, respondent should have been able to supply the missing material easily, and it seems unlikely that the respondent would have sought or the Court would have awarded sanctions.

Presiding Justice Joan D. Klein  
Associate Justice H. Walter Croskey  
Associate Justice Patti S. Kitching  
Re: *Fairbanks v. Farmers New World Life Ins. Co.*, No. B216742  
July 28, 2011  
Page 2

It seems more likely, therefore, that sanctions were based on a failure to comply with Rule 8.124(b)(1)(B) which requires the appendix to include any filed document that “is necessary for proper consideration of the issues, including ... any item that the appellant should reasonably assume the respondent will rely on.” As Section 5 of the opinion does not expressly state otherwise, counsel are likely to understand that sanctions were awarded for violation of this portion of the rule even though it is not cited in the opinion.

Awarding sanctions for violation of Rule 8.124(b)(1)(B) could have potentially harmful consequences, however, because it is sometimes difficult to decide what is necessary for a proper consideration of the issues on appeal, let alone to anticipate the respondent's arguments and the documents it will rely on.

If interpreted to award sanctions for violation of Rule 8.124(b)(1)(B), Section 5 of the Court's opinion will encourage gamesmanship by respondents who will file motions to dismiss and/or for sanctions based on the purported omissions, rather than simply filing a respondent's appendix supplementing the record with the documents they believe should have been included in the appellant's appendix, as contemplated by rule 8.124(b)(5) (“A respondent's appendix may contain any document that could have been included in the appellant's appendix or a joint appendix”). Such motions will involve the additional expense of preparing motions and oppositions, and require the expenditure of judicial resources in resolving fine questions regarding what the appellant should have “reasonably assume[d] the respondent will rely on” when it prepared the appendix.

So interpreted, Section 5 of the opinion will also cause careful appellants' attorneys to err on the side of being overinclusive in preparing appellants' appendices. But such an approach is in direct conflict with the purpose of allowing appeals to proceed by way of appendix rather than clerk's transcript. A clerk's transcript is generally overinclusive because it is designated immediately after the filing of the notice of appeal, when the appeal is at the gestation stage and the appealing party does not yet know which issues will end up on the cutting room floor.

The appendix, by contrast, is filed concurrently with the opening brief and can be winnowed down to a narrower subset of documents tailored to the issues that are actually included in the opening brief. To encourage that winnowing, rule 8.124(b)(3)(A) provides that an appendix “must *not* . . . [c]ontain documents or *portions of documents* filed in superior court that are unnecessary for proper consideration of the issues.” (Emphasis added.) The rule's intent is to shorten appendices to the extent possible. (See Advisory Com. Com. to Rule 8.124(b) (“Subdivision (b)(3)(A) prohibits the inclusion of such documents in an appendix when they are not necessary for proper consideration of the issues raised in the appeal. Even if a document is otherwise includable in an appendix, the rule prohibits the inclusion of any substantial portion of

Presiding Justice Joan D. Klein  
Associate Justice H. Walter Croskey  
Associate Justice Patti S. Kitching  
Re: *Fairbanks v. Farmers New World Life Ins. Co.*, No. B216742  
July 28, 2011  
Page 3

the document that is not necessary for proper consideration of the issues raised in the appeal. *The prohibition is intended to simplify and therefore expedite the preparation of the appendix, to reduce its cost to the parties, and to relieve the courts of the burden of reviewing a record containing redundant, irrelevant, or immaterial documents.*”) (emphasis added.)

Awarding sanctions for an omission from an appellant’s appendix that can easily be cured by including the omitted document in a respondent’s appendix runs counter to rule 8.124(b)(3)(A)’s intent and will encourage rather than discourage the “kitchen sink” approach that was anathema to the drafters of the rule.

### **Suggested Revision Of Opinion**

The simplest way to avoid misinterpretation and potentially harmful effects is to exclude Section 5 of the opinion from publication. The omissions in *Fairbanks* were apparently egregious, though due to error rather than malice (see typed opn., 35), and may have warranted monetary reimbursement to the respondent for the cost of preparing a lengthy respondent’s appendix. But the Academy is not aware that similarly egregious omissions pose any recurrent problem requiring correction by a published opinion.

However, if the Court disagrees, the Academy respectfully suggests that the Court amend Section 5 to clarify the nature and volume of the omissions, to state why appellants’ counsel should have known that the documents were required to be included in the appendix, and to make clear that the sanctions were awarded for violation of rule rule 8.124(b)(1)(B), not (b)(1)(A).

If the Court decides to publish Section 5, the Academy also urges the Court to use this opportunity to prod counsel to file joint appendices, as encouraged by rule 8.124(a)(3), or at least to consult each other and exchange a list of documents to be included in the appendix, before filing, so that errors of the type that led to sanctions here may be spotted by the respondent and corrected by the appellant.

### **The Academy**

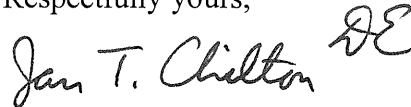
The California Academy of Appellate Lawyers is comprised of California lawyers with substantial experience before the state and federal appellate courts in California and elsewhere. The Academy and its members are interested in cases that involve important issues of appellate practice. The Academy has often filed amicus curiae briefs, letters urging the granting of review, and similar papers in such cases.

Presiding Justice Joan D. Klein  
Associate Justice H. Walter Croskey  
Associate Justice Patti S. Kitching  
Re: *Fairbanks v. Farmers New World Life Ins. Co.*, No. B216742  
July 28, 2011  
Page 4

The Academy's amicus filings are prepared at the direction of its amicus committee, whose current members include Jan T. Chilton (the Academy's First Vice President and Chair of the amicus committee), Dennis A. Fischer, Jon Eisenberg, Jay-Allen Eisen, Robin Meadow, and Robin Johansen, all of whom participated in the preparation of this letter, as did the Academy's President, David Ettinger, and John Taylor, an Academy member who brought this matter to the amicus committee's attention.

Robert Gerstein is a member of the Academy and a member of its amicus committee, but, for obvious reasons, he did not participate in any manner in the decision to write this letter or in its preparation.

Respectfully yours,

Handwritten signature of Jan T. Chilton in cursive, with the initials "DE" written to the right of the name.

Jan T. Chilton

See Attached Proof of Service

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.


On July 28, 2011, I served true copies of the following document(s) described as **LETTER TO COURT OF APPEAL: REQUEST TO PARTIALLY DEPUBLISH OR AMEND SECTION 5 OF THE OPINION** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 28, 2011, at Encino, California.

  
\_\_\_\_\_  
Victoria Beebe

SERVICE LIST

*Fairbanks v. Farmers New World Life Ins. Co.*  
Court of Appeal Case No. B216742

|  |  |
|--|--|
| <p>John A. Girardi<br/>Girardi Keese<br/>1126 Wilshire Boulevard<br/>Los Angeles, CA 90017</p> <p>Scott A. Marks<br/>The Marks Law Firm<br/>21900 Burbank Boulevard, Third Floor<br/>Woodland Hills, CA 91367</p> <p>Robert S. Gerstein<br/>12400 Wilshire Boulevard, Suite 1300<br/>Los Angeles, CA 90025</p> <p>John Theodore Nockleby<br/>Loyola Law School<br/>919 Albany Street<br/>Los Angeles, CA 90015</p> | <p>Attorneys for Plaintiff and Appellant<br/><i>Pauline Fairbanks</i></p> <p>-AND-</p> <p>Attorneys for Plaintiff, Cross-complainant and Appellant<br/><i>Michael Cobb</i></p> |
| <p>David B. Parker<br/>Theodore W. Frank<br/>Parker Mills LLP<br/>801 So. Figueroa Street, Suite 1200<br/>Los Angeles, CA 90017-5569</p>   | <p>Attorneys for Appellant<br/><i>David Sheller and The Sheller Law Firm PLLC</i></p>  |
| <p>Peter H. Mason<br/>Richard R. Mainland<br/>Joshua D. Lichtman<br/>Fulbright &amp; Jaworski LLP<br/>555 South Flower Street, 41st Floor<br/>Los Angeles, CA 90017</p>  | <p>Attorneys for Defendants and Respondents<br/><i>Farmers New World Life Insurance Company and Farmers Group, Inc.</i></p>  |