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Bauguess v. Paine: The Denial of the Attorney Fee Sanction at the (Mis)Trial Stage

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In his analysis of the California Supreme Court's opinion in Baugess, the author outlines the traditional policy rationale for awards of attorney's fees, examines the particular factual setting in Baugess, and concludes that while the case may have been correctly decided on its facts, the rule propounded is overbroad in its blanket denial of trial court authority to award attorney's fees to an aggrieved party where an adversary attorney's misconduct wrongfully causes a mistrial.

Exercising rare judicial restraint, the California Supreme Court in *Bauguess v. Paine*[1] refused to carve out another exception to the general rule disallowing attorney's fees absent statutory authorization.[2] Reviewing a lower court decision awarding attorney's fees as a sanction for what was believed to be intentional counselor misconduct causing mistrial, the high court reversed, finding that the trial court had exceeded its inherent powers.

Unique to the case was the interplay between two bodies of legal authority governing the awarding of attorney's fees; one dealing with judicial supervisory power, generally evident in the pretrial discovery context,[3] and one dealing with a court's legal and

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1. 22 Cal. 3d 626, 586 P.2d 942, 150 Cal. Rptr. 461 (1978).

2. CAL. CIV. PROC. CODE § 1021 (West 1955). The general common law rule, as codified, provides, in pertinent part:

> Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to agreement, express or implied, of the parties. . . .

3. Supervisory powers of the court are provided for generally in two California statutes. CAL. CIV. PROC. CODE § 128 (West Supp. 1979) provides, in pertinent part:

> Every court shall have power:
> 3). To provide for the orderly conduct of proceedings before it, or its officers;
> 4). To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein;
> 5). To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto.

CAL. CIV. PROC. CODE § 187 (West 1954) provides:

> When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or

equitable powers at the post-trial stage.[4] While attorney's fees have been granted pursuant to one or both of the powers, the supreme court decided neither was dispositive nor sufficient to award fees in the mistrial context.[5]

In light of the majority's interpretation of the facts,[6] the decision was undoubtedly based upon the trial court's abuse of discretion in handling the matter. Utilizing an analytical approach and ignoring the aspect of attorney misconduct however, the court articulated an overinclusive rule to be applied when such impropriety is evident.

I. FACTS

The case at the trial court level involved a personal injury suit. Diagrams of the accident scene had been admitted into evidence and used as note paper by the jurors, accompanied by the strong admonition that the panel was not to share their written observations with other individuals.[7] Upon discovering that the appellant, as plantiff's attorney, had asked for and received access to the diagrams after the culmination of the day's proceedings, Judge Lucian B. Vandegrift confronted him the following day with an accusation of intentional misconduct.

Appellant vehemently denied he had acted improperly. He contended once an item has been officially admitted into evidence, opposing counsel has the right and duty to examine it thoroughly.

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the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code.

The Civil Discovery Act, CAL. CIV. PROC. CODE §§ 2016-2025. (West Supp. 1979) allows for implementation of judicial supervisory powers throughout the pre-trial discovery context and most clearly outlines how the power may be exercised in CAL. CIV. PROC. CODE § 2034 (West Supp. 1979), which provides for contempt and attorney fee sanctions when a party fails to obey court orders or refuses to cooperate with the discovery processes.

4. *See* note 2, *supra* for the general legal rule regarding attorney fees. Exceptions have been codified, however, and govern along with judicially carved equitable exceptions. *See, e.g.*, CAL. CIV. PROC. CODE § 1021.5 (West Supp. 1979). For judicial equitable exceptions *see* notes 17-19, *infra*. An excellent brief discussion of the American inroads into the general rule and a demand for provisional reformation of that rule is contained in Sands, *Attorneys Fees as Recoverable Costs*, 63 A.B.A. J. 510 (1977).

5. 22 Cal. 3d at 639, 586 P.2d 950, 150 Cal. Rptr. at 469.

6. *See* text at notes 9-11, *infra*. *Cf.* text at notes 47 and 48 *infra*, regarding Justice William P. Clark, Jr.'s interpretation of the facts.

7. The diagrams involved were copies of a policeman's sketch of the accident scene. One copy was given to each of the jurors during the patrolman's testimony but the court neglected to collect the diagrams at the close of his testimony. Upon later observing the jurors taking notes on the diagrams, the judge instructed the jury that they would be permitted to take notes as long as they were kept confidential. He then asked the clerk to collect the diagrams and supply note paper to the jurors. After the trial had recessed for the evening, appellant asked permission of the clerk to examine all of the diagrams and was allowed to do so.

Construing appellant's assertion as an attack on the court's power, Judge Vandegrift granted defendant's motion for mistrial due to prejudice. Indicating contempt or other disciplinary action might be appropriate, the judge granted defendant a hearing on his motion to award attorney's fees for the two days of aborted trial and continued the matter.

In the subsequent hearing, Judge Vandegrift ordered the appellant to pay the defendant $700 in attorney's fees as a sanction for his misconduct, characterizing the award as an alternative to penalty for contempt.[8]

The California Supreme Court reversed the order, holding that, in the absence of statutory authorization, a trial court has no power to award attorney's fees upon mistrial. Finding neither equitable nor supervisory considerations justifying such an award, the court reasoned that an extension of such power to the trial court level would be unfounded and unwise.

II. A Proper Ruling in Light of the Trial Court's Abuse Of Discretion

In overturning the trial court's judgment awarding attorney's fees, the California Supreme Court confines its *analysis* to the facts of the case, interpreting the facts as not constituting true attorney misconduct. Unfortunately, the court does not limit the rule and, as a result, denies the attorney fee sanction in all mistrial situations, whether or not they are caused by lawyer impropriety.

A cursory reading of the majority opinion makes clear that the court finds the allegations of attorney misconduct to be invalid.[9] In summarizing the facts of the case, the court downplays the conduct of appellant and refuses to consider his examination of the evidentiary diagrams as prejudicial.[10] Rather, it concludes that the trial court committed three errors which resulted in the

8. 22 Cal. 3d at 633-34, 586 P.2d at 946, 150 Cal. Rptr. at 465.

9. Justice Clark, in his dissent, recognizes this fact when he states, "They [the majority] suggest that Bach [appellant] is innocent of any misconduct. . . ." 22 Cal. 3d at 642, 586 P.2d at 951, 150 Cal. Rptr. at 470.

10. Evidencing their interpretation of the appellant's actions at the outset, the majority states, "He took the exhibit, looked at it briefly, and returned it." 22 Cal. 3d at 632, 586 P.2d at 945, 150 Cal. Rptr. at 464. *Cf.* Justice Clark's opposite view: "It is clear Bach did not casually examine exhibit 7. . ." *Id.* at 641, 586 P.2d at 951, 150 Cal. Rptr. at 470.

abuse of judicial discretion,[11] and which, standing alone, demand reversal in the particular context.

A. The Conflict Between the Rules of Evidence and the Supervisory Powers at the Trial Court Level

In *Bauguess*, the trial judge created a conflict between the rules of evidence, and his own supervisory powers which ultimately led to the mistrial. Erroneously believing that only those items admitted into evidence can be shown to the jury, the judge admitted the diagrams before distributing them among the jurors, accompanying their distribution with a warning to keep any notes written thereon confidential. However, by officially admitting the diagrams into evidence, the judge ignored the general rule that any document admitted into evidence may be inspected at any time by counsel.[12] When the appellant examined the diagrams during a court recess, he was merely exercising his right as plaintiff's counsel (although in obvious disregard of the judge's intention to keep the jurors' notes confidential).[13] By designating the diagrams as evidence and negligently allowing the jurors to make notes upon them, the trial judge was primarily responsible for any prejudice that may have resulted from the appellant's actions and could not properly assess attorney's fees against the appellant for causing the mistrial.

B. The Evasion of Appropriate Contempt Sanctions

The trial judge erred when he wrongfully chose to levy attorney's fees as a *penalty*, rather than more traditional contempt sanctions. This becomes obvious when comparing the various purposes behind contempt sanctions and those rules permitting attorney's fees, and in examining the trial court's motive in making the award.

It has been well established that the legislative purposes behind the contempt sanctions provided in California's Code of Civil

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11. "Abuse of discretion" is the standard of review which must be met in order for an appellate court to overturn the trial court's award of attorney fees. *See* Baker v. Eilers Music Co., 175 Cal. 652, 654, 166 P. 1006, 1007 (1917); Hadden v. Waldeck, 9 Cal. 2d 631, 72 P.2d 114 (1937). *See generally* 6 WITKIN, CALIFORNIA PROCEDURE, *Appeal* §§ 242-45, at 4234-36 (2d ed. 1971). For a traditional definition, *see* note 35, *infra*.

12. 22 Cal. 3d at 636 n.6, 586 P.2d at 948 n.6, 150 Cal. Rptr. at 467 n.6. *See* Pape v. Dalton, 40 Cal. 638 (1871); 31 CAL. JUR. 3D, *Evidence* § 211 (1976). Indeed, as part of the judicial record, exhibits become public and may be inspected by anyone absent a lawful order to the contrary. Estate of Hearst, 67 Cal. App. 3d 777, 782-83, 136 Cal. Rptr. 821, 823-24 (1977).

13. 22 Cal. 3d at 636 n.6, 586 P.2d at 948 n.6, 150 Cal. Rptr. at 467 n.6.

Procedure Section 1218,[14] are two-fold: 1) To protect judicial integrity and punish any disrespect for that integrity[15] and 2) to compel the proper and orderly conduct of judicial proceedings, including obedience to court order.[16] On the other hand, legal and equitable rules allowing attorney's fees are based on a number of objectives, some of which correspond to the *second* purpose governing the usage of contempt sanctions. Equity allows attorney's fees in order to deny unjust enrichment,[17] encourage suits effectuating strong public policy,[18] discourage vexatious or burdensome lawsuits,[19] and compensate needless expense brought about through fraud.[20] Legal allowances are aimed at consummating contractual agreements,[21] compelling obedience

14. CAL. CIV. PROC. CODE § 1218 (West 1979) provides for a fine not exceeding $500 or imprisonment not exceeding five days, upon finding a person guilty of contempt.

15. *See* In Re Buckley, 10 Cal. 3d 237, 514 P.2d 1201, 110 Cal. Rptr. 121 (1973), *cert. denied*, 418 U.S. 910 (1974); People v. Fusarco, 18 Cal. App. 3d 877, 96 Cal. Rptr. 368 (1971).

16. Rosato v. Superior Court of Fresno County, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied* 427 U.S. 912 (1975); *See* In Re Hagan, 224 Cal. App. 2d 590, 36 Cal. Rptr. 828 (1964).

17. "Common fund" and "substantial benefit" theories support equitable allowances of attorney's fees to stem unjust enrichment. Serrano v. Priest, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977), defines both of these theories and contains an excellent in-depth discussions of them. The "common fund" principle goes into effect when a number of persons are, in common, entitled to a specific fund, and an action brought by a plaintiff for the benefit of all results in the creation or preservation of that fund. In such a case, plaintiff may be awarded attorney's fees out of the fund, thus denying unjust enrichment to the others who will receive benefits of the fund without an outlay of expense. (*See, e.g.*, Estate of Reade, 31 Cal. 2d 669, 191 P.2d 745; *see also* 4 WITKIN, CALIFORNIA PROCEDURE, *Judgment*, §§ 129-133, at 3278-83 (2d ed. 1971).) A "substantial benefit" rule may be applied when a class action or corporate derivative action results in the conferral of substantial benefits upon the defendant. Consequently, the defendant may be required to yield some of those benefits in the form of attorney's fees. (*See* Knoff v. City of San Francisco, 1 Cal. App. 3d 184, 81 Cal. Rptr. 683 (1969); Fletcher v. A.J. Industries, 266 Cal. App. 2d 313, 72 Cal. Rptr. 146 (1968); *see also* 4 WITKIN, CALIFORNIA PROCEDURE, *Judgment*, § 134, at 3283-84 (2d ed. 1971).)

18. *See* the "private attorney general" theory adopted by the California Supreme Court in Serrano v. Priest, 20 Cal. 3d 24, 42-50, 569 P.2d 1303, 1312-17, 141 Cal. Rptr. 315, 324-29 (1977). For a discussion of California's development of the theory *see* McDermott, *Forward: The Private Attorney General Rule and Public Interest Litigation in California*, 66 CAL. L. REV. 138 (1978).

19. *See* Cato v. Parham, 293 F. Supp. 1375, 1378-79 (E.D. Ark.), *affd.* 403 F.2d 12 (8th Cir. 1968); Bell v. School Board, 321 F. 2d 494, 500 (4th Cir. 1963).

20. *See* Glendale Fed. Savings & Loan Assn. v. Marina View Heights Development, Inc., 66 Cal. App. 3d 101, 135 Cal. Rptr. 802 (1977); Prentice v. North Am. Title Guar. Corp., 59 Cal. 2d 618, 381 P.2d 645, 30 Cal. Rptr. 821 (1963).

21. *See* note 2, *supra.*

to discovery orders,[22] and compensating a party who has been forced to litigate a discovery issue needlessly.[23] While compelling obedience to a court order is a common rationale behind both contempt sanctions and attorney fee awards, none of the legal or equitable rules authorize attorney's fees solely as punishment for irreverence before the court.[24] In *Bauguess*, the supreme court clearly indicates that punishment was the trial judge's motivation for assessing attorney's fees against the appellant.

The first confrontation between appellant and trial judge concerning the diagrams was described as an "acrimonious" discussion[25] in which the court was "particularly displeased" with the attorney's position.[26] "Construing this position *as an attack on its powers*, the court informed appellant that his position constituted *contempt* of court" (emphasis added).[27]

At the hearing on respondent's motion for attorney's fees, the trial court reiterated its displeasure with appellant's conduct[28] and later found the appellant in direct contempt for "violat[ing] the court's order."[29] The judge, however, declined to impose further amercement because of his characterization of the attorney's fees already assessed as "an alternative to a penalty for contempt."[30]

Indeed, the high court specifically delineates the factors that led to the trial court sanction, stating that "[a]lthough *ostensibly* awarded to compensate respondents. . . ," (emphasis added) the sanction was prompted more by appellant's vigorous argument

22. *See* CAL. CIV. PROC. CODE § 2034 (West Supp. 1979); *See also* Stein v. Hassen, 34 Cal. App. 3d 294, 109 Cal. Rptr. 321 (1973); Peterson v. City of Vallejo, 259 Cal. App. 2d 757, 66 Cal. Rptr. 776 (1968).

23. *See* Allen v. Pitchess, 36 Cal. App. 3d 321, 111 Cal. Rptr. 658 (1973); Sigerseth v. Superior Court for L.A. County, 23 Cal. App. 3d 427, 100 Cal. Rptr. 185 (1972).

24. Under the Civil Discovery Act, CAL. CIV. PROC. CODE § 2016-2025. (West Supp. 1979), assessment of attorney's fees as punishment is exclusively forbidden. *See* Jacuzzi v. Jacuzzi Bros., Inc., 243 Cal. App. 2d 1, 52 Cal. Rptr 147 (1966). A number of interesting recent cases have challenged the constitutionality of imprisonment for contempt charges as cruel and unusual punishment. These challenges, for the most part, have been unsuccessful. For the most interesting and controversial of these, *see* In Re Far, 36 Cal. App. 577, 111 Cal. Rptr. 649 (1974).

25. 22 Cal. 3d at 632, 586 P. 2d at 945, 150 Cal. Rptr. at 464. "Acrimonious" is defined as "bitter" and "caustic in temper, manner, or speech." WEBSTER'S NEW WORLD DICTIONARY 12 (2d ed. 1972).

26. 22 Cal. 3d at 632, 586 P.2d at 945, 150 Cal. Rptr. at 464.

27. 22 Cal. 3d at 633, 586 P.2d at 946, 150 Cal. Rptr. at 465.

28. Judge Vandegrift exclaimed, "[What] would make me happier than anything in the world is to have you just maybe eat a little humble pie and admit that you made a mistake in judgment and its not going to happen again." *Id.* at 633, 586 P.2d at 946, 150 Cal. Rptr. at 465.

29. *Id.* at 634, 586 P.2d at 946, 150 Cal. Rptr. at 465.

30. *Id.*

and refusal to apologize.[31]

These statements, coupled with the court's concern that the amount demanded of appellant was in excess of the $500 limit allowed for contempt,[32] suggests that the trial judge labelled the assessment "attorney fees" rather than "punishment for contempt" merely because he desired to avoid the monetary ceiling on contempt sanctions.[33]

It is clear that the trial judge imposed the attorney fee sanction to punish the appellant for his alleged lack of respect but failed to utilize the appropriate contempt measures.[34] Instead, he attempted to evade the statutory limitation placed on contempt by describing the sanction as "attorney's fees." In so doing, he abused his discretion, and acted in a manner unbecoming to his position.[35]

C. The Post-Trial Hearing was Tainted by the Judge's Refusal to Relinquish the Bench

Generally, a trial judge may sit in judgment of contempt behavior that occurs before him unless he has become so "personally embroiled" with a lwayer in the trial that he is found unfit to do so.[36] Ultimately the determination is made by inquiry into actual bias on the judge's part and into the possible appearance of bias and the likelihood that prejudice may exist.[37]

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31. *Id.* at 639, 586 P.2d at 949, 150 Cal. Rptr. at 468.

32. *Id.* at 637-39, 586 P.2d 948-50, 150 Cal. Rptr. at 467-68. *See* text accompanying note 14, *supra*. *See also* text accompanying notes 33 and 34 and note 92, *infra*.

33. Unfortunately, the court approaches the issue from this angle without considering the validity of greater awards absent ulterior motives, *ie.* when compensation of the innocent party would be the motivating factor rather than punishment. Concern for avoiding the monetary limit is proper in the contempt context but when compensation is the catalyst, different legislative intentions prevail and the concern is unfounded. *See* text at notes 76 and 77 and note 92, *infra*.

34. *See* text accompanying notes 14 and 15, *supra*. For a general discussion of contempt and its effect on the trial attorney, *see* Comment, *Contempt of Court and the Legal Profession*, 1978 CRIM. L. REV. 463.

35. The classic definition of judicial discretion is contained in Bailey v. Taaffe, 29 Cal. 422, 424 (1866): "The discretion intended. . .[is] an impartial discretion, guided and controlled in its exercise by fixed legal principles. [It is] to be exercised . . . in a manner to subserve and not to impede or defeat the ends of substantial justice." *See also* note 11, *supra*.

36. In Re Buckley, 10 Cal. 3d 237, 256, 514 P.2d 1201, 1213, 110 Cal. Rptr. 121, 133 (1973) (*quoting* Mayberry v. Penn, 400 U.S. 455, 465 (1970)) *See* DeGeorge v. Superior Court, 40 Cal. App. 3d 305, 315, 114 Cal. Rptr. 860, 867 (1974).

37. *See* In Re Martin, 71 Cal. App. 3d 472, 480, 139 Cal. Rptr. 451, 456 (1977), (*quoting* Taylor v. Hayes, 418 U.S. 488, 501 (1974)).

It is apparent that the trial judge acted imprudently on a third occasion when he decided to preside over the post-trial hearing. The facts above clearly indicate that the trial judge became "personally embroiled" with the appellant. The judge's numerous threats to impose a contempt citation, his repeated expressions of personal displeasure with appellant, even after the jury had been dismissed, and his summary denial of appellant's requests before the hearing display a predisposition of bias,[38] for which he should have disqualified himself.[39] When he did not withdraw, he erred irreversibly and abused his discretion.

Assuming, *arguendo*, the majority's refusal to find attorney misconduct was correct and in consideration of the three errors committed by the trial judge, it would appear that the proper result was achieved in the particular set of facts found in *Bauguess*. The lower court abused its discretion and because the appellant had not acted improperly, the decision imposing attorney fee sanctions was reversed.

Unfortunately, the reasoning and language chosen by the supreme court was overbroad and not confined to the specific facts involved. Without adequate consideration of the misconduct/mistrial situation in a general sense, the court articulated a rule denying attorney's fees in all mistrial contexts, creating the potential for injustice to those parties suffering needless expense in the face of counselor impropriety.

III. An Improper Rule When Applied to the Misconduct/Mistrial Context

The supreme court in *Bauguess* frames its analysis simply, stating the general rule initially and then delineating its exceptions. Traditionally, the general rule has been that each litigant must bear his or her own attorney's fees, absent statutory authorization or agreement among the parties.[40] Since an argument for attor-

38. Bauguess v. Paine, 22 Cal. 3d at 633, 586 P.2d 946, 150 Cal. Rptr. at 464-65. *See also* In Re Martin, 71 Cal. App. 3d 472, 139 Cal. Rptr. 451 (1977) where just such a showing of predisposition was found to be proof of possible bias and was pronounced abuse of discretion by the trial court.

39. *See* In Re Martin, 71 Cal. App. at 481-82, 139 Cal. Rptr. at 456-57.

40. *See* Cal. Civ. Proc. Code § 1021 (West 1955) and note 2, *supra*. *See also* Prentice v. North Am. Title Guar. Corp., 59 Cal. 2d 618, 620, 381 P.2d 645, 647, 30 Cal. Rptr. 821, 823 (1963). The reasons behind the general rule against fee shifting are summarized in Young v. Redman, 55 Cal. App. 3d 827, 835-36, 128 Cal. Rptr. 86 (1976). They include: the philosophies that "one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponent's counsel." (Fleischman Corp. v. Maier Brewing, 386 U.S. 714, 718 (1967)); the difficulties of proof inherent in litigating what constitutes reasonable attorney fees (F.D. Rich Co. v. Industrial Lumber Co.,

ney's fees following mistrial will not qualify under the general rule,[41] the court dedicates its opinion to a consideration of the exceptions to the rule. These exceptions are grouped into two categories: 1) equitable allowances, justified by the historic powers of equity courts[42] and 2) awards based upon the supervisory powers inherent in all courts, enabling them to carry out their duties.[43]

Dealing initially with the equitable exceptions, the court briefly described the reasons behind such awards, using *Serrano v. Priest* as its sole authority.[44] In *Serrano* there was "a finding that compelling reasons of public policy warranted such an award."[45] Inasmuch as the court found that the trial court award was not motivated by public policy and because it felt that the equities of the case did not require the burden of attorney's fees to shift, the court concluded that the equitable exceptions did not apply.

The court's rationale for finding burden shifting inappropriate, however, was that the appellant was not "solely responsible" for the events leading to mistrial and should not have been required to bear the expenses involved.[46] The court did not discuss the prospect in which the attorney alone is responsible for the events bringing about mistrial.

Justice William P. Clark, Jr., makes clear in his dissenting opinion that *Bauguess* was just such an instance.[47] Considering additional facts, Clark explains that the diagrams originally passed among the jurors were supplied by the appellant himself and that he undoubtedly had access to other identical copies. Clark indicates that the appellant acted deliberately to obtain "information

417 U.S. 116, 129 (1974)); the threat posed to the principles of independent advocacy. *Id. Cf.* Bauguess v. Paine at 637-38, 586 P.2d at 948-49, 150 Cal. Rptr. at 467-68.

41. In California there is no express statutory authorization for awarding attorney's fees upon mistrial.

42. *See* text accompanying notes 17-20, *supra.*

43. *See* text accompanying notes 3, 22 and 33, *supra.*

44. 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977).

45. *Id.* at 42-47, 569 P.2d at 1312-15, 141 Cal. Rptr. at 324-27; Bauguess v. Paine, 22 Cal. 3d at 636, 586 P.2d at 947, 150 Cal. Rptr. at 466.

46. *Id.* at 636-37, 586 P.2d at 948, 150 Cal. Rptr. at 467.

47. *Id.* at 640-43, 586 P.2d at 950-52, 150 Cal. Rptr. at 469-71. Expressing disappointment that the majority would condone "Bach's astonishing imposition upon the orderly procedures of the court. . . ," Justice Clark scoffs at its suggestion that appellant was innocent of misconduct because the admonitions of confidentiality had not been directed specifically to him. *Id.* at 641-42, 586 P.2d at 951, 150 Cal. Rptr. at 470. *But see* majority opinion, *id.* at 636 n.6, 586 P.2d at 948 n.6, 150 Cal. Rptr. at 467 n.6.

which might [have given] him a competitive advantage"[48] by revealing the jurors' impressions of the proceedings. From these additional facts, it does appear the appellant was not merely exercising an evidentiary right but was intentionally disobeying the spirit of Judge Vandegrift's order. While the order was not directly addressed to appellant, it was clearly meant to protect against unfair advantage on the part of either party and to avoid the possibility of mistrial. When appellant examined the juror's notes, he blatantly disregarded the court's noble motive and defied the court to exercise its supervisory powers, playing one set of rules against another. Knowingly endangering the entire proceeding, appellant was culpable and in Justice Clark's view, should have been forced to compensate the opposing party for the waste of time and money he caused.

If such an interpretation was accepted or if such a case arose with a clearer indication of attorney misconduct, the majority's analysis would prove deficient and the rule it laid down would seem to require revision.

A. Equitable Justification for the Attorney Fee Sanction

Under circumstances where attorney misconduct independently causes mistrial, the aspects of compelling public policy and overriding equitable considerations warrant the levying of attorney fee sanctions against the culpable lawyer.[49]

Equity steps in where one has been harmed and left without an adequate remedy at law.[50] In the event of misconduct causing mistrial, just such a situation exists. Certainly the party dismissed from court because of the intentional misbehavior of opposing counsel has been harmed monetarily, with no legal remedy at his disposal. Unlike the party employing the malefactor, the opposing party cannot sue for malpractice and recover fees he has been forced to pay for needless litigation.[51] While the California Bar Association and the ABA Code of Professional Re-

48. *Id.* at 641, 586 P.2d at 951, 150 Cal. Rptr. at 470.

49. Contempt sanctions in such an instance might adequately penalize the attorney but would be ineffective to equitably replenish financial resources of the opposing party. While contempt is the appropriate method for punishing misconduct, such punishment would be only an ancillary affect in the mistrial situation. The additional factor of resulting mistrial would remove the case from the many involving mere attorney insolence demanding punishment and would bring to the forefront the court's intent to compensate the injured party.

50. *See* Young v. Redman, 55 Cal. App. 3d 827, 837-38, 128 Cal. Rptr. 86, 93 (1976). Though the case discusses the justifications for certain equitable allowances, it is also likely to be the strongest authority for denying such allowances in the face of bad faith litigation. *See also* Dewitt v. Hays, 2 Cal. 463, 469, 56 Am. Dec. 352 (1852).

51. For the inclusion of attorney's fees as an element of legal malpractice, *see*

sponsibility provide in-house regulations and administrative chastisements for wayward attorneys,[52] such sanctions are by no means adequate compensation to the party actually harmed.

Presently, under analogous circumstances, equity provides compensation, in the form of attorney's fees, to one forced to litigate needlessly. When a person, due to the tort (generally misrepresentation) of another, is required to act in the protection of his or her interests by bringing or defending an action against a third person, he or she is entitled to recover attorney's fees from the offending party.[53]

In much the same way, a party forced to sacrifice time already invested in court has unnecessarily been required to defend his own interest against a third party plaintiff, due to prejudice caused by counselor impropriety. In *Bauguess*, appellant's conduct transposed two days to litigation into needless expenditures and caused respondent to make an unnecesary defense of his interest.[54]

The misconduct/mistrial is similar to the "bad faith litigant" situation in which attorney's fees are awarded not only to compensate the innocent party but also to deter "bad faith" activities within litigation. Both federally and in California, attorney's fees can be assessed against a party who brings suit in "bad faith" or

Budd v. Nixen, 6 Cal. 3d 195, 201-202, 491 P.2d 433, 437, 98 Cal. Rptr. 849, 853 (1971). *See generally* 45 A.L.R. 62-71 (1956).

52. *See* the California State Bar Act, CAL. BUS. & PROF. CODE §§ 6000-6172. (West 1974) and the California Rules of Professional Conduct, 1 Cal. 3d Rules 51-58 (1970). *See also* Pollock, *Sanctions Imposed By Courts On Attorneys Who Abuse The Judicial Process*, 44 U. CHI. L. REV. 619 (1977) for other possible judicial sanctions.

53. *See* Prentice v. North Am. Title Guar. Corp., 59 Cal. 2d 618, 381 P.2d 645, 30 Cal. Rptr. 821 (1963). As vendor of a piece of property, the plaintiff, due to negligence of the escrow holder, was required to protect his interest by bringing a quiet title action against the purchaser. Subsequently suing the escrow holder, the plaintiff was allowed to recover the amount of attorney's fees he had expended in the quiet title action.

54. Illustrating, in *Prentice*, but for the escrow holder's tortious activities, the plaintiff would not have been forced into expenditures for needless litigation to protect his interests. In *Bauguess*, but for the appellant's misconduct, the respondent would not have been forced to make expenditures later rendered needless by said conduct. In both cases, the malefactor forced innocent parties to pay attorney's fees which would not have been necessary had the malefactor acted properly. The analogy is, however, limited. In the case where tortious conduct causes needless litigation, the tort may consist of mere negligence. Were attorney's fees awarded for counselor *negligence* causing mistrial, concern for imperiling zealous advocacy would become legitimate. *See* text accompanying notes 85-87, *supra*.

for oppressive, invalid reasons.[55] "Bad faith is the equivalent of dishonesty, fraud and concealment"[56] and may be found in actions leading to the lawsuit or in the conduct of litigation.[57] As discussed in *Young v. Redman*, equity allows awards of this type to deter needless litigation and to preserve the foundation upon which free access to the judiciary rests.[58]

Where attorney misconduct results in mistrial, a situation analogous to bad faith litigation exists and the rationale for allowing attorney's fees should be sufficiently persuasive to permit fee sanctions. When a lawyer attempts covertly to gain information forbidden to him or seeks to persuade jurors outside the courtroom, he is acting deceitfully. By acting in bad faith and consequently causing mistrial, he effectuates the same consequences caused by the "bad faith litigant"—the expenditure of money by the opposing party in needless litigation and the wasting of valuable court time.

The rationale behind attorney's fees for bad faith litigation is analogous to and should sustain the demand for attorney's fees in the misconduct/mistrial context. Were attorney's fees assessed to the deviant lawyer, the injured party would be compensated, attorney misbehavior would be deterred and the concept of "fair play," upon which zealous advocacy rests, would be advanced.[59]

" 'Equity does not wait upon precedence which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention'."[60] Certainly the misconduct/mistrial situation is one which begs for equitable intervention to allow the attorney fee

55. *See* Hall v. Cole, 412 U.S. 1 (1972). For California authority, *see* County of Inyo v. City of L.A., 78 Cal. App. 3d 82, 91, 144 Cal. Rptr. 71, 77 (1978). ("Finally, we turn to the 'vexatious litigant' ground asserted in support of the attorney fee. We assume existence of power to make the award on this ground. . . ."); Williams v. MacDougall, 39 Cal. 80, 85-86 (1870). While it may be true that Young v. Redman, 55 Cal. App. 3d 827, 128 Cal. Rptr. 86 (1976) refused to extend such power to the trial court level, the refusal was based, not upon disagreement with the rationale behind such an allowance, but upon fear that such power would be misused at that level. *Id.* at 838, 128 Cal. Rptr. at 93-94. For rebuttal of that fear in the misconduct/mistrial context, *see* text at notes 78-92, *supra*.

56. Crisci v. Security Ins. Co., 66 Cal. 2d 425, 430, 426 P.2d 173, 176, 58 Cal. Rptr. 13, 16 (1967).

57. Hall v. Cole, 412 U.S. 1, 15 (1972).

58. 55 Cal. App. 3d 827, 838, 128 Cal. Rptr. 86, 93 (1976).

59. The majority in *Bauguess* recognizes such a foundation of fair play and good faith when, in discussing the independence of the bar, it explains that counsel may properly urge even an untenable proposition provided he does so "in good faith" and "does not resort to deceit." 22 Cal. 3d at 638, 586 P.2d at 949, 150 Cal. Rptr. at 468. *See also* text accompanying notes 85-87, *infra*.

60. Satterfield v. Garmire, 65 Cal. 2d 638, 645, 422 P.2d 990, 995, 56 Cal. Rptr. 102, 107 (1967).

sanction else injustice be done to the party suffering economic loss in the face of an aborted trial.

B. Supervisory Justification for the Attorney Fee Sanction

Perceiving no fitting equitable exception to the general rule disallowing attorney's fees, the majority in *Bauguess* turns its attention to the scope of trial court supervisory powers.[61] Recognizing the trial court's ability "to secure compliance with its orders, to punish contempt and to control its proceedings,"[62] the supreme court rejects the imposition of attorney fee sanctions for the causation of a mistrial as part of such power.

Citing several cases in support of its conclusion, the court judiciously avoids explanation of the cases. Indeed, under close scrutiny, none of the cases stand as solid proponents for the court's broad ruling.

Wisniewski v. Clary[63] involved the failure of *plaintiff* to attend a mandatory settlement conference. Written policy of the particular Los Angeles Superior Court declared that if a *defendant* were absent from mandatory conference, counsel fees might be imposed. Regarding the written policy as a valid exercise of the trial court's power, the appellate court interpreted the rule strictly and disallowed the attorney fee sanction because it had been levied against the *plaintiff*. Significantly, the appellate court did not strike down the policy itself but held the power of the trial court to write its own regulations was inherent in the court and active apart from legislative grant by statute.[64] While the specific facts required disallowance of the sanction, the *Wisniewski* court confirmed the power of the trial court to levy attorney fee sanctions for improper conduct.

Young v. Redman[65] is cited as an example of the disallowance of attorney's fees when there has been a bad faith defense or failure of a party to appear at trial. *Young*, however, deals mainly with equitable rather than supervisory powers and cannot properly be used as support for denial of the sanction as a tool in a court's supervisory repertoire. Although the case initially deals

61. *See* note 3, *supra*.
62. 22 Cal. 3d at 637, 586 P.2d at 948, 150 Cal. Rptr. at 467; *cf.* Bloniarz v. Roloson, 70 Cal. 2d 143, 147-48, 449 P.2d 221, 223, 74 Cal. Rptr. 285 (1969).
63. 46 Cal. App. 3d 499, 120 Cal. Rptr. 176 (1975).
64. *Id.* at 504, 120 Cal. Rptr. at 180.
65. 55 Cal. App. 3d 827, 128 Cal. Rptr. 86 (1976).

with a lower court exercise of supervisory power in denying plaintiff's motion for continuance, the bulk of the opinion discusses the reasons the court believes equitable attorney fee sanctions are inappropriate in the face of vexatious litigation.[66]

Finally, *Welgross v. End*[67] is included as an instance in which an appellate court overturned fees awarded due to plaintiff's dilatory conduct at the discovery stage. In *Welgross* the deciding factor was the "purely punitive" nature of the award.[68] Inasmuch as the sanction was utilized solely as a punishing device and not for the proper purpose of securing compliance with court order,[69] the court struck down the award as an abuse of trial court discretion.[70] The citation to *Welgross* is of interest because its facts are directly analogous to those found in *Bauguess*. The *Bauguess* court also finds the trial court's motivation punitive and properly expressed only through contempt sanctions.[71] But *Welgross'* application to the misconduct/mistrial situation is questionable. In the misconduct/mistrial instance, attorney's fees would be awarded chiefly to compensate the innocent party for expenses of needless litigation and to guarantee attorney obedience and efficient litigation in the future.[72] Under such circumstances, the rationale behind *Welgross* would not apply and for this reason *Welgross* provides no basis for the rule of *Bauguess*, which envelopes the misconduct/mistrial situation within its broad holding.

Again, the supreme court fails to squarely approach the issue in its discussion of the alleged absence of statutory or legislative intent to justify a grant of attorney's fees upon mistrial. Discussing *Fairfield v. Superior Court*,[73] the court limits its holding to the particular facts of the case without examining the appellate court's discussion of legislative intent, an integral part of the decision. In *Fairfield*, the trial court allowed plaintiff attorney's fees when defendant refused to obey an order compelling further answers to interrogatories. Although the Code of Civil Procedure Section 2030 provided for a motion and possible court order to compel further answers, it did not authorize attorney's fees when such an order went unheeded. Nor did Section 2034, which au-

66. *Id.* at 834-39, 128 Cal. Rptr. at 90-94. *See* notes 40 and 50, *supra*. The court's discussion of attorney's fees is not aimed at judicial supervisory power to award fees after denying motion for continuance. Rather, it is directed at the trial court's equitable powers to do so when a party insists upon maintenance of a suit in bad faith and for oppressive reasons.

67. 252 Cal. App. 2d 982, 61 Cal. Rptr. 52 (1967).

68. Bauguess v. Paine, 22 Cal. 3d at 637, 586 P.2d at 948, 150 Cal. Rptr. at 467.

69. 252 Cal. App. 2d at 992, 61 Cal. Rptr. at 59.

70. *Id.* at 991, 61 Cal. Rptr. at 58.

71. *See* text at notes 14-35, *supra*.

72. *See* text at notes 75-76, *infra*.

73. 246 Cal. App. 2d 113, 54 Cal. Rptr. 721 (1966).

thorized attorney fee sanctions in certain other specified situations. Upholding the trial court award, the appellate court reasoned that to reject the award would be to contravene the legislature's intent in enacting the Civil Discovery Act.[74] One of the principle purposes behind the Act being to "allow for efficient, economical disposition of cases,"[75] the *Fairfield* court authorized the award absent statutory text on point because it felt such would be necessary to force the further answers requisite to efficient discovery.

Indeed, the Civil Discovery Act evidences legislative intent to provide for smooth, efficient litigation by allowing attorney's fees and to provide compensation to the party suffering needless expense when attempting to expedite the judicial process.[76] Allowance of attorney fee sanctions in the misconduct/mistrial situation would fulfill both of these purposes, in accordance with the Legislature's goals. By allowing attorney's fees to the victim of an aborted trial resulting from opposing counsel's actions, the court would be compensating one who had suffered needless expenses through no fault of his own. Allowance of such a sanction would also compel future obedience by the malefactor and thus provide for smooth, efficient litigation when and if the case is retried.

The fact that there is no statute precisely authorizing attorney fee sanctions upon mistrial provides no reason for blanket denial of such sanctions. *Fairfield* is only one of a number of cases in which the judiciary has adopted supervisory rules pursuant to legislative intent, absent specific statutory authorization.[77]

Obvious practical reasons exist for utilizing legislative intent as

74. Fairfield v. Superior Court, 246 Cal. App. 2d at 120, 54 Cal. Rptr. at 726.

75. *Id.* at 119, 54 Cal. Rptr. at 725.

76. CAL. CIV. PROC. CODE § 2034 (West Supp. 1979) throughout, requires the party failing to comply with court order to pay the moving party "reasonable expenses incurred in obtaining the order, including reasonable attorney fees." *See* §§ (a), (b)(2)(iv), (c) and (d). *See also* Allen v. Pitchess, 36 Cal. App. 3d 321, 111 Cal. Rptr. 658 (1973); Sigerseth v. Superior Court, 23 Cal. App. 3d 427, 1100 Cal. Rptr. 185 (1972).

77. *E.g.*, Wisniewski v. Clary, 46 Cal. App. 3d 499, 120 Cal. Rptr. 176 (1975), where the trial court's power to write policy requiring attorney fee sanctions was approved pursuant to the legislative intent displayed in CAL. GOV'T CODE § 68070 (West Supp. 1979), which authorizes courts to formulate rules for its officers. *See* text at notes 63-64, *supra*. *See also* Venice Canals Resident Home Owners Assn. v. Superior Court, 72 Cal. App. 3d 675, 140 Cal. Rptr. 361 (1977), in which the court upheld a trial court requirement that petitioners post a bond, absent statute necessitating the same. Since the Code required bond posting in other similar situa-

a guide in formulating rules unauthorized specifically by statute. The Legislature cannot possibly draft a law for each obscure circumstance that arises. Pursuant then to their intent in writing the Civil Discovery Act, the supreme court should have provided for attorney's fees in the misconduct/mistrial situation. The court's restraint in doing so was not based exclusively upon the lack of statutory authority, but also upon fears of the abuse of unlimited power at the trial court level.

C. *The Sufficiency of Safeguards to Limit Abuse of the Attorney Fee Sanction*

The court expresses reluctance to unleash power without appropriate safeguards and guidelines.[78] While a trial court's power to punish contempt is tempered by legislative enactment,[79] the power to award attorney's fees for mistrial would have no statutory safeguards.[80] This consideration has not stopped judicial approval of supervisory exercises in other areas,[81] nor should it be sufficient in this area. A trial court would remain adequately limited by equitable "reasonableness" and sufficiently policed, as in other contexts, by the appellate standard of review. Both the Civil Discovery Act and the cases allowing equitable attorney's fees state that such trial court allowances must be "reasonable" in amount.[82] And as with all trial court decisions, the award could be overturned by an appellate court finding of the "abuse of discretion."[83]

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tions, the constructive legislative intent was found to allow it in the immediate context as well.

78. 22 Cal. 3d at 639, 586 P. 3d at 949, 150 Cal. Rptr. at 468.

79. *See* CAL. CIV. PROC. CODE §§ 1209-1222 (West Supp. 1979); *see also* In Re McKinney, 70 Cal. 2d 8, 11-13, 447 P.2d 972, 73 Cal. Rptr. 580 (1968); *cf.* In Re Oliver, 333 U.S. 257, 274-76 (1948).

80. *Cf.* identical fear expressed in "bad faith" litigation context. Young v. Redman, 55 Cal. App. 3d at 838, 128 Cal. Rptr. at 93. *Contra*, Fairfield v. Superior Court, 246 Cal. App. 3d 113, 54 Cal. Rptr. 721 (1966) where the court countered such fear by surmising that the trial court's power will not be unlimited and will remain an ability only "to make orders . . . as are just." 246 Cal. App. at 120, 54 Cal. Rptr. at 726.

81. *See* text at notes 73-76 and note 77, *supra*.

82. CAL. CIV. PROC. CODE § 2034 (West Supp. 1979) tempers its compensatory allowances of attorney's fees with the adjective "reasonable." (*See* (a), (b)(2)(iv), (c), and (d). Quinn v. State, in discussing thoroughly the equitable "common fund" theory, emphasizes the "reasonable" limitation on fee awards. 15 Cal. 3d 162, 539 P.2d 761, 124 Cal. Rptr. 1 (1975). For an excellent discussion of federal statutory attorney fee awards and a suggestion of a formula to determine the reasonableness of such awards, *see* Berger, *Court Awarded Attorney's Fees: What Is "Reasonable"?*, 126 U. PA. L. REV. 281 (1977).

83. *See* 6 WITKIN, CALIFORNIA PROCEDURE, *Appeal* §§ 242-45, at 4234-36 (2d ed. 1971). The Supreme Court's failure to recognize the standard as an adequate check on trial court power may display their displeasure with the traditional resiliency of the standard. While it is true that the standard generally is a tough one to

The majority cites the trial judge's actions as illustrative of the danger that would exist were they to carve out another exception. But again, the trial judge's award was improperly motivated and the facts called for contempt sanctions, if any.[84] Were attorney's fees awarded in lieu of correct contempt sanctions, the appellate court could properly find abuse of discretion and overturn the award. Were the award based upon proper considerations, the amount would be regulated by the "reasonable" standard, and safeguards would be adequate.

Second of the apprehensions expressed by the court is that the supervisory awarding of attorney's fees might imperil independence of the bar and inhibit zealous advocacy. Again, the court's fear and analysis is tainted by their interpretation of the facts in *Bauguess* and its rationale cannot be applied to the misconduct/mistrial situation. A mere reading of the court's own quote from *Smith v. Superior Court*[85] evidences a qualification of the attorney's advocacy rights: " 'Even if a legal proposition is untenable, counsel may properly urge it in good faith; he may do so even though he may not expect to be successful, *provided of course, that he does not resort to deceit or to willful obstruction of the orderly process*' " (emphasis added).[86] In the misconduct situation, an attorney has exceeded his boundaries by attempting to deceive the judge or prejudice the trial. In such a situation, a sanction would not inhibit free exercise of a right but would deter the abuse of that right, protecting the very basis of good faith upon which the independence of the bar and the adverary system rest.[87]

Denying adequate procedural due process to an attorney in the appellant's position is the last of the supreme court's concerns. It suggests four aspects that cast doubt on whether the appropriate level of due process was offered the appellant: 1) the trial judge hadn't personally observed appellant's alleged misconduct but

meet, it would not be so in the attorney fee context because of the relative ease with which attorney's fees can be computed and the resultant obvious nature of an extensive trial court award. *See* Fairfield v. Superior Court, 243 Cal. App. 2d 113, 120, 54 Cal. Rptr. 721, 725, (1966), stating that even though a trial court has wide discretion in discovery matters, the sanctions it may levy are still limited to those which are "suitable and necessary."

84. *See* text at notes 14-35, *supra.*

85. 68 Cal. 2d 547, 440 P.2d 65, 68 Cal. Rptr. 1 (1968), quoting Gallagher v. Municipal Court, 31 Cal. 2d 784, 192 P. 2d 905 (1948).

86. 22 Cal. 3d at 638, 586 P. 2d at 949, 150 Cal. Rptr. at 468.

87. *See* note 59, *supra.*

heard the motion for sanction, 2) the hearing was based not upon actual record but on the participant's "somewhat imperfect memories of the events," 3) the appellant did not contest the award because he was fearful the testimony would prejudice him at the contempt hearing, and 4) the penalty assessed was in excess of that permitted for contempt.[88] These factors appear insubstantial and add little to the majority opinion. A trial judge often receives and acts upon second-hand evidence in the contempt context.[89] Surely evidence is also validly introduced where no official in-court record has been made.[90] While the no-contest concern is proper, it would not be so in the misconduct/mistrial situation because, as previously outlined, the attorney would be subjected to either contempt or attorney fee sanctions.[91] The penalty assessed in this particular case exceeded the highest permissible amount of contempt sanctions, as presently regulated by appellate checks and balances.[92] Although the concerns may be valid to an extent it is again important to observe that they arise uniquely out of the specific facts in *Bauguess v. Paine*, interpreted by the majority as failing to show attorney misconduct. Therefore, they supply little substantive support for the rule of the case, which covers all mistrial situations, including those caused by counselor impropriety.

IV. CONCLUSION

The California Supreme Court in *Bauguess v. Paine* fails to limit its ruling to the specific facts at hand and in so doing pronounces a rule that is patently overbroad in effect. Finding no attorney misconduct in evidence, the court approaches the issue of the awarding of attorney's fees upon mistrial in a generalized fashion and ignores the more limited situation in which an attorney's improprieties cause the mistrial. By denying trial court authority to award attorney's fees in all mistrial situations, the majority avoids equitable and supervisory considerations which mandate such awards in the face of counsel improbity. Equity,

88. 22 Cal. 3d at 639, 586 P. 2d at 949-50, 150 Cal. at 468-69.

89. This is the case when a party disobeys a court-ordered injunction. Receiving word from the one being harmed or third persons, the judge can issue an order to the party requiring him to reappear before the court and show cause why he should not be held in contempt. CAL. CIV. PROC. CODE § 1212 (West 1972).

90. While this concern would be very important at the appellate level, because of the necessity of a written record to challenge lower court action, the lack of a record in this case would, from all indications, have mattered little.

91. *See* text at note 84, *supra*.

92. *See* note 33, *supra*. While the $700 awarded by the trial court exceeded the $600 provision of CAL. CIV. PROC. CODE § 1218 (West Supp. 1979), it did not exceed the potential monetary loss by an attorney when he is found guilty of contempt. Section 1218 alternatively provides for five days in jail, for which the denial of wages for most attorneys would exceed the $700 levied.

legislative intent, and the existence of adequate judicial safeguards collectively lend credence to a more liberal rule in the misconduct/mistrial situation. The high court's failure to distinguish the misconduct/mistrial situation comes at the expense of none other than the innocent litigant, forced to pay his own attorneys for time laid waste by opposing counsel's improper activities.

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