ASCDC
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

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November 18, 2014

ELECTRONICALLY FILED

Honorable Judith McConnell, Presiding Justice
and the Associate Justices
California Court of Appeal
Fourth Appellate District, Division One
Symphony Towers
750 B Street, Suite 300
San Diego, CA 92101

Re: ***Hamp v. Harrison Patterson O'Connor & Kinkead, et al.***
Case No. D064453
Opinion Date: October 30, 2014
Request for Publication

Dear Presiding Justice McConnell and Associate Justices:

We write on behalf of the Association of Southern California Defense Counsel (ASCDC or Association) to request publication of this court's decision filed on October 30, 2014.

ASCDC is the nation's largest and preeminent regional organization of lawyers devoted to defending civil actions, comprised of approximately 1,100 attorneys in Southern and Central California. ASCDC is actively involved in assisting courts and the trial bar in addressing legal issues of interest to its members and the public.

In addition to representation in appellate matters, the Association provides members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas focusing on the improvement of the administration of justice, trial, and litigation practice.

Association members routinely represent professional clients (e.g., attorneys, accountants, insurance, financial services, and health care providers) in the defense of civil actions alleging a variety of tort claims. ASCDC has been actively involved for many years assisting courts in the resolution of legal issues of interest to its members and the clients they represent, including appearance as amicus curiae in numerous cases, including, *Howell v. Hamilton Meats & Provisions* (2011) 52 Cal.4th 541, *Cassel v. Superior Court* (2011) 51 Cal.4th 113, *Reid v. Google* (2010) 50 Cal.4th 512, *Kibler v. Northern Inyo County Hospital District* (2006) 39 Cal.4th 192, *Viner v. Sweet* (2003) 30 Cal.4th 1232, and *Summit Financial Holdings v. Continental Lawyers Title* (2002) 27 Cal.4th 1160.

Consequently, the Association and its constituent members have a substantial interest in publication of decisions pertinent to the standards applicable to claims of professional malpractice, including of attorneys' control over litigation, the requirement for expert testimony, and the standards generally applicable to claims of professional negligence. ASCDC asserts the *Hamp* decision should be certified for publication because it "reaffirms a principle of law not applied in a recently reported decision," "explains ... an existing rule of law," "[i]nvolves a legal issue of continuing public interest," and "[m]akes a significant contribution to legal literature by reviewing the standards applicable to litigation of professional negligence claims." (Rule 8.1105(c)(3), (6)-(8), Cal. Rules of Court.)

THE *HAMP* DECISION SHOULD BE PUBLISHED

The Association urges the Court of Appeal to publish its decision in *Hamp* for three reasons. First, if published, the *Hamp* decision would reinvigorate the venerable principle that in a civil action the attorney has "complete charge" of the litigation including tactical decisions to abandon claims or defenses deemed by the attorney to be unmeritorious or counterproductive. Second, the decision reinforces and explains that expert testimony is required to establish claims of professional negligence, even in legal malpractice cases, a category of cases that judicial officers might otherwise be tempted to utilize their own expertise to identify potential bases for liability. Third, the court's detailed discussion of the assessment of claims of professional negligence and breach of fiduciary duty against attorneys would make a significant contribution to the legal literature.

1. Publication Would Revitalize the Venerable Rule that the Attorney Has "Complete Charge" of Civil Litigation

Hamp revitalizes the principle that in civil litigation "the attorney has complete charge and supervision of the procedure that is to be adopted and pursued in the trial of an action." (Slip Op., p. 25; quoting *Zurich General Accident & Liability Ins. Co. Ltd. v. Kinsler* (1938) 12 Cal.2d 98, 105, overruled on other grounds in *Fracasse v. Brent* (1972) 6 Cal.3d 784, 792.) Going on, the *Hamp* court stated: "Under this principle, 'an attorney … may abandon a defense he [or she] deems to be unmeritorious.'" (Slip Op., pp. 25-26; quoting *Linsk v. Linsk* (1969) 70 Cal.2d 272, 277; referring also to *Duffy v. Griffith Co.* (1962) 206 Cal.App.2d 780, 793-795.) Publication of the *Hamp* decision would breathe new vitality into those previously well-established principles and thus avoid the possibility that the significance of those long-ago established rules might fade with the passage of time. The authorities cited by the Court, from the years 1938, 1962 and 1969, run the risk of being considered stale by courts and litigants.

The *Hamp* decision provides an appropriate context for reiteration of the principle, as a claim for legal malpractice cannot be based solely upon the retrospective assessment of how a different strategy might have produced a more favorable outcome. Thus, publication is warranted because the court's opinion "[i]nvokes a previously overlooked rule of law" and "reaffirms a principle of law not applied in a recently reported decision." (Cal. R. Ct., rule 8.1105(c)(8).)

2. The Decision Provides Important Guidance Regarding The Requirement For Expert Testimony

This court's decision recounts the general rule that "expert witness testimony is required in a professional negligence case to establish the applicable standard of care, whether that standard was met or breached by the defendant, and whether the defendant's negligence caused the plaintiff's damages," citing the decisions from *Scott v. Rayhrer* (2010) 185 Cal.App.4th 1535, 1542, and *Unigard Ins. Group v. O'Flaherty & Belgum* (1995) 38 Cal.App.4th 1229, 1238.

Publication of *Hamp* would help elucidate the meaning of the relatively abbreviated analysis of *Unigard* that might be improvidently interpreted to authorize courts to independently scrutinize an attorney's conduct to identify standard of care grounds for criticism. Predictably, judges are likely to hold an opinion on the quality of legal representation. *Unigard's* discussion might be viewed as authorizing judges to utilize such opinions to assess potential bases for

attorney fault. Without reference to expert testimony, *Unigard* critiqued "the failure of the O'Flaherty law firm to raise the workers' compensation defenses in the answer" as identifying "a question of fact ... as to why the O'Flaherty firm failed to raise these defenses in a demurrer …, a summary judgment motion …or in some other pleading." (*Id*. at 1239.)

Unigard then otherwise criticized, as arguably only an additional basis for decision, the effect of the underlying nonsuit as precluding Unigard from presenting expert testimony. (*Ibid.*) As structured, the *Unigard* approach might be seen as allowing the courts to utilize inherent legal expertise to identify potential issues of breach. Such an approach would unjustly tilt the playing field in favor of a plaintiff -- a court's identification of bases for criticism would implicitly support a finding of breach.

Hamp coalesces the somewhat segmented analysis of *Unigard* and keeps courts out of the process of evaluating issues of quality, whether an attorney's representation *might* (suggestively) be considered substandard -- leaving these issues for identification by the parties and impartial resolution by a jury. *Hamp* more clearly, but harmoniously with *Unigard*, sets forth standards generally requiring expert testimony to *both* identify standard of care issues and the weighing of whether a breach occurred. In other words, *Hamp* discourages an approach that would otherwise implicitly support dissatisfied clients by independently identifying standard of care issues.

Hamp appropriately discourages courts from acting on ample temptation to identify issues of standard of care when it comes to attorney conduct. Publication of the decision would encourage courts to avoid becoming involved in defining the dispute on attorney performance issues, "the type of case that tugs the hearts of most trial judges." (*Zasueta v. Zasueta* (2002) 102 Cal.App.4th 1242, 1243.)

This Court's decision in *Hamp* is consistent with the rule set forth in *Scott v. Rayhrer, supra,* 185 Cal.App.4th 1535, 1542, but because *Scott* arose from a medical malpractice case, the requirement for expert testimony in that context to support a theory of *res ipsa loquitur* is less likely to implicate the personal feelings and experiences of judges, who generally would not consider themselves to be medical experts.

For these reasons, the decision should be published because it explains, or modifies, an existing rule of law, involving a legal issue of continuing public interest. (Rule 8.1105(c)(3), (6).)

3. The *Hamp* Decision Would Significantly Contribute to the Legal Literature if Published

Finally, *Hamp* should be published because of its comprehensive discussion of the legal standards applicable to the resolution of claims of professional liability, including the significance of the pleadings to framing issues to be decided by motions for summary judgment (Slip Op., p. 18), the rule that every attorney mistake will not necessarily support a claim of negligence (p. 19), that triable issues are not raised based on inferences that are not reasonably supported by the facts (p. 22), the need for expert testimony in professional negligence actions (pp. 22-27), the standards for a claim of breach of fiduciary duty against an attorney (pp. 27-34), recognition of the deference given to attorneys' litigation decisions (pp. 25-27), the standards applicable to a claim of attorney breach of fiduciary duty (pp. 27-34), and the requirement to demonstrate causation from an allegedly negligent act or omission (pp. 33-34). Therefore, publication is warranted because the court's opinion "[m]akes a significant contribution to legal literature by reviewing . . . the development of a common law rule." (Cal. R. Ct., rule 8.1105(c)(7).)

For all of the foregoing reasons, the Association respectfully asks the Court to certify *Hamp* for publication.

Respectfully submitted,

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cc: See attached Service List

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 111 West Ocean Boulevard, 14th Floor, Long Beach, CA 90802-4646. On November 18, 2014, I served a true and correct copy of the following document(s) on the attached list of interested parties:

REQUEST FOR PUBLICATION

( ) **By United States Mail** (CCP §§1013a, et seq.): I enclosed said document(s) in a sealed envelope or package to each addressee. I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, with postage fully prepaid.

(X) **By Overnight Delivery/Express Mail** (CCP §§1013(c)(d), et seq.): I enclosed said document(s) in a sealed envelope or package provided by an overnight delivery carrier to each addressee. I placed the envelope or package, delivery fees paid for, for collection and overnight delivery at an office or at a regularly utilized drop box maintained by the express service carrier at 111 West Ocean Boulevard, Long Beach, California.

( ) **By Messenger Service**: I enclosed said document(s) in a sealed envelope or package to each addressee. I provided them to a professional messenger service (Signal Attorney Service) for service. An original proof of service by messenger will be filed pursuant to California Rules of Court, Rule 3.1300(c).

I declare under penalty of perjury under the laws of the State of California and of the United States that the above is true and correct. I declare that I am employed in the office of a member of the Bar of the within court at whose direction this service was made.

Executed on November 18, 2014, at Long Beach, California.

LAURIE THEOBALD

Proof of Service Mailing List
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