CIVIL PROCEDURE

A. PERSONAL JURISDICTION:
A NEW LOOK AT OLD TESTS

Cornelison v. Chaney. The supreme court held that California could assert personal jurisdiction over a nonresident defendant who collided with a California plaintiff in Nevada while driving to California in the course of the defendant's interstate trucking business. The court found a substantial nexus between the accident and the defendant's business contacts with California and concluded that a balancing of the interests of the state and of the parties showed that these contacts provided sufficient basis for personal jurisdiction in California.

Personal jurisdiction in California may be extended as far as due process will allow; nevertheless, to ensure sister-state recognition of California judgments, each exercise of jurisdiction must meet the United States Supreme Court's standards. Although the court in Chaney applied the doctrines set forth in International Shoe Co. v. Washington, Hanson v. Denckla, and Buckeye Boiler Co. v. Superior Court, Chaney is the first major decision to interpret these cases as allowing the exercise of personal jurisdiction over a nonresident whose wrongful act both occurred and caused injury to the plaintiff outside the state.

Other jurisdictional cases decided by the supreme court this year indicate that Chaney does not signal maximum judicial expansion of the state's long-arm jurisdiction. In Javorek v. Superior Court the court held that the doctrine of Seider v. Roth is not part of the law.

1. 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976) (Mosk, J.) (4-3 decision).
2. Id. at 146, 149, 545 P.2d at 266, 268, 127 Cal. Rptr. at 354, 356.
3. The California long-arm statute, CAL. CIV. PROC. CODE § 410.10 (West Supp. 1976), provides: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."
5. 326 U.S. 310 (1945).
8. 17 Cal. 3d 629, 552 P.2d 728, 131 Cal. Rptr. 768 (1976).
of quasi in rem jurisdiction in California.\textsuperscript{10} In \textit{Sibley v. Superior Court}\textsuperscript{11} the court refused to exercise jurisdiction over a nonresident individual whose acts outside the state caused effects within.\textsuperscript{12}

Analysis of the \textit{Chaney} opinion reveals that, in fact, the court decided a case presenting novel facts by using the standard formula controlling the exercise of personal jurisdiction over nonresidents in California courts. First, guided by \textit{International Shoe}, the court examined the defendant's contacts with California by identifying relationships between the alleged tort, the forum state, and the defendant's forum-related activities. Second, the court balanced the interests of the state and those of the parties, indicating that this process is fundamental in deciding whether personal jurisdiction is fair. Though this two-step approach proved workable in \textit{Chaney}, its structure may permit a court to decide a case without full consideration of all the issues relating to the fairness of long-arm jurisdiction. This Note examines the two-step jurisdictional test and proposes a reformulation that, by encouraging the articulation of reasons for assuming personal jurisdiction over nonresidents, may assist lawyers and courts in their analysis of close cases that do not conform to factual precedents.

\section{The Facts}

The defendant was a Nebraska resident who hauled goods interstate by truck. He made about 20 trips a year to California, held a California Public Utilities Commission license to haul freight, and maintained business relationships as an independent contractor with several shipping brokerage firms, one of which was located in California.

While driving his truck to California to deliver freight and pick up another load, he was involved in a highway collision in Nevada in which the plaintiff's husband was killed.\textsuperscript{13} The plaintiff, a California resident, filed a complaint in California alleging wrongful death and served process on the defendant by mailing a copy of the summons and

\textsuperscript{10} The court stated that an insurer's contractual obligations to defend and indemnify its insured are not items of property that can be attached in order to permit the exercise of quasi in rem jurisdiction over the action. 17 Cal. 3d at 646, 552 P.2d at 741, 131 Cal. Rptr. at 781.

\textsuperscript{11} 16 Cal. 3d 442, 546 P.2d 322, 128 Cal. Rptr. 34 (1976). See text accompanying notes 46-50 \textsuperscript{infra}.

\textsuperscript{12} This situation is recognized as one in which a state has the power to exercise jurisdiction over a nonresident individual. See \textit{Comment on Bases of Jurisdiction}, supra note 4, at 472. For a discussion of why the court declined jurisdiction, see text accompanying notes 47-48 \textsuperscript{infra}.

\textsuperscript{13} 16 Cal. 3d at 146-47, 545 P.2d at 265-66, 127 Cal. Rptr. at 353-54.
complaint to his residence in Nebraska. The defendant appeared specially and moved to quash issuance and service of the summons on the ground that the court lacked personal jurisdiction over him. The trial court granted the motion and dismissed the action; the supreme court reversed.

II. The Court's Analysis

The doctrine controlling the Chaney decision was announced in International Shoe: for state long-arm jurisdiction to comport with due process, the nonresident defendant must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" At the outset the court concluded that the defendant's California business was not of sufficient scope to justify general jurisdiction in California in all causes of action that might be asserted against him. The court then used the two-step jurisdictional test to decide whether the defendant's contacts with California were of sufficient scope and quality to make jurisdiction over this particular cause of action fair and reasonable.

a. The Requisite Contacts

Since the defendant in Chaney had some minimum contacts with California, the compound issue facing the court was whether those contacts were of the requisite type and whether they were sufficiently related to the plaintiff's cause of action. Hanson v. Denckla imposed the chief requirement for the type of contact required to support per-

14. Id. at 146, 545 P.2d at 265, 127 Cal. Rptr. at 353. CAL. CIV. PROC. CODE § 415.30(a) (West Supp. 1976) provides:
A summons may be served by mail as provided in this section. A copy of the summons and of the complaint shall be mailed (by first-class mail or air-mail, postage prepaid) to the person to be served, together with two copies of the notice and acknowledgment provided for in subdivision (b) and a return envelope, postage prepaid, addressed to the sender.

15. 16 Cal. 3d at 146, 545 P.2d at 265, 127 Cal. Rptr. at 353. CAL. CIV. PROC. CODE § 418.10(a) (West Supp. 1976) provides:
A defendant, on or before the last day of his time to plead or within such further time as the court may for good cause allow, may serve and file a notice of motion either or both:
(1) To quash service of summons on the ground of lack of jurisdiction of the court over him.
(2) To stay or dismiss the action on the ground of inconvenient forum.

16. 16 Cal. 3d at 143, 545 P.2d at 264, 127 Cal. Rptr. at 352.
17. 326 U.S. at 316.
18. 16 Cal. 3d at 148, 545 P.2d at 267, 127 Cal. Rptr. at 355. A contrary finding would have rendered defendant subject to suit in California on any transitory cause of action, however unrelated to his forum activities, subject only to the forum non conveniens defense. For the statutory basis of the forum non conveniens defense, see note 15 supra.

sonal jurisdiction: "[T]here [must] be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state." There, that is, the defendant, and not some third-party, must intentionally initiate the contacts between the state and himself. The court spent little time discussing this requirement; the defendant’s trips to California were clearly contacts by which he purposefully availed himself of the privilege of doing business in California.

The court’s major task was to determine whether a relationship existed between the alleged tort and the defendant’s forum activities sufficient to support jurisdiction—whether, that is, in the language of International Shoe and Buckeye Boiler, the cause of action “arose out of” or “was connected with” the defendant’s forum-related activities. The dissent’s application of these key phrases assumed that a strict geographical relationship is required; in the dissent’s view a cause of action cannot “arise out of” or “be connected with” economic activities in the state unless it is based on acts performed or injuries suffered within the state. The opinion in International Shoe, however, does not require such a rigid reading: “The criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative.” The holding in International Shoe requires that a state’s basis for asserting jurisdiction over a nonresident with forum contacts be fair, reasonable, and just; the phrase “arising out of or connected with” should thus be considered not as a geographical test, but as a tool for identifying contacts on which jurisdiction can be based. Any logical relationship between a cause of action and the defendant’s “minimum contacts” is sufficient if it helps support a conclusion that jurisdiction would be fair.

The Chaney court’s handling of the phrase “arises out of or is connected with” is its major contribution to the analysis of contacts as

20. *Id.* at 253.
22. 326 U.S. at 319; 71 Cal. 2d at 899, 458 P.2d at 62, 80 Cal. Rptr. at 118.
23. 16 Cal. 3d at 153-54, 545 P.2d at 270, 127 Cal. Rptr. at 358 (Clark, J., dissenting).
24. 16 Cal. 3d at 153-54, 545 P.2d at 270, 127 Cal. Rptr. at 358 (Clark, J., dissenting). Justice Clark pointed out that no previous California case has upheld long-arm personal jurisdiction where both the wrongful act and the injury occurred outside California.
25. 326 U.S. at 319.
26. In *Buckeye Boiler* it was obvious that the defendant’s relevant forum contact—the sale of a defective tank that in some way reached California—caused the plaintiff’s injury. But the *Buckeye* opinion never suggests that this causal link is the only relationship between forum contacts and the cause of action that can support jurisdiction.
a basis for jurisdiction. The court viewed that phrase as encompassing not solely geographical relationships, but any logical relationship that, in the court's words, "demonstrate[s] . . . a substantial nexus between plaintiff's cause of action and defendant's activities in California." The opinion sets forth several such relationships between the Nevada accident and the defendant's California business that would be sufficient to support the exercise of jurisdiction, provided a balancing of interests supported such a result. The defendant had been engaged "in a continuous course of conduct" that brought him into the state frequently, and the accident occurred while the defendant was making such a business trip to California. Furthermore, "[t]he accident arose out of the driving of the truck, the very activity which was the essential basis of defendant's contacts with this state." But, as the court points out, the existence of relationships between the plaintiff's cause of action and defendant's forum activity is not determinative of the crucial question: whether, given such contacts, jurisdiction is fair. In deciding whether those relationships supported jurisdiction under the particular facts presented, the court therefore balanced the inconvenience of a California defense against both the interest of the plaintiff in suing locally and the interest of the state in assuming jurisdiction.

b. The Balancing of Interests

The Chaney decision indicates that a balancing of interests should be a fundamental part of the process of determining whether jurisdiction exists, and not simply a means of deciding whether a court should in its discretion assert jurisdiction found permissible on the basis of defendant's forum activity. The court's recognition of the need for this approach to ensure fairness is another significant contribution to the law of long-arm personal jurisdiction.

The court in Chaney considered and balanced the following interests:

27. 16 Cal. 3d at 149, 545 P.2d at 268, 127 Cal. Rptr. at 356.
28. Id., 545 P.2d at 267, 127 Cal. Rptr. at 355.
29. Id., 545 P.2d at 268, 127 Cal. Rptr. at 356.
30. Id. at 150-51, 545 P.2d at 268-69, 127 Cal. Rptr. at 356-57.
31. Id.
32. But see Gorfinkel & Lavine, supra note 21, at 1199. In a discussion of Buckeye Boiler, the authors read International Shoe as suggesting that jurisdiction would be reasonable per se given adequate forum contacts. Their view is that convenience factors should be considered only in applying the doctrine of forum non conveniens, rather than as independent grounds for jurisdiction. In contrast, this Note argues that the adequacy or inadequacy of forum contacts cannot be determined without a consideration of all the factors relevant to the fairness of jurisdiction, including convenience factors. See text accompanying notes 43-53 infra.
The relative availability of evidence and the burden of defense and prosecution in one place rather than another; the interest of a state in providing a forum for its residents or regulating the business involved; the ease of access to an alternative forum; the avoidance of a multiplicity of suits and conflicting adjudications; and the extent to which the cause of action arose out of defendant's local activities.\(^3\)

The court treated these interests summarily, finding that the balance of convenience between the parties was virtually neutral\(^4\) and emphasizing California's interest in providing its residents with a California forum.\(^5\) The court then introduced a new factor to the California balancing process: whether the defendant was involved in interstate business and therefore could foresee, plan for, and insure against the necessity of defending tort actions in states far from home.\(^3\) The scholarly discussions cited by the court\(^7\) argue for expansion of jurisdiction over large interstate corporations rather than individuals like Chaney. But even with respect to individuals the possibility of defense in numerous states is likely to be reflected in the defendant's insurance rates. Given the court's assumption that a California defense will be little more burdensome than a Nevada defense, the exercise of California jurisdiction does not appear unfair to the defendant or his insurer in light of the scope and nature of the defendant's California operations.\(^3\) The court concluded that "under all the circumstances, it would not offend due process to subject the defendant to the jurisdiction of the California courts."\(^3\)

### III. A Reformulation of the Personal Jurisdiction Test

The process by which California courts presently determine the propriety of asserting personal jurisdiction over nonresident defendants

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33. 16 Cal. 3d at 151, 545 P.2d at 268, 127 Cal. Rptr. at 356.
34. Id., 545 P.2d at 269, 127 Cal. Rptr. at 357. The court admitted that most of the evidence, except for the plaintiff's eyewitness testimony and the evidence on damages, was in Nevada, but failed to weigh the extra costs of getting evidence to California or the effect of the lack of power to subpoena unwilling witnesses. The court asserted that the defendant's burdens would be little different in the two states, but did not support this assertion with facts from the record.
35. Id. See Comment on Bases of Jurisdiction, supra note 4, at 471; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37, Comment a at 158 (1971).
36. 16 Cal. 3d at 151, 545 P.2d at 269, 127 Cal. Rptr. at 357.
38. 16 Cal. 3d at 151, 545 P.2d at 269, 127 Cal. Rptr. at 357.
39. Id. at 152, 545 P.2d at 269, 127 Cal. Rptr. at 357 (emphasis added).
consists of two distinct steps. The Buckeye Boiler court described the process:

Once it is established that the defendant has engaged in activity of the requisite quality and nature in the forum state and that the cause of action is sufficiently connected with this activity [step one], the propriety of an assumption of jurisdiction depends upon a balancing of the inconvenience to the defendant in having to defend itself in the forum state against both the interest of the plaintiff in suing locally and the interrelated interest of the state in assuming jurisdiction [step two].

Following these two steps, the court in Chaney concluded its analysis of the relation between the defendant's forum contacts and the plaintiff's cause of action by asserting that due process would be met if the balancing process came out in plaintiff's favor. Thus the first step, the analysis of contacts, was nondeterminative: whether the contacts were such as to make the exercise of jurisdiction fair could not be determined without going on to consider convenience factors.

Applying the same two-step test in Sibley v. Superior Court, the court rested its decision solely on step one: after deciding that the defendant's contacts with the forum were not sufficient to make jurisdiction fair, the court declined to balance the interests of the parties and the state. The court in effect required a favorable outcome of the contacts analysis (step one) as a condition for proceeding to a balancing of interests (step two). In cases like Chaney division of the jurisdiction test into two steps is unhelpful; in cases like Sibley the division deprives a court of some of the analytical tools essential to a principled, fully articulated decision about the assertion of jurisdiction. When a court can decide that contacts are insufficient to make jurisdiction fair, without explicitly considering all of the factors bearing directly on fairness, then some of the reasons for the court's decision remain unarticulated.

The approach that courts should adopt involves a unified evaluation of the fairness of jurisdiction. A court would begin by identifying the defendant's contacts with the state and their relationship to the cause of action. Once this preliminary nonjudgmental process is completed, the court would evaluate and weigh all the factors that

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40. 71 Cal. 2d at 899, 458 P.2d at 62, 80 Cal. Rptr. at 118.
41. 16 Cal. 3d at 150, 545 P.2d at 268, 127 Cal. Rptr. at 356.
42. 16 Cal. 3d 442, 546 P.2d 322, 128 Cal. Rptr. 34.
43. Id. at 448, 546 P.2d at 326, 128 Cal. Rptr. at 38. See also Regents of the University of New Mexico v. Superior Court, 52 Cal. App. 3d 964, 125 Cal. Rptr. 413 (2d Dist. 1975) and Interdyne Co. v. SYS Computer Corp., 31 Cal. App. 3d 508, 107 Cal. Rptr. 499 (2d Dist. 1973), in which jurisdiction was denied on the basis of insufficient forum contacts, without considering convenience factors.
make the exercise of jurisdiction fair or unfair under the perceived circumstances. These factors include some that are presently relevant to the present "analysis of contacts": the number and extent of the defendant's contacts with the state, the closeness of the relationship between the cause of action and those forum contacts, and whether the contacts are the result of defendant's purposefully availing himself of the privileges and protections of the state's laws. Other factors relevant to fairness include those in the present "second step": the convenience of each of the parties, and the interests of the state in providing a forum for the plaintiff and in regulating the activity giving rise to the cause of action. By integrating the process into one evaluative step, the proposed test precludes a court from declining jurisdiction because of "insufficient contacts" without a complete and open consideration of the reasons why jurisdiction would not be fair.

A closer examination of Sibley demonstrates the desirability of the proposed approach. There the California limited partners sued both their Georgia general partner and Sibley, a Florida resident who had guaranteed the general partner's performance. The supreme court held that jurisdiction over Sibley would be unreasonable and unfair primarily because he had not sought any financial benefit from his dealings with California investors. Concluding on that basis that the defendant's contacts with the state were insufficient to support jurisdiction, the court saw no need to proceed to what it perceived as the separate step of balancing interests.

If the court had considered how burdensome it would be for Sibley to conduct a defense in California, it might have found that his liability depended solely on the defendant general partner's liability. In that case the guarantor's burden in joining the California defense

44. See Fisher Governor Co. v. Superior Court, 53 Cal. 2d 222, 225-26, 347 P.2d 1, 3-4, 1 Cal. Rptr. 1, 3-4 (1959). The extent of the relationship between the cause of action and the defendant's forum contacts was listed as one of several factors relevant to the jurisdictional inquiry. See text accompanying note 51 infra.

45. See also Comment, Minimum Contacts Confused and Reconfused—Variations on a Theme by International Shoe—or, Is This Trip Necessary?, 7 SAN DIEGO L. REV. 304 (1970). The author recommends that all the formulas, tests, and phrases used in solving jurisdiction problems be discarded, and that courts focus simply on the question posed in International Shoe: are there minimum contacts such that the exercise of jurisdiction would be fair? This Note agrees that all "tests" should be applied with the ultimate goal of fairness in mind, but also suggests that the "purposeful availment," balancing of interests, and other tests, when used together, help courts make and express principled decisions about fairness. Such well-reasoned decisions may be rare if courts apply either the vague fairness standard, advocated in the cited Comment, or the present test, which allows a court to make a decision without considering all the relevant factors.

46. 16 Cal. 3d at 444, 546 P.2d at 323-24, 128 Cal. Rptr. at 35-36.
47. Id. at 447, 546 P.2d at 325, 128 Cal. Rptr. at 37.
48. Id. at 448, 546 P.2d at 326, 128 Cal. Rptr. at 38.
would have been minimal, and his lack of a profit motive would not appear to be relevant. On the other hand, independent issues about the guarantor's liability may have been important. The court could have strengthened its holding by revealing those considerations. Furthermore, the court failed to discuss the burdens that the plaintiff would face under the remaining alternatives: a single trial in Georgia, or trials in two states. Such burdens might include increased costs of litigation and the possibility of conflicting adjudications. Nor did the court assert the California policy of providing a forum for California plaintiffs bringing causes of action that have a connection with the state. The court's failure to discuss all of the issues relevant to the fairness of jurisdiction leaves the basis for the decision unclear; the opinion must either be limited to its facts or read as holding that personal jurisdiction over nonresidents cannot attach absent a showing of the defendant's profit motive. These unfortunate readings could have been avoided if the court had discussed all the issues relevant to the jurisdictional tests that this Note proposes.

The proposed reformulation is similar, in effect, to the approach now employed whenever a California court reaches the "balancing of interests" step. The authors of both the majority and dissenting opinions in Chaney discussed the whole range of issues bearing on the fairness of jurisdiction. Although the dissenting opinion may be criticized for focusing unduly on geography, it considered the full range of factors bearing on fairness and may in fact have stated a better case than did the majority. The opinion in Fisher Governor v. Superior Court provides an even better example of the range of factors that courts should be considering. Although the defendant's contacts with California were few and unrelated to the cause of action, the court did not rest its decision on these findings alone; it demonstrated further that the interests of the parties and of the state did not support jurisdiction. Such issues may appear to be surplusage in easy cases like Fisher Governor; in cases like Chaney or Sibley, however, they may be crucial to a principled decision.

Perhaps most importantly, the proposed test is consistent with the language and rationale of International Shoe. The Court wrote:

[The demands of due process] may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the cor-

49. Sibley, as guarantor, assumed the responsibility to stand behind his principal when the guaranty was signed; it is unclear why, as part of that responsibility, he should not be required to throw in his lot with the principal obligor in an action against it in the state of its organization.

50. See note 35 supra.

poration to defend the particular suit which is brought there. An "estimate of the inconveniences" which would result to the corporation from a trial away from its "home" or principal place of business is relevant in this connection.\(^{52}\)

Not only does the language of *International Shoe* permit a court to balance interests in determining whether the defendant has such minimum contacts as to make jurisdiction fair, but its logic demands such analysis if the relevance of contacts to fairness is to be adequately evaluated.\(^{53}\)

**Conclusion**

The *Chaney* court resolved the difficult problem of jurisdiction over a nonresident who allegedly committed a tort outside of the state by recognizing that the key to the due process issue presented is fairness. Rejecting the easy answer offered by a territorial analysis, the court set forth several connections between the plaintiff's cause of action and the defendant's activities in California, and explained why the assertion of jurisdiction over the defendant would be fair in light of those relations. The court thus avoided the potential pitfall of the current jurisdictional test, which allows a court to limit its consideration of issues relating to fairness to those cases in which it first finds the defendant's forum contacts sufficient to support jurisdiction. The concept of "fair play and substantial justice"\(^{54}\) in jurisdiction has content only when a court articulates interests that determine the fairness of asserting jurisdiction and balances those factors against one another. Because the *Chaney* court employed all the tools at its disposal, it disclosed the reasons for its decision that personal jurisdiction over the defendant is fair. A jurisdictional test involving an integrated evaluation of fairness will ensure principled resolutions of jurisdictional disputes.

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52. 326 U.S. at 317. The Learned Hand opinion from which this language is derived suggests that an "estimate of inconveniences" is essential to the determination of whether an exercise of jurisdiction is reasonable, given the defendant's forum contacts. *See* Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930).

53. The purpose of examining contacts is to reach a decision about the fairness of jurisdiction:

[T]he more closely the defendant is related to the state, the more convenient it will probably be for him to stand suit in the state. . . . [T]he more closely the defendant is related to the state, the greater is the interest of the state in him and consequently the more appropriate it will be, from the standpoint of the best interests of international and interstate systems, that the state should be in a position to try the case against the defendant in its courts.

*Restatement (Second) of Conflict of Laws* § 37, Comment a at 158 (1971).

B. Plaintiff’s Right to Counsel During An Examination by Defendant’s Psychiatrist

*Edwards v. Superior Court.* The California Supreme Court ruled that a civil suit plaintiff has no right to counsel during a psychiatric examination conducted by a psychiatrist designated by defendant. This decision was based upon the court’s conclusion that counsel’s presence would make it too difficult or impossible for the psychiatrist to conduct a proper examination.

It is the thesis of this Note that *Edwards* does not adequately analyze or measure the competing rights that are at stake and that, as a consequence, the result reached, even if correct, is not well supported.

**I. Factual Summary**

Petitioner Edwards was the plaintiff in a personal injury suit in which she alleged physical and emotional injuries. Defendant school district sought to have a psychiatrist of its own choosing examine her pursuant to section 2032 of the Code of Civil Procedure. When plaintiff demanded that her attorney be permitted to attend, defendant obtained an order compelling her to submit to the examination without the presence of counsel. The trial court stayed this order temporarily to give plaintiff an opportunity to withdraw her claim for emotional injury. She declined to do so and instead petitioned the supreme court for a writ of mandate directing the trial court to vacate its order. In denying her petition, the court held, by a 5 to 2 vote, that there is no absolute right to counsel at such an examination and that, as a rule, counsel should be excluded.

**II. Background**

Section 2032 of the Code of Civil Procedure is the first California statute to authorize physical or mental examination of a party by the

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2. Section 2032(a) provides in part: “In an action in which the mental or physical condition . . . of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental . . . examination by a physician . . . .” CAL. CIV. PROC. CODE § 2032 (West Supp. 1976).
3. See note 2 *supra.*
adverse party's physician, but it is silent on the question of whether the examinee has a right to counsel during the examination. Courts have faced this question in a variety of contexts.

In *Sharff v. Superior Court*, the California Supreme Court held that a personal injury plaintiff was entitled to the presence of counsel at a physical examination conducted by defendant's doctor. The court found persuasive the argument that counsel was required to protect plaintiff from improper questions. To the counterargument that an attorney, "by making groundless objections, may hinder an examination," the court replied:

The plaintiff, however, should not be left unprotected on the assumption that an attorney will unduly interfere with the examination. Should such interference occur, appropriate steps may be taken by the court to provide the doctor with a reasonable opportunity to complete his investigation . . . .

The first California case involving a psychiatric examination and a demand to admit plaintiff's counsel was *Durst v. Superior Court*. The court of appeal held that plaintiff had no right to counsel, distinguishing *Sharff* on the basis that a psychiatric examination is much more vulnerable to third-party interference than is a physical examination. However, the court relied equally upon a second distinction: the examiner in *Durst* was a court-appointed "impartial expert" rather than one selected by defendant.

Finally, in *Whitfield v. Superior Court*, a court of appeal confronted the same intermediate situation that arose again in *Edwards*: a psychiatric examination (as in *Durst*) conducted by defendant's physician (as in *Sharff*). In a decision that presaged the result in *Edwards*, the court held that plaintiff had no right to counsel. The distinction between psychiatric and physical examinations was found "more persuasive" than the distinction between court-appointed and defense-appointed experts.

4. However, long prior to the adoption of section 2032 (its effective date was Jan. 1, 1958), courts had been found to have inherent authority to compel such examinations. For a discussion of the case law prior to section 2032, see 3 J. DeMelo, *California Deposition and Discovery Practice* § 11.01(2)(a) (1975).


6. Id. at 510, 282 P.2d at 897.

7. Id. at 510-11, 282 P.2d at 897.


9. Id. at 452-53, 35 Cal. Rptr. at 146-47.

10. The trial court had used its power to appoint expert witnesses to investigate and testify at the trial pursuant to the forerunner of *Cal. Evid. Code* § 730 (West 1966).

11. 246 Cal. App. 2d 81, 54 Cal. Rptr. 505 (2d Dist. 1966). Hearing was denied by the supreme court in 1966, three justices dissenting. Id. at 86, 54 Cal. Rptr. at 508.

12. Id. at 85, 54 Cal. Rptr. at 508.
III. Analysis of Edwards

Plaintiff in Edwards put forward three justifications for allowing her counsel to attend the psychiatric examination. Two of these—that counsel’s presence would provide her with comfort and emotional support, and that it would ensure accuracy in reporting the examination—received only cursory treatment from both the majority and the dissenters in the supreme court. The third and most important reason was plaintiff’s claimed need for protection from improper questioning, a claim which received extended, but faulty, consideration by the court.

In rejecting the idea that plaintiffs need protection during psychiatric interviews, the majority argued that counsel’s presence and interposition of objections might disrupt or seriously impair the effectiveness of the interview. Moreover, the court felt that these objections would often be ill-taken because “[m]any questions which would be legally objectionable, if posed in a courtroom, might be very relevant in the formulation of a sound psychiatric judgment.” In addition, the opinion outlined several less disruptive safeguards available to protect plaintiff from improper questions. The court fortified its conclusion that counsel need not be admitted, first, by citing case law denying criminal defendants the right to counsel during psychiatric examination, and, second, by emphasizing the element of fairness inhering in the procedural posture of the case. Plaintiff’s own psychiatrist has had months, if not years, of unlimited access to plaintiff for psychoanalysis and treatment. . . . Fundamental fairness requires that a similar unrestricted professional exposure for a brief period be allowed the other side.

13. 16 Cal. 3d at 910-11, 549 P.2d at 849, 130 Cal. Rptr. at 17. The majority argued that if comfort and emotional support were grounds for admitting third parties, plaintiff’s relatives or minister might have as strong a claim for admittance as her attorney. The dissenters argued that plaintiff’s comfort was one factor that, when taken together with the other relevant factors, militated in favor of admitting her counsel. Id. at 915, 549 P.2d at 852, 130 Cal. Rptr. at 20.

14. Id. at 910-11, 549 P.2d at 849-50, 130 Cal. Rptr. at 17-18. In rejecting this argument, the majority used language, much of it dicta, that strongly implies that the trial court may forbid any recordation of the interview. This is in sharp contrast to the physical examination cases. See Gonzi v. Superior Court, 51 Cal. 2d 586, 335 P.2d 97 (1959); Ebel v. Superior Court, 39 Cal. App. 3d 934, 114 Cal. Rptr. 722 (5th Dist. 1974) (use of tape recorder). The majority’s claim that an examinee who knows that his statements are being recorded might “react defensively, thereby preventing the full, open and objective communication essential to an effective psychiatric examination” is implausible. A stronger justification is necessary to deprive plaintiff and his advisors of the raw data of the examination and to leave them only the poor substitute of a report written by the examiner.

15. 16 Cal. 3d at 911, 549 P.2d at 849, 130 Cal. Rptr. at 17.

16. Id. at 912, 549 P.2d at 850, 130 Cal. Rptr. at 18.

17. Id. at 910, 549 P.2d at 849, 130 Cal. Rptr. at 17.

18. Id. at 912, 549 P.2d at 850, 130 Cal. Rptr. at 18.
Each of these arguments has faults that significantly undermine the *Edwards* opinion.

a. Possible Interference With the Interview

The first part of the court's argument—that because psychiatric relevance is not identical to legal relevance, a lawyer, familiar only with the latter, has no place at the interview and can only needlessly interfere with it—suffers from a major analytical hiatus. The court made the tacit assumption that any question that might be psychiatrically relevant may be asked at the examination, no matter how objectionable it might otherwise be. The validity of this assumption is certainly not evident considering the extent to which other courts have analyzed the content of psychiatric interviews.

In the past, courts have differed considerably in defining the permissible scope of the psychiatric examination. The *Edwards* view—that the psychiatrist is to have complete freedom in his questioning and that any resulting unfairness to plaintiff can be adequately remedied afterwards—has some popularity. Other courts have taken the position that plaintiff may properly refuse to answer certain questions, and at least one court has held that the psychiatrist may ask only questions that would be proper on deposition. The latter courts, accordingly, allow plaintiff's counsel to attend the examination and interpose objections.

Those courts that impose limitations upon the examiner's questions apparently do so for two reasons—reasons not considered by the *Edwards* court. The first is to prevent the examination from becoming a type of deposition regarding the facts in issue. Such a "second de-
position" would be unfair to plaintiff: any statement made by him during the interview that hurts his case may be admissible in evidence, at least for the purpose of showing the basis for the psychiatrist's diagnosis, and any statement conflicting with his other testimony will almost certainly be admissible for the purpose of impeachment. The second reason is to protect plaintiff from having to disclose information to the other side that he should be entitled to keep to himself. Plaintiff has certain privileges—for instance, attorney-client, self-incrimination—that are so fundamental to the adversary process that he should not be divested of them the moment he enters the office of defendant's psychiatrist. It is not difficult to conceive of questions that might be psychiatrically relevant but that nevertheless are of doubtful legitimacy—for instance, "What have you told your spouse about the accident?"; "How relieved would you be if there were a settlement so that you wouldn't have to go through the emotional strain of a trial?" If plaintiff indeed has the right to refuse to answer certain questions, the only way meaningfully to protect this right is to permit his counsel to attend the interview.

The Edwards court failed to address these justifications for granting plaintiff's request. Moreover, the arguments that it used to support its conclusion suffer from analytic and evidentiary deficiencies. As a result, Edwards is a poorly reasoned opinion.

Three possible arguments support the Edwards assertion that counsel would unnecessarily interfere with the interview. The first is that no question, no matter how great its apparent repugnance to the adversary system, ought to be considered improper in a psychiatric examination, because any restrictions upon the psychiatrist's inquiries would be fatal to the validity of the examination. The Edwards ma-

24. Plaintiff may not, of course, seal defendant's psychiatrist's lips by asserting a doctor-patient relationship and the related privilege. Even if such a relationship can be said to arise under the statutory requirement that plaintiff "[submit] to an examination by a physician for the purpose of securing a diagnosis . . . ." Cal. Evid. Code § 991 (West 1966), the patient-litigant exception precludes any possible privilege. Id. § 996 (West 1966).

25. See 1 M. BELL, MODERN TRIALS § 85 (1954). The author tells of a personal injury suit in which he participated where plaintiff had gone unaccompanied to defendant's doctor who queried him in detail about the events leading up to the accident. The doctor thus could testify as an "independent witness" of "impeaching" statements made by the plaintiff. To the argument that "a true story does not suffer by repetition," the author rejoins, "every trial lawyer knows to the contrary and the answer to this contention is that one deposition, and no more, is deemed sufficient in law before trial." Id.

26. In Tietjen, the court was concerned about self-incriminating information; in Nomina, the problem was questions about plaintiff's sex life, about his relationship with his parents 30 years previously, about confidential matters between him and his spouse, and about his witnesses.

27. Merely showing that some inconvenience or minor hindrance might result is
The second argument is that, even if some questions can be considered improper, it is not appropriate to protect against them by allowing counsel to attend or participate in the examination because counsel's presence will destroy or severely impair its validity. This view was expressly adopted by the majority; conclusory statements aside, however, the only support for it was defendant's psychiatrist's affidavit that he could not conduct a proper examination in the presence of counsel. The court's complete deference to the psychiatrist on the issue of how the interview is to be conducted would be much more convincing if this deference were based on more and better psychiatric evidence.

A third argument in support of *Edwards* and one that pervades the tone and language of the opinion is that the psychiatrist's professional impartiality may be relied on to obviate the danger of improper questioning. This approach relies too heavily on the integrity and skill of the psychiatric profession. Even the most impartial psychiatrist may put questions that arguably ought not be permitted, and de-

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28. Courts permitting plaintiff's counsel to attend the interview have not been deterred by fears that he would unduly interfere. The trial court may guard against the danger by order. Nomina v. Eggeman, 26 Ohio Op. 2d at 125, 188 N.E.2d at 444 (quoting with approval Sharff's enunciation of this proposition; see text accompanying note 7 supra); Tietjen v. Department of Labor & Indus., 13 Wash. App. at 90, 534 P.2d at 154 ("Any unnecessary interference caused by an attorney could be alleviated by specific court order.").

In California, the trial court has the power, as in other areas of discovery, to prevent frivolous objections to or unnecessary interference with the interview by using its broad discretion to "specify the . . . manner, conditions and scope of the examination." Cal. Civ. Proc. Code § 2032(a) (West Supp. 1976). See generally 3 J. DeMio, *supra* note 4, ¶ 11.01(8).

29. 16 Cal. 3d at 908, 549 P.2d at 847, 130 Cal. Rptr. at 15.

30. Psychiatrists disagree about allowing a third party to be present at an interview. See, e.g., R. Sadoff, *Forensic Psychiatry* 198 (1975). It is probable, however, that most psychiatrists would strongly object were the third party to interrupt.

31. In *Whitfield*, the court noted that "the examination involved here . . . in a sense might be considered an adversary proceeding," but went on to "assume that defendants here expect the doctors selected by them to make a psychiatric examination which is at least unbiased and objective" in order that the resulting testimony be convincing to the jury. 246 Cal. App. 2d at 85-86, 54 Cal. Rptr. at 508.
defendant's psychiatrist can by no means be assumed to be especially impartial.\textsuperscript{32}

\textit{b. Alternative Safeguards}

The \textit{Edwards} majority also argued that other adequate safeguards, short of admitting counsel, are available to plaintiff, such as deposing the examiner, obtaining his notes, and moving to exclude at trial.\textsuperscript{33} None of these procedures, however, affords adequate protection against the previously discussed dangers of an unmonitored psychiatric examination. If the examination effectively (and improperly) resulted in the taking of a deposition as to the facts at issue, the psychiatrist could not be prevented from testifying for purposes of impeachment to any inconsistencies between plaintiff's testimony and his statements at the interview.\textsuperscript{34} Similarly, since a disclosure of privileged information during the interview may well be held to waive the privilege,\textsuperscript{35} the information thus disclosed could come into evidence when the psychiatrist is asked upon what he based his conclusions.\textsuperscript{36} Finally, the safeguards catalogued in \textit{Edwards} are directed only at excluding certain interview information from evidence; they are wholly ineffective at reducing the risk that information revealed to the psychiatrist will simply reach the other side—for example, when plaintiff has disclosed his litigation strategy or legal theories.

\textsuperscript{32} The \textit{Edwards} dissent cites considerable authority for the partiality of expert witnesses employed by one party to the litigation. 16 Cal. 3d at 919 n.6, 549 P.2d at 855 n.6, 130 Cal. Rptr. at 23 n.6. This partiality does not, of course, reflect a lack of ethics on the part of psychiatrists. Rather, it reflects both the fact that any psychiatrist is bound to have certain attitudes, deriving from such sources, for example, as the school of psychiatry to which he belongs or his prior trial experience, and the realization that defendant's psychiatrist will have been chosen precisely because his employer believes that his attitudes are favorable to the defense's view of the case.

\textsuperscript{33} 16 Cal. 3d at 912, 549 P.2d at 830, 130 Cal. Rptr. at 18. If plaintiff seeks and obtains from defendant's psychiatrist a written report about the examination, defendant is entitled to receive from plaintiff written reports on any other examinations undergone by him, and plaintiff waives his privileges with respect to any such examinations. \textsc{Cal. civ. proc. code} § 2032(b)(1)-(b)(2) (West Supp. 1976).

\textsuperscript{34} See notes 24-25 supra.

\textsuperscript{35} \textsc{cal. evid. code} § 912(a) (West 1966). \textit{But see id.} § 912(d) (West 1966).

\textsuperscript{36} In the extreme situation (which arose in \textit{Tietjen}) where plaintiff may disclose self-incriminating information in the course of the interview, he could conceivably be subject to the risk that the psychiatrist would testify against him in subsequent criminal proceedings. It is doubtful that the trial court could eliminate this risk by a grant of immunity. See \textsc{Daly v. Superior Court}, 58 Cal. App. 3d 74, 129 Cal. Rptr. 686 (1st Dist. 1976), \textit{hearing granted}, Aug. 12, 1976 (S.F. 23503). Plaintiff could, however, argue that he may assert a doctor-patient privilege in all actions other than the one for which the examination was made. \textsc{Cal. evid. code} §§ 991, 996 (West 1966), discussed at note 24 supra.
c. Other Supportive Arguments

Once the court found difficulties with counsel's presence at psychiatric interviews and identified alternative safeguards, it relied\(^{37}\) on a criminal case, *In re Spencer*,\(^{38}\) to support its holding. *Spencer* held that a defendant who has pleaded insanity has no right to counsel at an examination by a court-appointed psychiatrist\(^{39}\) so long as certain safeguards are provided. A fortiori, the *Edwards* court reasoned, a civil suit plaintiff has no right to counsel either. The difficulty with this argument is that *Spencer* involved a court-appointed expert whereas the *Edwards* psychiatrist was an employee of one of the parties.\(^{40}\) As a result, *Spencer* need not be considered controlling authority.\(^{41}\)

The final argument put forward by the majority was that since plaintiff's own psychiatrist had examined her without hindrance, "fairness" required that defendant's psychiatrist be afforded a similar opportunity.\(^{42}\) Despite a certain superficial symmetry, this argument is not convincing. There is a good reason for imposing more restraints upon defendant's psychiatrist—he is the one more likely to infringe upon plaintiff's rights.\(^{43}\) Any resulting asymmetry is only a natural consequence of having an adversary system.

\(^{37}\) 16 Cal. 3d at 910, 549 P.2d at 849, 130 Cal. Rptr. at 17.

\(^{38}\) 63 Cal. 2d 400, 406 P.2d 33, 46 Cal. Rptr. 753 (1965).

\(^{39}\) The court is required to select and appoint psychiatrists to examine defendant in this situation. *CAL. PENAL CODE* § 1027 (West 1970). See also *Tarantino v. Superior Court*, 48 Cal. App. 3d 465, 122 Cal. Rptr. 61 (1st Dist. 1975), holding that counsel may be excluded from a court-ordered psychiatric examination held to determine defendant's competence to stand trial. *CAL. PENAL CODE* § 1367 (West 1970).


\(^{41}\) A second distinction that one might attempt to draw between *Edwards* and *Spencer* is that a civil plaintiff is compelled to undergo the psychiatric examination whereas a criminal defendant is not. The *Nomina* court made this argument, 26 Ohio Op. 2d at 125, 188 N.E.2d at 444, but it is not very convincing. Had Edwards refused to be interviewed, she would have been subject to various possible sanctions, including dismissal or adverse judgment by default. *CAL. CIV. PROC. CODE* § 2034(b)(2) (West Supp. 1976). Had Spencer refused, his refusal could have been admitted into evidence at trial, *People v. French*, 12 Cal. 720, 87 P.2d 1014 (1939), and the psychiatrist might have been allowed to testify about any conclusions which he could draw from defendant's non-cooperation. See *Johnson v. People*, 172 Colo. 72, 470 P.2d 37 (1970). In view of these possibilities and of the disparity in their respective stakes—one was suing for damages, the other was on trial for his life—it is difficult to make a meaningful comparison of the respective degrees of compulsion.

The *Edwards* dissenters sought to distinguish the two cases on the basis that *Spencer* involved a constitutional question whereas *Edwards* involved only a question of sound judicial policy in civil proceedings. 16 Cal. 3d at 918, 549 P.2d at 854, 130 Cal. Rptr. at 22. While this distinction is undoubtedly accurate, it does not explain why the latter situation is not automatically governed by the former, as the majority claimed.

\(^{42}\) See text accompanying note 18 supra.

\(^{43}\) A related consideration is that Edwards' psychiatrist had been engaged to treat