2d Civil No. B185110

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

WILLIAM F. ADAMS LAW OFFICES et al.,
Lienholders and Appellants,

vs.

RICHARD PERRILLO, PICCO & PRESLEY et al.,
Plaintiff, Defendants, Respondents.

Appeal from Los Angeles Superior Court, No. SC063100
Honorable Cesar Sarmiento

RESPONDENTS' BRIEF

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Court of Appeal
State of California
Second Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: **B185110**

Case Name: **William F. Adams Law Offices et al. v. Perrillo et al.**

Please check the applicable box:

■ There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 14.5(d)(3).

☐ Interested entities or parties are listed below:

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4.	

Please attach additional sheets with Entity or Person Information if necessary.

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INTRODUCTION

Appellant William Adams is, to put it colloquially, barking up the wrong tree.[1] He was one of the attorneys for plaintiff Richard Perrillo for a short time in this action, but he was discharged long before trial. After Perrillo obtained a favorable jury verdict, Adams injected himself into the attorney fee proceedings to demand that *defendants* (respondents here) pay his attorney fees. If he is owed anything, it is not by defendants, but by his former client, Perrillo. The trial court properly denied Adams' claim, which was flawed for many reasons.

Initially, there are two fatal jurisdictional defects.

(1) A discharged attorney has no standing to demand fees in the client's action; only the client—the party to the contract containing the fee-shifting provision—has standing. Adams has no right to demand from defendants—and defendants have no contractual duty to pay to him—fees that his client has not claimed to have incurred for his services.

(2) Adams' appeal is untimely. He filed his notice of appeal more than 60 days after the clerk served notice of entry of the minute order denying his motion for fees. Since that order was a judgment that finally determined Adams' rights in the matter, the court had no power to entertain Adams' subsequent motion for reconsideration, which therefore could not and did not extend Adams' time to file his notice of appeal.

Moreover, setting aside the jurisdictional problems, Adams' appeal is deficient on the merits.

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[1] We refer to Adams and the William F. Adams Law Offices collectively as "Adams."

First, for all the reasons set forth in Picco & Presley, Greg Picco, and Margaret Presley's ("Picco & Presley's") Opening Brief in their appeal from Perrillo's judgment in the underlying litigation between Perrillo and Picco & Presley (2d Civil No. B182561), there was no lien contract between Picco & Presley and Perrillo, let alone an agreement to any fee-shifting provision. Moreover, any purported lien on the civil settlement was void as contrary to public policy, because it attempted to circumvent the Workers' Compensation laws.

Second, the trial court acted well within its discretion to deny Adams fees where Adams' role was the most limited of the three law firms involved in the case; the total fees claimed by all the law firms wildly exceeded the amount of their client's recovery; defendants objected that Adams' services weren't reasonable or necessary and neither Perrillo nor the other attorneys supported Adams' request; Perrillo and the other law firms' silence raised serious questions about whether Adams was entitled to more than the $8,000 in fees Adams has admittedly already received; and Adams' submitted bills contained at least two admitted overcharges that raised a "red flag" in the trial court's mind.

Third, the trial court properly denied Adams' motions to reconsider its fee order in light of "new" information that was not "new"—just a supplemental declaration and more detailed records that were in Adams' possession at the time of the fee hearing.

The appeal should be dismissed or the judgment affirmed.

STATEMENT OF FACTS

A. The Underlying Action Between Plaintiff Perrillo And Defendant Lawyers Regarding A Payment Dispute.

This appeal arises out of a payment dispute between Dr. Richard Perrillo and lawyers, including respondent Picco & Presley, for a group of individuals injured by exposure to toxic chemicals. The factual and procedural background of the underlying action is set forth in detail, with supporting record citations, in Picco & Presley's Appellants' Opening Brief (hereinafter "Picco & Presley's AOB"), filed April 18, 2006 in this Court, 2d Civil No. B182561 ("related appeal"). Pursuant to California Rules of Court, rule 13(a)(5), Picco & Presley adopts by reference their brief in the related appeal.

As explained in Picco & Presley's AOB, the lawyers represented the injured individuals in both their Workers' Compensation claims against their employers and in their civil actions against third parties. Perrillo examined the individuals and provided reports. Perrillo claimed the lawyers agreed to pay him out of any recovery they obtained for their clients in the civil matter, in accordance with the terms of certain "Notices of Doctor's Liens" signed by their clients. He sued the lawyers when they did not distribute to him his claimed share of settlement proceeds in the civil litigation. Among other things, the lawyers claimed the Notices of Doctor's Lien, which Perrillo had obtained from their clients without the lawyers' prior review or approval, were invalid as to the vast majority of individuals who also had Workers' Compensation claims; as to them, Perrillo's payment must come exclusively through Workers' Compensation.

B. Perrillo Retains Lopez Hodes.

In 2000 Perrillo first retained Lopez, Hodes, Restainoi, Milman & Skikos ("Lopez Hodes") to represent him in his action against the lawyers. (Clerk's Transcript ["CT"] 1:68, 3:473-474.) He agreed to pay the firm 40% of any gross recovery. (CT 3:477.) The retainer agreement authorized Lopez Hodes, at its "sole discretion and expense, to associate any other attorneys to perform services or consultation." (CT 3:478.) Any such association would "not increase the amount of attorney's fees paid by" Perrillo, but the associating attorney would be paid out of Lopez Hodes' fees, as arranged by Lopez Hodes and the associating attorney. (*Ibid*.)

C. Lopez Hodes Hires Adams To Assist In Some Tasks.

According to Adams, Lopez Hodes originally brought Adams into the case to assist with preparing the opposition to defendants' summary judgment motion, and Adams continued after that to assist with discovery and trial preparation. (CT 3:517-518, 4:796-802.) Lopez Hodes remained lead counsel responsible for "overall legal strategy," and the firm's partner (Steven Skikos) expected to try the case. (CT 2:200, 204-205, 4:797.)

On joining the case in March 2002, Adams wrote Perrillo to notify him, pursuant to his ethical obligations, that he and Lopez Hodes had "entered into an agreement to share their legal recovery" such that Adams would receive 40% and Lopez Hodes 60% of the contingency fee set forth in Lopez Hodes' retainer agreement with Perrillo. (Adams' Motion to Augment, granted 3/2/06, Exh. C, p. 1125.) Adams confirmed that his services would cost Perrillo nothing. (*Ibid*. ["The division of fees between

the law offices does not result in any additional legal fees to you"].) Perrillo acknowledged the fee-splitting arrangement by signing Adams' letter. (*Id*. at p. 1126.)

In the fall of 2002, one of the defendant lawyers (Michael Goch) settled with Perrillo for $50,000. (CT 3:474-475.) Perrillo kept half of the proceeds, and Lopez Hodes and Adams split the other half, with Lopez Hodes receiving $17,000, and Adams receiving $8,000. (CT 3:475, 521.)

D. Perrillo Retains Cassinat As Lead Counsel.

In May 2003, Perrillo retained Cassinat Law Corporation to "prosecute and try, as lead counsel" his case. (CT 2:399.) Lopez Hodes was to support Cassinat "to the extent [Cassinat] deems such support and assistance to be necessary." (*Ibid*.) Cassinat accepted a 30% contingency on the gross recovery. (*Ibid*.) Perrillo agreed that "any claim by Lopez for fees or costs in this Action shall not diminish" Cassinat's 30% contingency fee. (*Ibid*.) Cassinat formally associated into the case in June 2003. (CT 1:20 [docket entry]; see also concurrently filed Request for Judicial Notice, Exh. A [Association of Counsel].)

E. Adams Withdraws From The Litigation And Files A Notice Of Lien.

Perrillo declared that "Adams resigned from the case during the winter of 2003." (CT 3:475.) Adams claims he was "effectively terminated" in June 2003. (CT 3:521.) According to Adams, "Dr. Perrillo and Lopez Hodes, without my knowledge or consent, entered into a fee

sharing agreement with attorney John Cassinat while I was still attorney of record." (CT 3:520.) Adams contends the agreement was "wholly inconsistent with the terms of my pre-existing fee sharing agreement, awarding [Cassinat] a share of the contingency fee that added up to considerably more than 100% of any award that might have been divided. This was effectively a breach of my written agreement, and effectively terminated my services." (*Ibid*.) Adams thereafter "ceased to perform further work on this matter." (CT 3:520-521.) He claims he was never reimbursed for his fees, except for the $8,000 payment that was his share of the Goch settlement. (CT 3:521.)

Adams filed a notice of withdrawal in late June 2003. (CT 1:19 [docket entry], 3:521; see also concurrently filed Request for Judicial Notice, Exh. B [Notice of Withdrawal].) Four months later, Adams filed a notice of lien "in a sum yet to be ascertained against any judgment or settlement as security for payment of attorney's fees and costs" in the Perrillo action. (CT 1:51.)

F. Judgment Is Entered In Favor Of Perrillo In The Underlying Action.

In July 2004, the jury rendered a verdict in favor of Perrillo and against the remaining lawyers on Perrillo's breach of contract and tort claims, awarding him $307,146.59. (CT 1:58.) The jury rejected Perrillo's claims for emotional distress and punitive damages. (CT 2:336-337.)

The trial court determined that Perrillo was the prevailing party and therefore entitled to attorney fees based on the fee-shifting provision

contained in "Notice of Doctor's Lien," whose validity and applicability to defendants had been the subject of the litigation. (CT 1:58, 3:459; see also Picco & Presley's AOB, pp. 51-53.)

In November 2004, Adams filed a notice of appearance and request for special service of all documents on Adams' counsel. (CT 1:53-54.)

On January 3, 2005, judgment was entered in the Perrillo action, leaving a blank for attorney fees. (CT 1:57-59.)

G. Adams, On His Own, Moves For Attorney Fees And Is Denied.

1. Perrillo files two motions for attorney fees seeking fees for services performed by Lopez Hodes and Cassinat, but not Adams.

In January 2005, Perrillo filed two motions for attorney fees, one for services performed by Lopez Hodes and one for services performed by Cassinat. (CT 2:345-359, 375-392.) Lopez Hodes requested $612,660 (CT 4:767) and Cassinat requested $496,011.33 (CT 2:392 [requesting $483,011.33 in fees]; Perrillo's Clerk's Transcript in related appeal ["Perrillo's CT"] 18:3832, 3836 [requesting additional $13,000 in fees].)

Absent from Perrillo's motions, Perrillo's, Lopez Hodes' and Cassinat's declarations, or the law firms' billing records is any substantial mention of Adams or his services.[2]

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[2] Lopez Hodes attorney Mark Crawford's bills briefly mention Adams on 17 days. (CT 1:85 [3/5/02], 86 [3/3/02, 3/27/02], 90 [5/15/02], 92 [8/13/02], 93 [8/28/02, 8/30/02], 94 [10/2/02], 95 [10/21/02, 10/22/02], 96 [1/13/03, 1/15/03-1/17/03, 1/21/03, 1/24/03], 98 [6/27/03].) Lopez

(continued...)

2. Adams files his own fee motion.

Adams filed his own Motion for Attorney Fees in February 2005, seeking $246,020 in fees purportedly earned by Adams and his legal assistant. (CT 3:510-541.) On the same day, Adams filed a notice of joinder in Perrillo's motions for attorney fees, but he disputed Lopez Hodes' submissions insofar as they "fail[ed] to mention that Adams, in fact, performed many of the tasks identified in the moving papers." (CT 3:481-482.)

Adams represented that he and his legal assistant spent approximately 570 hours on the case. (Adams' Motion to Augment, *supra*, Exh. B, p. 1123.) Adams claimed that he had a "significant role" in the litigation. (CT 3:517.) Specifically, he declared that he "suppl[ied] principal effort for legal research and writing, considerable law and motion practice, preparation for, taking, and defending expert depositions concerning attorney ethics, defending the plaintiff's deposition as a plaintiff and expert, and serving as a resource for dealing with lien procedures, and psychology law, practice, and ethics." (*Ibid*.) He declared that he researched and prepared "the bulk of the opposition to defendant's Motion for Summary Judgment," as well as motions in limine and several other discovery motions and oppositions; took and defended numerous depositions; and prepared trial charts, timelines, and exhibits. (CT 3:517-518.) He declared that he assumed the role of lead counsel for two weeks

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[2] (...continued)
Hodes' discovery index notes Adams' involvement in a motion to compel. (CT 1:137.) The firm's costs invoices reveal a few Adams-related items. (CT 2:320 [6/12/02], 321 [6/28/02], 323 [10/18/02].)

when a Lopez Hodes attorney was on vacation. (CT 3:518.) He declared he was responsible for most of the communications and interactions with dozens of the individuals who Perrillo examined and who signed the "Notice of Doctor's Lien" documents that were the subject of the litigation. (*Ibid*.)

Picco & Presley opposed Adams' fee motion. (CT 4:677-694, 753-756.) Among other things, they objected that (1) they neither signed nor agreed to the Notices of Doctor's Lien that Perrillo obtained from their clients, and thus were not bound by the Notices' fee-shifting provisions (CT 4:682-689); (2) Adams' claimed fees and costs were unreasonable because "[h]aving three separate and unrelated law firms perform the same work unnecessarily increase[d] the overall fee amount" and resulted in duplicative work (CT 4:755); (3) Adams' $450 per hour rate was inflated compared to the $300 per hour rate of the other two firms and out of proportion to Perrillo's $300,000 recovery (*Ibid*.); (4) Adams' "block billed" time entries made it "impossible to evaluate the reasonableness" of his entries purporting to show 11 to 17 hour workdays (*Ibid*.); (5) Adams' April 20, 2002 entry double billed for the same 7-hour task, creating a $3,150 overcharge (CT 4:756; see Adams' Motion to Augment, *supra*, Exh. B, p. 1105). Defendant-lawyer Joseph Iacopino objected on similar grounds. (CT 4:701.)

3. The trial court denies Adams' fee request.

Pursuant to Adams' request, the trial court heard all attorney fee motions on the same day. (CT 3:652-653, 4:673-674.) Adams' attorney

said nothing at the short hearing, which largely focused on whether defendants were bound by the fee-shifting provision in the Notices of Doctor's Lien, documents they did not sign and had not even seen until years after their clients signed. (Reporter's Transcript ["RT"] 1-11.) At the end of the hearing the court noted that it would take the motions under submission and that if it ordered fees, it would specify the allocation among the three law firms. (RT 13-14.)

On April 21, 2005, the court decided the three fee motions as follows:

- *Cassinat Law Corporation*: The court awarded $465,283.50 in attorney fees—nearly all of the $496,011.33 Cassinat requested: "Given the complexity of the issues, the nature of the parties, and the number of witnesses in this trial" the court found that the number of hours Mr. Cassinat billed on the case and his hourly rate ($300) were reasonable. (CT 4:766.)

- *Lopez Hodes*: The court awarded $91,899—15% of the firm's requested fees. (CT 4:767.) The trial court found the total requested fees unreasonable, given the jury's $307,162.59 award: "Any amount in attorneys' fees that is awarded must be reasonable in light of all of the facts and circumstances in the case. It is not reasonable that the attorney fees for the law firm that did not try the case should receive almost double the amount of the jury award." (*Ibid*.)

- *Adams*: The court awarded $0:

"The Adams Law Office has submitted insufficient billing detail and records to support its request for attorneys' fees.

> The bills submitted show that Adams billed for more than 10 hours on 16 different days. For example, on May 2, 2002 Adams billed for 24 hours, for April 14, 2002 Adams billed for 16.50 hours and on 4 other days the Adams Law Office billed for more than 12 hours. They submitted no records to show what was done to justify the number of hours billed. [¶] The court is also unable to determine, based on what the Adams Law Office submitted, if this work was or was not duplicative of the work done and billed by the Cassinat Law Office or the Lopez firm." (CT 4:765-767.)

H. The Trial Court Denies Adams' Motion For Reconsideration.

On May 6, 2005, Adams filed a "motion for reconsideration of motion for attorneys' fees or, alternatively renewed motion for attorneys' fees." (CT 4:771-839.) In support of his motion Adams filed another declaration providing a more detailed explanation of the services he claimed he performed. (CT 4:795-802.) He provided evidence in the form of screen shots of his computer showing case-related files and when they were created; case-related correspondence and memoranda from, to or about him; and deposition excerpts showing his attendance. (CT 4:809-838.)

At the hearing on Adams' motion, the court explained that it had originally denied Adams' fee request after it had "spent a lot of time going through all those bills." (RT 19.) When the court "saw the item for 24 hours I immediately – I think any judge sees somebody bill 24 hours in one

day, that's a red flag." (*Ibid*.; see Adams' Motion to Augment, *supra*, Exh. B, p. 1108 [24-hour billing entry on 5/2/02].) The court told Adams it had "gone through your declaration and read what you did. Had I received that information at the time, obviously, my ruling would have been different." (RT 20.) But Adams' supplementary information was not new information; "it's information that you obviously had the whole time." (*Ibid*.) The court therefore was not inclined to change its mind. It believed its original decision was correct; it was "based on what I saw on the billing. There was insufficient documentation to support what I saw there." (RT 31.)

In its subsequent minute order, the court ruled:

> "Pursuant to CCP 1008 a court must find that there are new or different facts and circumstances before it can reconsider an order.
>
> "In this case counsel for the Adams Law Firm has now submitted an extensive and detailed declaration from William F. Adams and additional supporting documentation for the billing. This information, however, does not constitute new or different facts or circumstances. All of the facts submitted were available and within the knowledge of the moving party at the time of the filing of the motion and hearing for attorney fees." (CT 5:897.)

I. The Trial Court Denies Adams' Motion For Relief Pursuant To Code Of Civil Procedure Section 473 And Renewed Motion For Reconsideration.

On July 1, 2005, Adams filed a motion for relief pursuant to Code of Civil Procedure section 473 "on the ground that the failure to include information in the original Motion for Attorneys' Fees, which the Court has confirmed would have resulted in a ruling granting the Motion for Attorneys' Fees, was due to counsel's inadvertence, mistake and/or excusable neglect." (CT 5:905-906.) Alternatively, Adams "renew[ed]" his motion for reconsideration on the ground that new law (*Le Francois v. Goel* (2005) 35 Cal.4th 1094 [*Le Francois*]) allowed the trial court to reconsider its erroneous rulings on its own motion. (CT 5:906-907.)

At the hearing, the trial court declined to accept Adam's invitation to reconsider: "My take on this is, I don't think I made a mistake of law in this case, and I don't think I made a mistake of fact when I made the initial ruling." (RT 36.) Rather, "[t]he problem was the information from which the court could – the information that was in the record-keeping that would back up the billing wasn't provided in the initial motion. Had that been provided, as I said the last time, my ruling very well would have been different." (RT 36-37.)

After hearing argument on whether Adams' failure to supply sufficient supporting information was excusable neglect, the court denied the alternative section 473 motion. (RT 37-42; see also CT 5:1076.)

Adams filed his notice of appeal on July 18, 2005. (CT 5:1081.) As we explain below, it was untimely.

ARGUMENT

I.

ADAMS' APPEAL MUST BE DISMISSED FOR TWO FATAL JURISDICTIONAL DEFECTS: (A) ADAMS HAS NO STANDING TO SEEK RELIEF IN THIS ACTION; (B) HIS APPEAL IS UNTIMELY.

A. Adams Has No Standing To Seek Fees From Defendants In His Former Client's Action.

This appeal must be dismissed because Adams had no standing to appear in the trial court on his own behalf and move for fees.[3]

Adams was never a party to the Perrillo litigation. His sole interest in the case derives from his contingency fee-splitting agreement with Lopez Hodes. (Adams' Motion to Augment, *supra*, Exh. C, p. 1125.) That interest was not even sufficient to create a lien on Perrillo's judgment.[4] Regardless, Adams' interest in being paid out of the proceeds of the litigation gave him no right to intervene in the action or make any motion

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[3] Defendants first objected to Adams' standing in the motion for reconsideration proceedings. (CT 4:845, 854) Standing objections may be raised at any time in the proceedings, and even for the first time on appeal. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 438-439.)

[4] See *Law Offices of Stanley J. Bell v. Shine, Browne & Diamond* (1995) 36 Cal.App.4th 1011, 1014-1015, 1019 [contingency fee-splitting arrangement between law firms created no lien with respect to client's recovery]; see also *Carroll v. Interstate Brands Corp*. (2002) 99 Cal.App.4th 1168, 1172 ["When the client enters into a retainer agreement with one particular attorney, a lien in favor of another, albeit associated attorney is neither express nor implied and does not exist"].

for fees on his own behalf. Any number of cases illustrate, but *Meadow v. Superior Court* (1963) 59 Cal.2d 610 (*Meadow*) is particularly apt and authoritative.

1. The *Meadow* rule laid down by the California Supreme Court controls, barring a discharged attorney from intervening and seeking fees in the former client's action.

In *Meadow*, a wife in a divorce proceeding discharged her attorneys. (*Id*. at p. 613.) The husband and wife reconciled and sought to dismiss the action. (*Id*. at pp. 613-614.) The attorneys alleged the reconciliation was fraudulent and designed to deprive them of their fees, and the trial court granted their motion for leave to file a complaint in intervention. (*Ibid*.) The attorneys sought fees pursuant to statutes authorizing courts to require a divorcing spouse with financial means to pay the attorney fees of the less well-off spouse. The pertinent statute (former Civil Code section 137.5) permitted an award of fees directly to the attorneys. (*Id*. at p. 615.)[5] Nevertheless, the Supreme Court held that the statute did not give the attorneys any right to intervene and demand fees absent their client's

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[5] Former section 137.5 provided: "In all actions for divorce or annulment or separate maintenance in which the court grants to the wife or husband, as the case may be, attorney's fees in the prosecution or defense of the action, as the case may be, such fees may, in the discretion of the court, be made payable, in whole or in part, to the attorney entitled thereto, and judgment may be entered and execution levied accordingly." (See *Weil v. Superior Court* (1950) 97 Cal.App.2d 373, 375, fn. *.) Here, by contrast, the relevant statute, Civil Code section 1717, subdivision (a), authorizes fees only to "the party prevailing on the contract" and says nothing about the prevailing party's attorney.

request. "'[I]t is only the party who has the right to apply for an award of attorney's fees" and the Civil Code statutes "do not give the attorney for a party, either before or after any discharge of his services by his client, the right to make a motion in his own behalf for an award of such fees.'" (*Id.* at p. 616, quoting *Marshank v. Superior Court* (1960) 180 Cal.App.2d 602, 607-608.) The trial court was therefore "'without jurisdiction'" to "'proceed with such motion or to make any award thereunder.'" (*Ibid*.) The discharged attorneys' remedy was to seek compensation "'in an independent action by the attorney against the client, and not by application to the court in which the litigation is pending.'" (*Meadow*, *supra,* 59 Cal.2d at p. 616, quoting *Hendricks v. Superior Court* (1961) 197 Cal.App.2d 586, 589.) Thus, the Court concluded, the trial court "acted in excess of its jurisdiction in, among other things, permitting [the lawyers] to intervene in the divorce suit in an attempt to secure payment of attorneys' fees and costs and in ordering petitioner husband to answer the complaint in intervention." (*Id*. at p. 612.)

California courts have followed the *Meadow* rule, not just in dissolution cases, but in all kinds of cases where attorneys seek to interject themselves and their fee claims into their former clients' action. (E.g., *Carroll v. Interstate Brands Corp.*, *supra*, 99 Cal.App.4th at p. 1173 [employment discrimination action: former attorney "is not a party to the underlying action and has no right to intervene" and assert his lien claim]; *In re Marriage of Read* (2002) 97 Cal.App.4th 476, 481 ["Freid and Goldsman had no right to file the proposed fee order with the judge after their discharge and substitution out of" their client's marriage dissolution

case]; *In re Marriage of Tushinsky* (1988) 203 Cal.App.3d 136, 142 ["The right of an attorney to recover attorney's fee cannot be invoked in the [marriage] dissolution action itself"]; *Hansen v. Jacobsen* (1986) 186 Cal.App.3d 350, 356 [personal injury action: "Because the discharged attorney is not a party to the pending action and may not intervene, the trial court has no jurisdiction to award fees to that attorney"]; *Bandy v. Mt. Diablo Unified Sch. Dist.* (1976) 56 Cal.App.3d 230, 234 [personal injury action: "A contractual lien [of discharged attorney] must be enforced, however, in an independent action by the attorney against the client and the attorney has no right to intervene in the main action to which he is not a party"]; see also *Isrin v. Superior Court* (1965) 63 Cal.2d 153, 160-161 [contingency-fee lawyer's lien gives no right to intervene in client's action]; *Hendricks v. Superior Court*, *supra*, 197 Cal.App.2d at pp. 588-589 [personal injury action: discharged attorney's contingent-fee contract gives him "no right to intervene in the main action"; compensation must be sought in an independent action]; *Fields v. Potts* (1956) 140 Cal.App.2d 697, 700 [after discharge, attorney cannot intervene in former client's contract action on theory that he has interest in subject matter].)

2. Exceptions to the *Meadow* rule are limited and do not apply here.

One appellate court distinguished *Meadow* and allowed a discharged divorce attorney to seek fees while the attorney was still of record. (*In re Marriage of Borson* (1974) 37 Cal.App.3d 632, 637-638.) The theory was that, while an attorney is still of record, the discharged attorney has implied

authority to make the motion on the client's behalf—though not his own. (*Id*. at pp. 637-638; see also 11 Witkin, Summary of Cal. Law (10th ed. 2005) Husband and Wife, § 9, p. 32-33.) Adams cannot avail himself of this exception because at the time he made his fee motion, he had not been Perrillo's attorney of record for nearly two years, having filed his notice of withdrawal in June 2003. (See CT 1:1 [docket noting Adams as "Former Attorney for Plaintiff"]; see also concurrently filed Request for Judicial Notice, Exh. B [Adams' Notice of Withdrawal].) Adams had no arguable authority to file a motion or appear on Perrillo's behalf after he had, in his own words, become a "'non-person'" whose offer of services after Cassinat's association was "rejected." (CT 3:521; see *In re Marriage of Borson*, *supra*, 37 Cal.App.3d at p. 637 [only attorney of record may appear in court on behalf of party]; *In re Marriage of Read*, *supra*, 97 Cal.App.4th at p. 481 [substitution of attorney deprived trial court of jurisdiction over *Borson* fees sought by discharged attorney].)

Also, separate and apart from the *Meadow* line of cases are a handful of cases that adjudicated a lawyer's (or other creditor's) lien on the judgment or settlement in the underlying action. (See *Brown v. Superior Court* (2004) 116 Cal.App.4th 320, 331-332.) Because those cases do not discuss the jurisdictional issue, however, they are not authority on this point. (*Id*. at p. 332.) In any event, the jurisdictional question, had it been posed, would have been whether the lienholder could assert his or her claim against the debtor's recovery in the underlying action, or whether the lienholder needed to bring a separate action. Adams is, by his own admission, "not seeking an order from [the trial court] adjudicating the lien

he has asserted with regard to [Perrillo's] recovery." (CT 4:880.) He is seeking an award of fees directly *from defendants*, *separate and above* whatever his lien claim is to a percentage of Perrillo's recovery. Under *Meadow*, he has no right or standing to do that *ever*, in this action or a separate action.

Finally, the more recent Supreme Court case *Flannery v. Prentice* (2001) 26 Cal.4th 572 (*Flannery*), in no way undermines the *Meadow* line of cases. *Flannery* discussed an attorney's right to fees awarded under the Fair Employment and Housing Act ("FEHA"). *Flannery* held only that where the plaintiff sought and obtained FEHA fees, and "where attorney compensation has neither been paid nor forgiven and there is no contract assuring it," then the awarded fees belong to the attorney and the client could not keep them. (*Id*. at pp. 581, 586.) The case says nothing about an attorney's right to intervene if the plaintiff does not seek and is not awarded FEHA fees. Moreover, this case is not a FEHA case, and Perrillo has not sought fees for Adams' services—more reasons why *Flannery* does not apply. Nor should it apply: *Flannery*'s focus was to encourage lawyers to take meritorious discrimination cases pro bono or at reduced fees. (*Id*. at pp. 584-585.) *Flannery* advanced the Legislature's anti-discrimination policy by assuring attorneys they would actually receive the fees awarded for their public interest work. No such important public interest exists here, where Adams' fees are assured by his employment agreement with Lopez

Hodes and Perrillo, and absent a fee-shifting provision, Perrillo would have no right to reimbursement for his fees at all.[6]

3. Due process prohibits Adams' standing here, where defendants have no reasonable opportunity to investigate the merits of his fee claim.

It is hard to imagine how allowing Adams' intervention here could comport with defendants' right to due process. Perrillo's refusal to seek fees on behalf of Adams strongly suggests that Perrillo has undisclosed defenses to Adams' fee claim. Why else would Perrillo decline to seek fees that he could otherwise have as a matter of right? Perrillo and Adams may have an understanding not reflected in the record.[7] Or Adams may have

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[6] A post-*Flannery* appellate court decision, *Lindelli v. Town of San Anselmo* (2006) 139 Cal.App.4th 1499, 1513-1516 (*Lindelli*), interpreted *Flannery* as implicitly recognizing an attorney's right to intervene and seek *private attorney-general fees* in the absence of the client's request. In reaching its conclusion, *Lindelli* appears to have misunderstood *Flannery*'s distinction between the client's right to request fees and the attorney's right to fees subsequently awarded. (See *Flannery*, *supra*, 26 Cal.4th at p. 581.) But it does not matter: *Lindelli* recognized *Meadow* as controlling authority for the proposition that lawyers have no right to intervene and make fee requests "in dissolution proceedings as well as in cases involving claims for fees arising out of contracts between attorneys and their clients." (*Id.* at p. 1511.) The latter describes this case. *Lindelli* distinguished *Meadow* from cases where attorneys seek fees "under [Code of Civil Procedure] section 1021.5 or any other provision providing for fee shifting in cases which vindicate fundamental public policies." (*Ibid.*)

[7] Cassinat's bills reveal entries related to Adams after he withdrew, including correspondence with Adams, Adams' attorney, and with Lopez Hodes about Adams' claimed lien. (See CT 2:418 [12/17/03, 12/18/03, 12/19/03], 440 [8/10/04, 8/11/04], 3:442 [10/6/04], 443 [11/29/04].) Defendants have no way of knowing what was discussed and possibly arranged.

breached his contract, or violated an ethical or professional duty.[8] If so, then silence is in Perrillo's best interest: If defendants are ordered to pay Adams' fees, then Perrillo may be able to avoid his own fee dispute.

Or perhaps Perrillo owed Adams nothing to begin with. Perrillo's acknowledgment letter confirms that Adams was to provide his services at no cost to Perrillo, but pursuant to a fee-splitting arrangement with Lopez Hodes. (Adams' Motion to Augment, *supra*, Exh. C, p. 1125; see *Carroll v. Interstate Brands Corp.*, *supra*, 99 Cal.App.4th at p. 1172 [counsel associated in "must look to the client's attorney for compensation, not to the client"]; *Trimble v. Steinfeldt* (1986) 178 Cal.App.3d 646, 651-652 [same].) If Perrillo owes Adams nothing, then neither should defendants, since the purpose of a contractual fee-shifting provision is to reimburse the prevailing party for fees incurred litigating a dispute arising under the contract. (*Trope v. Katz* (1995) 11 Cal.4th 274, 281-282; see also CT 3:459 [contractual fee-shifting provision in Notice of Doctor's Lien obligates patient to pay only for "legal fees used to recover" Perrillo's bills]; *City Investment Co. v. Pringle* (1920) 49 Cal.App. 353, 356 ["The object of a provision for attorney's fees in a contract is to reimburse a party for sums he pays, or becomes liable to pay, as attorney's fees"].)[9]

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[8] A client who discharges his or her attorney must usually pay for the reasonable value of the attorney's services performed up to the time of discharge. (*Fracasse v. Brent* (1972) 6 Cal.3d 784, 790-792.) *But*: "The general doctrine is qualified by the rule that acts of impropriety inconsistent with the character of the legal profession and incompatible with the faithful discharge of professional duties will prevent an attorney from recovering for his services." (*Jeffry v. Pounds* (1977) 67 Cal.App.3d 6, 9.)

[9] Exceptions for pro bono and in-house attorneys or attorneys seeking fees under different statutes vindicating important public interests

(continued...)

Defendants had no way of litigating any of these defenses in a cursory, postjudgment attorney fees proceeding. Due process forbids their being liable absent a full and fair investigation of the validity of Adams' fee entitlement.

In the court below, Adams argued that a former attorney has standing to seek attorneys' fees, citing *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 597. (CT 5:1046.) But *Weiss* proves the point: There, the discharged attorney sued his client and his client's new attorneys in a *separate action* for interference with his lien claim when they distributed the settlement proceeds. *Weiss* says absolutely nothing to suggest that a discharged attorney has standing to demand fees directly from the defendants in the original action brought by his former client.

Adams also argued he had standing under *Clemmer v. Hartford Ins. Co.* (1978) 22 Cal.3d 865, 885. (CT 5:1046.) But *Clemmer* is entirely different. *Clemmer* recognized that a non-party insurer of a defaulting defendant has sufficient interest in the proceedings (because it will ultimately be required to pay the judgment under Insurance Code section 11580) to bring a motion for relief under Code of Civil Procedure section 473. Adams is obviously not an insurer and is not required to pay Perrillo's judgment; he is a discharged attorney, and the controlling law holds that his interest does not give him standing to make any motion, including a section 473 motion and motion for reconsideration, on his own behalf in this

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[9] (...continued)
would not apply here. (See *Lolley v. Campbell* (2002) 28 Cal.4th 367, 373-375.)

action.[10] (*Chase v. Superior Court* (1962) 210 Cal.App.2d 872, 876-878 [court had no authority to hear motion for reconsideration and fee request filed by attorney acting without client's authorization]; *Lavaysse v. Superior Court* (1944) 63 Cal.App.2d 223, 225-226 [court was "without jurisdiction to entertain or grant" lawyer's own Code of Civil Procedure section 473 motion seeking fees when client dismissed action].)

B. Adams' Appeal Must Be Dismissed As Untimely Because It Was Filed More Than 60 Days After The Clerk Mailed Notice Of Entry Of The Postjudgment Order Denying Him Fees.

Even if Adams somehow had standing to appear on his own behalf and request fees in this action, his appeal must still be dismissed. Adams filed his notice of appeal more than 60 days after the clerk's notice of entry of the minute order that constituted the final judgment.

"A judgment is the final determination of the rights of the parties in an action or proceeding." (Code Civ. Proc., § 577.) The trial court's April 21, 2005 minute order was an immediately appealable postjudgment order that finally determined the last outstanding issue in the case—attorney fees. (Code Civ. Proc., § 904.1, subd. (a)(2).) Alternatively, the order was a "final determination of a matter collateral to the main issue in the case" and therefore "a final judgment as between the lienor and the lienee."

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[10] Of course, a statute may directly authorize the trial court to adjudicate the fee claims of dismissed attorneys in the context of the clients' action—as Probate Code section 3601 arguably does in a minor's personal injury settlement. (See *Curtis v. Estate of Fagan* (2000) 82 Cal.App.4th 270, 276-280.) But no such statute authorizes that adjudication here.

(*Bandy v. Mt. Diablo Unified Sch. Dist.*, *supra*, 56 Cal.App.3d at p. 233, fn. 2; see also *Trimble v. Steinfeldt*, *supra*, 178 Cal.App.3d at pp. 649-650 [order denying plaintiff's motion to expunge attorney's lien claim was a final determination of collateral matter as between plaintiff and attorney, a stranger to action].) There was nothing left for Adams to do after the April 21 order but appeal (or execute, had he prevailed), because his issue was finally determined. In the trial court's words: "The April 21, 2005 minute order constitutes entry of the post judgment order regarding the costs and attorney fees and no other orders or judgments are necessary." (CT 5:898 [trial court's June 5 minute order denying reconsideration].)

After entry of judgment, the trial court loses jurisdiction to reconsider that judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859, fn. 29 ["After entry of judgment, the superior court did not have jurisdiction to entertain or decide a motion for reconsideration"]; see also, e.g., *Safeco Ins. Co. of Illinois v. Architectural Facades Unlimited, Inc.* (2005) 134 Cal.App.4th 1477, 1482 ["It is well settled that entry of judgment divests the trial court of authority to rule on a motion for reconsideration"]; *APRI Ins. Co. v. Superior Court* (1999) 76 Cal.App.4th 176, 182 ["The issue is jurisdictional. Once the trial court has entered judgment, it is without power to grant reconsideration"]; *Ramon v. Aerospace Corp.* (1996) 50 Cal.App.4th 1233, 1238, fn. 4 ["a trial court loses power to rule on a motion for reconsideration filed after judgment"].)

Because a postjudgment motion to reconsider a judgment is invalid, rule 3(d) of the California Rules of Court, which would otherwise extend the time to appeal when the party has filed a motion for reconsideration,

does not apply. (*Safeco Ins. Co. of Illinois v. Architectural Facades Unlimited, Inc.*, *supra*, 134 Cal.App.4th at p. 1482 ["As soon as the trial court entered judgment on November 24, 2003, it lost jurisdiction to consider the motion for reconsideration. Therefore, the motion for reconsideration can have no effect on the plaintiff's period of time to file a notice of appeal"]; *Ramon v. Aerospace Corp.*, *supra*, 50 Cal.App.4th at pp. 1236-1238 [same]; *Passavanti v. Williams* (1990) 225 Cal.App.3d 1602, 1607-1608 ["a motion for reconsideration filed after judgment was entered will not extend the time to appeal from the judgment"].)

On April 21, 2005, the court clerk served the minute order denying Adams' motion for fees, attaching a "Clerk's Certificate of Mailing/Notice of Entry of Order" at pages 4 and 5. (CT 4:768-769.) Consequently, Adams' notice of appeal was due no later than June 20, 2005. (Cal. Rules of Court, rule 2(a) [time to appeal is "60 days after the superior court clerk mails the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, showing the date either was mailed"].) Adams filed his notice of appeal too late, on July 18, 2005. (CT 5:1081.) The fact that the trial court heard Adams' intervening motions for reconsideration and entered minute orders "demonstrates only that none of the parties nor the trial court was aware that it lacked jurisdiction to hear the motions. It does not act to give plaintiff the benefit of the rule 3 extension." (*Safeco Ins. Co. of Illinois v. Architectural Facades Unlimited, Inc.*, *supra*, 134 Cal.App.4th at p. 1482.)

Nor can Adams save his appeal by appealing from the orders denying his motions for reconsideration. "[T]he majority of recent

cases . . . have concluded orders denying motions for reconsideration are *not* appealable." (*Annette F. v. Sharon S.* (2005) 130 Cal.App.4th 1448, 1458-1459, emphasis in original [collecting cases].) In any event, since the trial court had no jurisdiction to entertain the motions, any appeal would have to be summarily dismissed.

Finally, Adams cannot save his appeal by making a motion to vacate the judgment under Code of Civil Procedure section 473. To extend the time to appeal, his motion would have had to have been filed before June 20. (Cal. Rules of Court, rule 3(b).) He filed it on July 1, eleven days too late. (CT 5:905; see *English v. IKON Business Solutions* (2001) 94 Cal.App.4th 130, 135-136 [appeal from judgment dismissed where section 473 motion filed two weeks after expiration of rule 2 period; rule 3 did not apply].)

Because Adams may not appeal from the April 21 minute order, the only possible basis for this appeal is the July 15, 2005 order denying Adams' motion for relief under Code of Civil Procedure section 473. (CT 5:1076.) Such orders are appealable. (*Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1394.) But as we explain in Section III.D below, Adams raised no argument in his opening brief on that point, and thus has waived any appeal on that basis; in any event, the court did not abuse its discretion in denying the motion.

There is no other conclusion but that Adams' appeal must be dismissed. "'The time for appealing a judgment [or appealable order] is jurisdictional; once the deadline expires, the appellate court has no power to

entertain the appeal.'" (*Annette F. v. Sharon S.*, *supra*, 130 Cal.App.4th at p. 1454; Cal. Rules of Court, rule 2(b).)

II.

ADAMS' APPEAL IS MERITLESS BECAUSE THE JUDGMENT OF HIS FORMER CLIENT MUST BE REVERSED IN THE CONCURRENT, RELATED APPEAL OF PICCO & PRESLEY.

Beyond these fatal jurisdictional problems, Adams' appeal fails because the underlying judgment in favor of his former client, Perrillo, must be reversed for all the reasons set forth in Picco & Presley's AOB, filed in the related appeal and incorporated into this brief by reference. (Cal. Rules of Court, rule 13(a)(5).) Once the judgment is reversed, Perrillo's right to fees terminates, as does any derivative claim by Adams. Picco & Presley have concurrently filed a Motion to Consolidate Appeals to give the Court the opportunity to decide Picco & Presley's appeal first, which may make Adams' appeal moot.

As explained in Picco & Presley's AOB in the related appeal, Perrillo's judgment must be reversed because, among other reasons:

- The majority of Notices of Doctor's Lien at issue were obtained by Perrillo from individuals with Workers' Compensation claims. But those purported liens are invalid as violative of public policy; Perrillo's recovery for these individuals must come exclusively through Workers' Compensation. (Picco & Presley's AOB, pp. 22-34.)

• The Notices of Doctor's Lien can only be interpreted, as a matter of law, as agreeing to compensate Perrillo through Workers' Compensation. (Picco & Presley's AOB, pp. 35-38.)

• Even if Perrillo had valid civil lien contracts, the lawyers never entered into any lien contract with Perrillo and breached no contract or tort duty to Perrillo. (Picco & Presley's AOB, pp. 39-50.)

• The lawyers never agreed to the attorney fee provision in the Notices of Doctor's Lien, which they did not review or sign. (Picco & Presley's AOB, pp. 51-54.)

III.

IN ANY EVENT, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN MAKING ITS FEE AWARD AND IT PROPERLY DENIED ADAMS' POST-JUDGMENT MOTIONS.

A. The Trial Court's Fee Award Was Well Within Its Discretion.

1. There was no possible abuse of discretion in reducing a fee award that is still nearly twice the amount of the plaintiff's recovery.

To constitute an abuse of discretion, an attorney fee award must "shock the conscience" because it is either so big or so small. (1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys § 231, p. 291.) By no stretch could the trial court's total award here be deemed too small.

The total claimed fees by all three law firms ($1,341,691) were over *four times* the amount awarded by the jury ($307,146.59). The fees "shock[ed] the conscience" only in that they were shockingly high, especially given Perrillo's completely unsuccessful claims for emotional and punitive damages.[11] This trial would have been considerably shorter, and perhaps the case would have settled, had it been prosecuted for what it was—a simple billing dispute. The court was perfectly within its power to dispense with a lodestar calculation and "simply reduce the award to account for the limited success." (*Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231, 248; see also *11382 Beach Partnership v. Libaw* (1999) 70 Cal.App.4th 212, 219 [trial court properly awarded less than amount of attorneys' fees requested, where trial took only two days and parties were attempting to make it more complicated than necessary]; *Montgomery v. Bio-Med Specialties, Inc.* (1986) 183 Cal.App.3d 1292, 1298 [court may dispense with lodestar method when calculating fee awards under Civil Code section 1717; thus fee award reducing requested fees by half was not abuse of discretion]; *Iverson v. Spang Industries, Inc.* (1975) 45 Cal.App.3d 303, 312-313 [no abuse of discretion to reduce $5,000 fee request to $750; "[t]his amount, which equals approximately 30 percent of the final judgment, is clearly not so small as to 'shock the conscience'"].)

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[11] Perrillo asked the jury to award $3,600,000 in noneconomic damages (see Perrillo's Reporter's Transcript in the related appeal ["Perrillo's RT"] 17:5477), and the jury unanimously awarded zero (CT 2:336). Perrillo threatened to seek 15% of each defendants' net worth as punitive damages (Perrillo's CT 17:3448), but the jury (10-2) found no punitive liability (CT 2:337; Perrillo's RT 17:6338-6339). All Perrillo obtained was $307,146.59 in economic damages. (CT 1:58.)

Adams' complaint is that the court did not allocate a portion of the ample fee award to him. But in fact, it does not matter how the court allocated fees. The trial court's allocation simply provided the rationale for its determination of a total reasonable fee. That total fee award belongs to Perrillo, to reimburse him for reasonable fees expended in his litigation. He, in turn, can use the money to defray the amount he owes his various attorneys under their agreements. (See § I.A.3, above; cf. *Flannery*, *supra*, 26 Cal.4th at p. 586 [FEHA fees belong to attorney only in the absence of a "contract assuring" the attorney's payment; otherwise, fees belong to client].) How Perrillo handles the difference between what his attorneys claim is due them under their retainers and what was awarded are matters entirely outside the scope of this litigation. Perhaps those issues will be the subject of a separate lien action, but they have nothing to do with defendants or this Court.[12]

Because the court's total fee award to Perrillo is more than generous (in fact, it is excessive, as Picco & Presley argued in their opening brief in the related appeal, pp. 54-55), there is no possible abuse of discretion.

[12] To the extent the April 21 minute order purports to award fees directly and exclusively to Cassinat or Lopez Hodes, the order would be void for the reasons discussed in Section I.A, above—Cassinat and Lopez Hodes are not parties to the litigation and have no right to receive fees directly from defendants.

2. Ample evidence supports the trial court's determination that Adams failed to show that his fees were reasonable and necessary.

Even if the part of the trial court's order awarding nothing for Adams' services is reviewed on the merits, the order must be affirmed because there was no abuse of discretion. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1094-1096 [trial court's fee award is reviewed for abuse of discretion].)[13]

The court had no personal knowledge of the services Adams performed. (RT 19.) Perrillo's silence on the question, however, spoke volumes. While Perrillo described and vouched for Lopez Hodes' services (CT 3:474 [¶¶ 4-5], 475 [¶¶ 11, 13]), he conspicuously said nothing about Adams other than that Adams received $8,000 from the Goch settlement (CT 3:475). Adams claimed he worked intensely with Lopez Hodes (CT 3:517-518), but Lopez Hodes' declarations and bills do not bear this out. (See note 2, above.) Adams claimed that Lopez Hodes intentionally deleted mention of him (CT 3:521), but whether that was so or not, the court was entitled to infer that, at least according to Perrillo, Adams had not performed reasonably necessary services; otherwise, Perrillo would have

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[13] Adams erroneously argues for de novo review. (AOB 25.) As the case he cites demonstrates, de novo review is appropriate to determine "whether an award of attorney fees is warranted under a contractual attorney fees provision." (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.) That standard does not apply here where, for purposes of this section, we assume that fees were justified under the fee-shifting clause in the Notice of Doctor's Lien and under Civil Code section 1717 and Code of Civil Procedure section 1021. (But see Section II, above.) The issue in this section is "the propriety" and "amount" of statutory attorney fees awarded to Adams—issues reviewed for abuse of discretion. (*Carver*, *supra*, 97 Cal.App.4th at p. 142.)

provided his own evidence of Adams' services and sought his fees from defendants. As the court noted, "Everything was contentious in this case. They litigated everything." (RT 20.) The court "just figured anything the attorneys had in this case, they were going to submit it." (*Ibid*.) As discussed in Section I.A above, Perrillo's silence below and his nonparticipation in this appeal gave and give rise to an inference that Adams' fee entitlement is not what he claims.

Certainly, Adams did not allay any suspicions—and may have aroused them—by submitting billing records with admitted errors and inadequate detail to explain the high hours billed on some days.[14] One entry in particular—a billing entry for 24 hours by Adams on a single day—"immediately" raised a "red flag" in the trial court's mind. (RT 19.) The court's concerns about overbilling could only have been exacerbated by Adams' $450/hour billing rate—$150/hour more than the highest rate claimed by Cassinat and Lopez Hodes' lawyers. (CT 2:356 [Lopez Hodes], 395 [Cassinat], 3:519 [Adams].)

Additionally, all of Adams' work in the litigation was performed long before June 2004, when Perrillo requested leave to amend his complaint to include a breach of contract cause of action. (Perrillo's

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[14] Adams' billing records show that he billed twice for the same task on April 20, 2002 and billed 24 hours on May 2, 2002. (Adams' Motion to Augment, *supra*, Exh. B, pp. 1105, 1108.) He admitted the latter error in his motion for reconsideration declaration. (CT 4:800 [¶ 28].) But he only obliquely admitted the former error in his Opening Brief. (AOB 12-13.) (And even then, he confuses that error with the May 2 error.) (*Ibid*.) The trial court also noted that sixteen entries were for more than ten hours a day, and Adams' block billing and terse descriptions made it difficult to determine whether these extraordinarily long hours were duplicative or reasonable. (CT 4:767.)

CT 11:2264; Perrillo's RT 15:4580-4581, 16:4853-4857.) That was the cause of action on which Adams based his fee claim. (CT 3:511 [seeking Civil Code section 1717 fees "in connection with the verdict on Plaintiff's contract causes of action"]; see also CT 3:513 [basis for fee request is jury verdict on Perrillo's breach of contract cause of action], 4:718 [same].) Defendants reasonably objected below that Adams was not entitled to fees based on the success of a claim that he did not rely on and did not exist when he was involved. (CT 4:689-691, 5:1036-1037.)

Finally, there was a serious question of overlawyering and duplication. As explained in Section III.A above, the total claimed fees by all three law firms ($1,341,691) were over four times the amount awarded by the jury ($307,146.59). The fees were shockingly high, and it was not unreasonable to take the reduction in part out of Adams' fee request. As the moving party, it was Adams' burden to show why he was entitled to fees and why his requested fees were necessary and reasonable.[15] Without Perrillo to vouch for the reasonableness or necessity of Adams' services, and in the face of defendants' objections that Adams' work was duplicative (CT 4:755; see also CT 4:846), the trial court was well within its discretion

[15] "Any claim not based upon the court's established schedule of attorney's fees for actions on a contract shall bear the burden of proof." (Code Civ. Proc., § 1033.5, subd. (c)(5).) "Allowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation," and "shall be reasonable in amount." (Code Civ. Proc., § 1033.5, subds. (c)(2) and (3).)

Adams bafflingly cites *Korech v. Hornwood* (1997) 58 Cal.App.4th 1412 for the proposition that former counsel bears no "special evidentiary burden" in fee proceedings. (AOB 32.) In *Korech*, the Court affirmed the *denial* of fees to former counsel who failed to meet their burden; that is, they "failed to make a sufficient showing of the attorneys' fees charged." (*Id.* at p. 1416.)

to determine that Adams had made no effective showing of how his services were reasonably necessary to achieve the limited success Perrillo obtained in the litigation. (CT 4:767.)

3. Adams' arguments are meritless.

On appeal, Adams challenges the trial court's denial of his fee motion on four grounds, none of which has merit:

1. *Adams argues the trial court supposedly failed to apply the proper legal standard to Adams' fee application.* (AOB 29-31.) Adams correctly identifies the factors that guide a trial court's determination of a reasonable fee. (AOB 30; see *PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th at pp. 1095-1096.) But the record here amply reflects that those factors support the trial court's denial of Adams' fees, including the limited result Perrillo obtained in comparison to what he sought; Perrillo's lack of corroboration of Adams' bills or services; Adams' limited role and that at a time when there was no basis for an attorney-fee award; the inference of overlawyering and duplication created by three law firms; the disproportionate fee-to-recovery relation; Adams' "red flag" billing entries and block billing.

Adams complains that the court indulged in "favoritism" toward trial counsel he "knew" from appearances before the court (AOB 31), but he misconstrues the trial court's remarks. The court said that it had "spent a lot of time going through" all the bills of all the lawyers. (RT 19.) Adams's 24-hour day billing entry immediately raised a "red flag" in the trial court's mind—one that was not removed by comparing Adams' bills to

those of the other firms, including Cassinat, whose work the court had come to know well from trial.[16] (*Ibid*.) Since a judge may consider its own first hand knowledge of "the nature and extent of the attorney's services from its observation of the trial proceedings and the pretrial and discovery proceedings reflected in the file" (*In re Marriage of Cueva* (1978) 86 Cal.App.3d 290, 301), the court's remarks were a perfectly appropriate comment on the evidence before it.

Finally, Adams argues that the trial court had no discretion to award a fee award of "zero." (AOB 31.) But, of course, the court awarded *Perrillo*, the prevailing party, a sizable fee award of $557,182—one that well exceeded his recovery. For the reasons discussed above, the court had discretion to reduce the requested fees by eliminating fees for Adams' services, given the questions raised about their reasonableness and necessity.

2. *Adams claims he is entitled to recovery of fees based upon quantum meruit*. (AOB 31-33.) Picco & Presley have no quarrel with an attorney's right to a quantum meruit recovery in the abstract. An attorney retained under a contingency fee agreement and discharged before the contingency occurs may well have a claim for the reasonable value of his or her services. But that claim is against the attorney's *former client*, not the client's adversary in the underlying action. (*Fracasse v. Brent*, *supra*, 6 Cal.3d at p. 786 [discharged attorney's declaratory relief action against

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[16] Adams argues that Cassinat's firm also billed 24 hours or more in a day (AOB 16), but he fails to mention that these hours were billed by *different attorneys*. (CT 2:418-419, 428-430, 432.) No one attorney other than Adams purported to bill anywhere close to 24 hours in a day. (*Ibid*.)

former client].) For all the reasons discussed in Section I.A above, Adams' quantum meruit claims must be brought against Perrillo in a separate action, not against defendants in this one.

3. *Adams asserts the trial court supposedly substituted "wholly intuitive, irrational, or arbitrary approaches as an alternative to established standards for assessing reasonableness of attorneys fees.*" (AOB 33-37.) This argument attacks the trial court's finding in its April 21, 2005 order that it was "unable to determine, based on what the Adams Law Office submitted, if this work was or was not duplicative of the work done and billed by the Cassinat Law Office or the Lopez firm." (CT 4:767.) In a long argument with nearly no cites to the record, Adams argues that he did not duplicate any work by Lopez Hodes and claims the billing records, properly analyzed, show this.[17] (AOB 36-37.) But what Adams omits to say is that he himself filed papers in the fee-hearing proceeding representing that he could not tell whether Lopez Hodes' fees duplicated his own. (CT 3:482.) The trial court cannot be faulted for rejecting Adams' fee claims when Adams himself had questions of duplication.

4. *Adams argues that his fee request was sufficiently detailed and accurate to justify a fee award to him.* (AOB 38-42.) Adams complains that the trial court unfairly denied him fees based on "some long days" and "a single, erroneous time entry that added up to 24 hours on a single day." (AOB 40.) Of course, the court did not know that the 24-hour

[17] This is not obviously so. For example, Adams asserts that "not a single deposition in the case was attended by more than one attorney." (AOB 36.) Yet the deposition transcript excerpts he submitted with his motion for reconsideration show that both Adams and Lopez Hodes appeared at the deposition of at least one witness. (CT 4:834.)

entry was erroneous until later, when Adams moved for reconsideration. (CT 4:800.) It only knew that the entry raised a "red flag." (RT 19.) Adams complains his bills were therefore scrutinized more closely than Lopez Hodes and Cassinat, who also billed long hours. (AOB 40.) The court denied disparate treatment (RT 19, 38), and its 85% reduction of Lopez Hodes' fees shows that it also viewed Lopez Hodes' bills with a skeptical eye.

Adams insists the amount of detail he provided in his bills was more than the law requires, since awards may be based on just an attorney's declaration. (AOB 38.) While such minimal evidence *can* support an award, it does not follow that more detailed billing evidence *mandates* an award.

Adams argues that defendants only raised "minor cavils" below and never urged that Adams be denied *all* his fees. (AOB 45.) But defendants essentially argued just that when they argued "much of the work purportedly done by Adams [was] duplicative of the work done by the other two law firms representing plaintiffs" and that "[h]aving three separate and unrelated law firms perform the same work unnecessarily increase[d] the overall fee amount." (CT 4:755.)

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The trial court is the best judge of the value of professional services rendered in its court, and the appellate court will not disturb that determination unless convinced that it is clearly wrong. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49.) For all the reasons discussed above, the trial court's fee award was well within its discretion. Its order must be affirmed.

B. The Court Properly Denied Adams' Motion For Reconsideration, Where Adams' "New Facts" Were Not New, But Could Have Been Produced At The Time Of His Fee Motion.

An order denying reconsideration is reviewed for abuse of discretion, that is, it is reviewed "deferentially" and the order must be upheld "even if [the reviewing Court] might have ruled otherwise in the first instance." (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 686 (*Garcia*); see also *New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 342 ["A trial court's ruling on a motion for reconsideration is reviewed under the abuse of discretion standard"].) There was no abuse of discretion here.

A party seeking reconsideration must show "new or different facts, circumstances, or law." (Code Civ. Proc., § 1008, subds. (a), (b).) Because the statute was enacted to effectuate "the Legislature's stated goal of reducing the number of reconsideration motions," courts have consistently read into the statute a "strict requirement of diligence." (*Garcia*, *supra*, 58 Cal.App.4th at pp. 688-690.) This requirement creates "an important incentive for parties to efficiently marshall their evidence." (*Id*. at p. 689.) Parties seeking section 1008 relief must therefore "show a satisfactory explanation for failing to provide the evidence earlier." (*Id*. at p. 690; *Blue Mountain Development Co. v. Carville* (1982) 132 Cal.App.3d 1005, 1013 ["the party seeking reconsideration must provide not only new evidence but also a satisfactory explanation for the failure to produce that evidence at an earlier time"].) If the rule were otherwise, "the number of times a court could be required to reconsider its prior orders would be limited only by the

ability of counsel to belatedly conjure a legal theory [or facts] different from those previously rejected, which is not much of a limitation." (*Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1199.)

Adams' final argument in his Opening Brief is that the trial court "should have granted reconsideration on the basis of the new information provided." (AOB 42, capitalization changed to lower case.) The "new information" consisted of screen shots of Adams' hard drive showing files related to this litigation; litigation-related correspondence; deposition transcript excerpts from two depositions reflecting Adams' attendance; and Adams' declaration providing further details of his role in the litigation. (CT 4:795-802, 809-840.) His information purported to provide support for some of his long billing days. For example, the computer records show files created throughout the night of April 14/15, 2002 in preparation for filing a summary judgment opposition. (CT 4:809-810.) Adams' supplemental declaration explained that the May 2, 2002, 24-hour billing entry was an error; the time should have been divided between two days. (CT 4:800.) The declaration, however, offered no excuse for the April 20, 2002 double-billed $7,300 entry. (Adams' Motion to Augment, *supra*, Exh. B, p. 1105; CT 4:795-802.)

At the reconsideration hearing, the trial court noted that Adams "obviously had" the submitted information "the whole time." (RT 20.) Because Adams was the moving party, "the support for any attorneys fees had to be there" in the original motion proceedings and, in the court's opinion, it was not. (RT 21.) Adams cannot and does not deny that all the evidence he produced for his reconsideration motion—his own declared

knowledge, computer records, and litigation papers—were obviously always within his possession. None of Adams' professed excuses justified his tardy submissions.

1. At the hearing, the court heard Adams' excuse for his error—that Adams had "scrambl[ed]" to put the original declaration together while in trial on another matter, and without much notice, because of his failure to receive notice from Perrillo's counsel of entry of judgment. (RT 22-23; but see CT 4:790 [Adams asserts he was in trial from March 7 to March 29, 2005] and compare with CT 3:510 [Adams' fee motion filed February 9, 2005—more than a month earlier].) The court was fully within its discretion to reject this excuse. The press of business is generally not an excuse for inadequate briefing. (Cf. *Garcia*, *supra*, 58 Cal.App.4th at p. 684 ["stress admittedly attending modern legal practice" is not an acceptable excuse to justify relief under Code of Civil Procedure section 473]; *Fairfield v. Ahlstrom* (1962) 206 Cal.App.2d 590, 592 ["It is settled that an attorney's occupation with other matters affords insufficient grounds to warrant relief under section 473, Code of Civil Procedure"].) And whatever "scrambling" Adams did to prepare his moving papers, he had adequate time to correct and supplement them before the fee hearing, which was continued on his request. (CT 3:652-655, 4:672-674.)

2. Adams argues that "[i]t is a satisfactory explanation for not producing the information earlier to show that no reasonable person could have anticipated the Court's improper analysis of the facts and law, together with its flatly incorrect interpretation of the previously submitted documentation." (AOB 47.) This argument is nothing more than an

argument that the trial court's April 21, 2005 fee ruling was wrong on the record before it. We showed in Section III.A above why that was not so. Reconsideration is wholly improper when the moving party is simply arguing that the trial judge misapplied or misinterpreted the law. "Since in almost all instances, the losing party will believe that the trial court's 'different' interpretation of the law or facts was erroneous," to interpret the statute this way "would be contrary to the clear legislative intent to restrict motions to reconsider to circumstances where a party offers the court some fact or authority that was not previously considered by it." (*Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500.)[18]

3. Adams argues that his new evidence showed that he in fact worked the hours billed; that the work was not duplicative; and that the May 2, 24-hour entry was an excusable mistake. (AOB 43-45.) But as for the billing entry error, counsel's "imprecision in drafting" is "not a proper basis for reconsideration."[19] (*Pazderka v. Caballeros Dimas Alang,*

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[18] See also *Le Francois*, *supra*, 35 Cal.4th at p. 1106:
"'When the court rules upon a party's motion, it is to be expected that the losing party will often feel the court has erred, and therefore may be inclined to seek reconsideration if such a procedure is readily available. Thus, absent section 1008, trial courts might find themselves inundated with reconsideration motions requiring that they rehash issues upon which they have already ruled and about which they have no doubt. Section 1008, properly construed, protects trial courts from being forced to squander judicial time in this fashion.'"

[19] Adams argues that since defendants did not note the 24-hour billing error in their opposition papers, his mistake was necessarily excusable. (AOB 45-46.) As discussed above, defendants specifically noted the April 20 double billing entry. (CT 4:756.) Although they did not specifically object to the May 2 entry, they objected generally that Adams' work was duplicative, excessive, and that Adams had supplied insufficient evidence to show otherwise (CT 4:755)—objections that encompass the

(continued...)

Inc. (1998) 62 Cal.App.4th 658, 670.) As for the new evidence showing that Adams' work was in fact done and nonduplicative, the court was within its discretion to decide this evidence was not "new" and Adams had not shown sufficient diligence in failing to produce the evidence earlier. After all, it did not take a crystal ball to see that Adams' fee motion would be subject to objections on the grounds of overlawyering and duplication, given the exorbitant amount of fees he claimed, amounting to 80% of his client's total recovery ($246,020 of $307,162.59), combined with his limited role in and his early exit from the litigation. A party's belief that certain evidence will not be necessary to prevail on his motion is not a sufficient ground to justify reconsideration. (*New York Times v. Superior Court*, *supra*, 135 Cal.App.4th at p. 343.)

4. Adams latches onto the trial court's remarks that its ruling would have been different in the original fee proceedings had Adams not made the billing errors he made and had he supported his entries with more detail. (AOB 45.) These remarks might have helped Adams show prejudice,[20] but reversal requires both prejudice *and* error. (Code Civ. Proc., § 475; Cal. Const., Art. VI, § 13.) Adams failed to show error on the court's part in denying his original fee motion based on the record before it at the time.

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[19] (...continued)
May 2 entry.

[20] But not necessarily; the trial court did not say it would have awarded Adams fees—for all the reasons set forth above, such an award would not have been appropriate—only that its ruling would have been "different." (RT 24-25.) And the court later clarified its earlier statement by explaining its ruling "very well" would have been different—not that it certainly would have been. (RT 36-37.)

5. Adams suggests reconsideration was appropriate because he was somehow lulled into believing his original evidentiary showing was sufficient when the court did not express any concern at the original fee hearing. (AOB 2, 43.) But of course, as moving party, Adams had the burden of establishing his claim for relief in his motion papers. He cites no case law for his extraordinary suggestion that the trial court had any duty to issue a tentative ruling or signal its evidentiary concerns at the hearing. (AOB 43.)

In sum, the court acted well within its discretion in denying Adams' motion for reconsideration where he did not demonstrate new facts or diligence in producing the evidence earlier. (See, e.g., *New York Times v. Superior Court*, *supra*, 135 Cal.App.4th at p. 343 [reconsideration of summary judgment improper, even though newly filed deposition transcripts would have raised triable issues; "Although the evidence was new to the trial court, it was available to WSN throughout the discovery process and was easily obtainable"].)

C. The Trial Court Properly Denied Adams' Second Motion For Reconsideration Because It Was Not Supported By Any New Law.

Two weeks after his motion for reconsideration was denied, Adams moved to renew his motion for reconsideration based on "new case law," i.e., *Le Francois*, *supra*, 35 Cal.4th 1094. (CT 5:905-907.) The trial court properly denied his motion.

First, *Le Francois* was not new. It was published on June 9 and modified June 10, 2005. The court issued its order on Adams' first reconsideration motion on June 16, 2005, a week after taking the matter under submission. (CT 5:896-900.) Adams could have brought the decision to the court's attention before it ruled, but he did not. Adams' attorney admits that she received a copy of *Le Francois* on June 9, 2005 and reviewed it on June 14. (CT 5:923-924.) She offered no explanation for not immediately presenting it to the trial court. (*Ibid*.) That failure alone was sufficient ground to deny Adams' motion. (*Baldwin v. Home Savings of America*, *supra*, 59 Cal.App.4th at pp. 1195-1201 [reconsideration denied where party seeking relief based on different law did not show why it could not have produced legal authority earlier].)

Second, the trial court was aware of *Le Francois*, or at least its principle that the trial court has power, sua sponte, to reconsider its interim orders: In the hearing on the second motion for reconsideration, the court remarked that Adams' counsel had argued *Le Francois* at the prior hearing.[21] (RT 36.) In fact, counsel had not argued the decision, but she had twice asserted that the court had inherent power to correct an erroneous ruling sua sponte. (RT 23, 30.) The court explained at the hearing on Adams' second motion for reconsideration that it had not misapplied *Le Francois*; it just believed it did not apply. "My take on this is, I don't

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[21] *Le Francois*' specification of "interim" order is deliberate. The Court noted: "What we say about the court's ability to reconsider *interim* orders does not necessarily apply to *final* orders, which present quite different concerns." (*Id*. at p. 1105, fn. 4, emphasis in original.) As we showed in Section I.B above, courts *may not* reconsider final orders that constitute judgments, such as the April 21 attorney fee order here.

think I made a mistake of law in this case, and I don't think I made a mistake of fact when I made the initial ruling." (RT 36.) While the court might have applied *Le Francois* if it felt its initial ruling, based on the evidence submitted at that hearing, was wrong, that was not so. (RT 37.) In the court's view, Adams was seeking to redeem himself, after losing a motion on the merits, by offering corrected records and more detailed explanations and arguments. That is exactly what the Legislature intended to prevent through section 1008—perpetual do-overs. (*Le Francois*, *supra*, 35 Cal.4th at p. 1098 [Legislature's goal was "'to reduce the number of motions to reconsider and renewals of previous motions heard by judges in this state'"]; see also *Garcia*, *supra*, 58 Cal.App.4th at pp. 685-691 [reconsideration improper based on more detailed declaration than initially provided].)

Under *Le Francois*, therefore, Adams' second motion for reconsideration was wholly improper. It was not based on new law and thus did not meet the statutory requirements. "[A] party may not file a written *motion* to reconsider that has procedural significance if it does not satisfy the requirements of section . . . 1008." (*Le Francois*, *supra*, 35 Cal.4th at p. 1108.) And since the trial court did not believe it had erred in its original ruling, it had no duty to take any action sua sponte.

D. Adams Waived Any Objection To The Trial Court's Denial Of His Motion For Relief Pursuant To Section 473 By Failing To Raise Any Argument In His Opening Brief.

Adams' opening brief fails to raise any issue with respect to the propriety of the trial court's July 15, 2005 order denying his motion for discretionary relief pursuant to Code of Civil Procedure section 473. True, buried in Adams' 5½ page argument on why the trial court allegedly erroneously denied his motions for *reconsideration* is a single complaint that the trial court refused to correct its alleged errors "on reconsideration, or *sua sponte*, pursuant to *Le Francois*, or pursuant to Code of Civil Procedure section 473." (AOB 47.) But Adams never follows up this statement with any analysis of the section 473 standard of review or any discussion of or citation to governing case law. The page citations of all his cases are to section 1008 principles. (*Ibid*.) An argument not made in a separate heading or subheading and supported by argument is waived. (Cal. Rules of Court, rule 14(a)(1)(B); see, e.g., *Locke v. Warner Bros., Inc.* (1997) 57 Cal.App.4th 354, 368 [failure to assert error in opening brief waives challenge]; *People v. Barrera* (1993) 14 Cal.App.4th 1555, 1562, fn. 5 [appellant "provides no separate analysis or discussion supporting his assertion the section is overbroad"; thus, his point is "without foundation for purposes of this appeal" and "deemed abandoned"]; *Stafford v. People* (1956) 144 Cal.App.2d 79, 83 ["Although plaintiff noticed an appeal from these orders the point is not presented in his brief and will be deemed to have been waived"]; *In re Steiner* (1955) 134 Cal.App.2d 391, 399 ["A point which is merely suggested by appellant's counsel, with no

supporting argument or authority, is deemed to be without foundation and requires no discussion"].)

If Adams attempts to raise the issue in his reply brief, the Court should decline to consider it. "Fairness militates against [the Court's] consideration of any arguments an appellant has chosen not to raise until its reply brief, and the authorities holding to that effect are numerous." (*Reed v. Mutual Service Corp.* (2003) 106 Cal.App.4th 1359, 1372, fn. 11.)

At a minimum, if the Court wishes to consider any section 473 argument, the Court should invite respondents to file further briefing, so that respondents may show exactly why the trial court acted within its discretion for not excusing Adams' asserted negligence and mistake. Among other things, his "mistake" was not a mistake, but the result of a calculated decision about the amount and kind of information he needed to prove his fee claim. His attorney's failure to submit sufficient evidence to prove his claim is not the kind of error that could have been reasonably made by a layperson such as to justify, let alone mandate, discretionary relief. (*Garcia*, *supra*, 58 Cal.App.4th at p. 684; see also *Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 17 ["Counsel's failure to understand the type of response required or to anticipate which arguments would be found persuasive does not warrant relief under section 473"].)

CONCLUSION

In raccoon hunting, a dog that is barking up the wrong tree has treed its prey and can smell it; it's just that the raccoon isn't in the tree under which the dog is barking.[22] That describes this case perfectly. Adams hasn't been paid what he claims is the full value of his services (whether his claim is valid or not is unknown), and he is looking for someone to hold accountable. But that someone is not the defendants; it is Perrillo and his lawyers, who have sat quietly throughout these proceedings like the raccoon in the neighboring tree, waiting for the dog to go away.

The judgment should be affirmed so that Adams can redirect himself to his proper remedy—an action against his former client.

Date: August 23, 2006

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[22] At least, according to one internet phrase-finder website: http://www.phrases.org.uk/bulletin_board/25/messages/940.html.