Mistakes Lawyers Make: Part II

ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

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Interview: U.S. District Judges Wm. Matthew Byrne, Jr. and Mariana R. Pfaelzer Discuss Mistakes Lawyers Make in Federal Court

The following interview with U.S. District Court Judges Byrne and Pfaelzer is the second in a series of articles on "Mistakes Lawyers Make." The interview was conducted by ABTL editor Benj. E. (Tom) King and former editor Thomas J. McDermott, Jr.

ABTL: As Federal Court judges, what are the most common problems you find with pleadings?

Judge Byrne: The general level of drafting pleadings is quite good. I think there is a tendency for pleadings to be overly lengthy in commercial cases. It is interesting how frequently errors are made in pleading jurisdiction. Diversity is not sufficiently set forth, allegations are directed to residency rather than citizenship, and the various federal question statutes are not adequately pleaded. Most of the judges in this district have each complaint reviewed immediately on its filing to see if the jurisdictional allegations are sufficient. If not, most judges will either dismiss the case or issue an order to show cause as to why it should not be dismissed. Some judges have their law clerks call the pleading party and request they amend their complaint before an answer is filed.

Judge Byrne

Judge Pfaelzer: In 50% of the diversity cases the jurisdictional allegations are insufficient. The court is caused a tremendous amount of work by having to set these cases for status conferences or having to issue orders to show cause to clarify whether there is jurisdiction or not. That kind of error is particularly devastating in a case in which a TRO or a preliminary injunction is sought. If the first thing the judge sees is that the jurisdictional allegations are insufficient, the possibility of obtaining injunctive relief is decreased by at least 50% before the court ever gets to the substance of the case.

ABTL: In view of the difference between the need to allege ultimate facts in the state court here and the practice of notice pleading followed in the federal court, do you find either that pleadings are unnecessarily lengthy or, conversely, that they don't provide enough?

Judge Byrne: It seems to me that pleadings are generally sufficiently detailed. The most frequent challenges are directed at fraud allegations, where specificity is required. It would be interesting to find out how much weight is actually given to the pleadings, first, by lawyers after the pleadings are drafted and filed, and second, by judges after a case gets underway. Under our present practice, the pleadings are somewhat ignored throughout discovery and eventually completely supplanted by the pretrial conference order.

Judge Pfaelzer

Judge Pfaelzer: Under our rules, we have a provision for a status conference, where the judge discusses the case with the attorney to find out what it is really about. And so, very early on the judge stops being very much concerned with the detail in the complaint. Maybe in a fraud case, the specificity of the pleading is important but in general I would say that in our system we are looking for a short, concise statement of the

Continued on Page 4

Index to Interview Subjects

Also Inside

From the Jury Box: A Lawyer/Juror Tells All

When I was summoned as a juror I was mildly upset, knowing what was going to happen. I would be trailing for a whole month at 111 North Hill Street. I've met some thoroughly crazy lawyers in my time but none befuddled enough, I thought, to have a lawyer on his jury. Yet I found four that would take me and all appeared perfectly sane. I enjoyed the experience, gained a bit of insight into the jury system, and came away with the belief that we certainly have something worth using and preserving.

It's a bit difficult to be on a jury. First there's the hurdle of being pulled for the panel, next being pulled for the box, and then surviving *voir dire*. (Incidentally, it means: "To speak the Truth.")

I actually served on two juries. The first was dismissed when someone bailed out after a day and a half of testimony, but the other proceeded through a three and a half week trial. Some days afterward, when I sat down and mulled it over, I was struck with some little do's and dont's and general thoughts on the subject.

Edward M. Lynch

First, whether it is warranted or not, it's a big mistake to be too flippant, or to display hostility or contempt toward the judge in the presence of the jury. Jurors instinctively align themselves with the judging process, meaning the judge. The jury in each case seemed to identify quickly with the judge and to look upon him as truly fair and impartial. I sensed a vicarious resentment by jurors on those rare occasions when counsel's tone or demeanor bordered even slightly upon the edge of disrespect. Even I was outraged. Why pick on him? He has nothing to win or lose by this. Get on with it.

Second, counsel should take full advantage of the opportunity to conduct the most complete *voir dire* that the judge will allow. One can make a serious mistake by relying too much upon the court's examination of the jury to weed out bias. I think it is extremely important that counsel be given wide latitude to question individual jurors when that otherwise seems appropriate, even if a little extra time is consumed. For example:

Ours was a murder case lifted right out of *West Side Story*. Three members of one gang had strayed onto the turf of another. The result was another senseless stabbing. A young man was held on the ground while one or more others stabbed him repeatedly in the back inflicting a mortal wound or wounds.

In my view there was no evidence whatever that the defendant had held or hit the victim, or that he had exhorted, counseled, conspired with, or urged anyone else to do so. The only connection I could make out between the defendant and the crime was that the defendant was probably at or near the melee.

On *voir dire* defense counsel asked a general question of the jury, something like, "My client is a Mexican. Is anyone prejudiced against Mexicans such that you cannot give him a fair trial?" No one moved. He drew twelve blank faces and moved on.

The jury hung nine to three for acquittal after three ballots. The first ballot was six to six and the next one eight to four. Before the last ballot the foreperson suggested that we go around the table and briefly explai the reason for our vote. (Incidentally, by chance, I was last in line.) One of the guilty voters explained, "All those Mexicans are hot-blooded. I just know he did it." I cannot believe that this individual would have been left on the jury if counsel had pressed a little harder, taking the time to talk to each of several prospective jurors about this subject. I do not believe that people will lie or mislead to remain on a jury, but they *are* generally reluctant to answer a question directed at the group as a whole.

Third, when exercising the peremptory challenge do not hesitate to dismiss any juror with whom you do not, for any reason, feel comfortable. The jurors went along with the challenge game very will. No one seemed to mind being knocked off. Maybe we're conditioned by the game shows.

During the trial, I think it's a mistake to lead the jury off on some evidentiary trail that either cannot or will not eventually connect up with the rest of the case.

We had assumed all along that the defendant would be linked in a fairly definite manner with the stabbing. We expected a weapon, perhaps *the* weapon, complete with fingerprints, and if not prints maybe possession or reputed ownership; in short, something that at least pulled the defendant into the circle of men that were preser when the crime occurred.

Testimony was educed fairly early in the case by the district attorney about some mysterious goings-on around the trunk compartment of an automobile on the day following the homicide. Something was either put into the trunk, taken out, or picked up and put back. I was as certain as the others that these activities would be dramatically linked up with the case. They never were.

Later, I heard more than one juror wonder out loud what that was all about, sensing a bit of resentment toward the prosecution and attendant loss of credibility. Similarly, I felt someone was trying to put something over on me. Such useless evidence became a rather large step in the direction of suspicion and skepticism about other parts of the prosecution's case-in-chief.

Lastly, regarding a lawyer's personal conduct during trial, I now believe that it is a bigger mistake than I had realized for opposing counsel to conduct themselves unprofessionally toward each other. Sarcasm, interruption, and diversionary infighting may be appropriate in the kitchen but never the courtroom.

The jurors want to hear the case. They really care very little about what the lawyers think of each other. I am not saying that a good natured barb or riposte is nev in order but lest you're in the mold of a Will Rogers you run the risk of simply being branded a jerk.

Also, we could all focus a little attention upon our personal mannerisms. Sitting in the jury box, I was

reminded that what some lawyers unconsciously do in the glare of the courtroom ranges between revolting and the merely odd. One of the lawyers in our case would occasionally lapse into a paroxysm of twitching, blinking, nail biting and ear pulling. This was observed by the jurors and became the subject of jest and sly comment. That's okay if it goes no further but I think that some of us may have been led to believe that these fits were directly linked to the reception of some evidence extremely damaging to his case, leading us in turn, perhaps, to attach more importance to evidence which, upon later analysis, was not very important at all.

Now to the jury itself. I was very impressed with the people with whom I sat; they were truly a cross-section of the community. It was suggested at the outset that I be the foreman but I explained that lawyers like to talk, which wastes time, and nominated a charming young lady who led us in our deliberations. That gave me lots of time to watch and listen.

We had been furnished pencils and notebooks and all of the jurors took notes, if memory serves. At the beginning of our deliberations the foreperson suggested that we review our notes out loud and discuss the evidence to ensure that we all had the same story. I was amazed that the trial notes of these laymen were so complete.

I cannot remember watching or participating in a Los Angeles County Superior Court trial in which the jurors were not furnished pencil and paper for notetaking. I do know that such is not always the case in the local Federal District Court. I would certainly want my jury to have pencils and paper.

Also, there's the question of taking the jury instructions into the jury room. I had read nothing on the subject beforehand nor since. I now believe that the instructions should be given to the jury to take into the jury room. I saw more than one juror leafing thoughtfully through the instructions, as did I.

Yet it is high time that the "plain English" movement comes ashore on the bleak land of instruction. The "reasonable doubt" instruction is nothing less than awesome prose, scarcely comprehensible even after two or three readings. Surely it can be improved upon. Take care in writing instructions that are not preapproved and ask your judge to let the jury take them into their deliberations.

One final question remains unresolved: Is it a mistake to leave a lawyer on your jury? I don't know. I hope not.

— Edward M. Lynch

Contributors to this Issue:

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Letter from the President

In recent months there has been considerable activity directed at court reform and and modifications of rules of procedure, including issuance of a set of proposed new local rules by the U.S. District Court for the Central District. Although the new proposed local rules were not implemented on their original planned effective date of October 1, 1982 and are now under further consideration, future enactment will result in several significant changes in federal practice.

Marsha McLean-Utley

Of particular significance to business litigators are the proposed revisions with respect to a limitation on the number of interrogatories which may be propounded; certification and settlement of class actions; offers to compromise; and discretionary waiver of pretrial procedures for short cause matters.

Proposed Local Rule 8.2.1 provides that no party, without prior leave of court and for good cause shown, shall serve more than 30 interrogatories, including subparts, on any other party. Application for leave to serve additional interrogatories is to be made upon seven days notice. While there may be abuses in connection with discovery and, in particular, with regard to blanket or form interrogatories, the more appropriate solution, I submit, is to provide for protective orders and to impose appropriate sanctions upon the abusers. The imposition of a blanket prior restraint in all cases, which can be avoided only if the court, following a hearing on noticed motion, finds "good cause" is too limiting. Further, the proposed new rule will require both additional court hearings and the consumption of time and expense by attorneys in an environment in which costs of litigation are already too high. The extent of such additional attorney's fees and expenses will depend upon the nature and quality of the showing the court may require before finding "good cause." For example, if the court were to adopt a policy to rule on the application only if provided with the precise interrogatories to be propounded, counsel will be required to prepare a set of interrogatories which actually may never be served upon any party. Such needless expenditure of attorney's time should be avoided and not mandated.

For the business litigant dealing with a complex matter, rigid enforcement of the interrogatory limitation would greatly impede relevant and necessary discovery. Although the ultimate effect of the proposed rule cannot yet be determined with certainty, presumably the courts will make appropriate distinctions as to the need for more comprehensive interrogatories in complicated business litigation.

Proposed new Local Rule 5 governs class actions. Significantly, the proponent of the class action is required to file a motion for class certification within 90 days; discovery is required to be commenced immediately upon

Continued on Page 12

major problem which the court would not have seen any other way.

Judge Byrne: I'd have to disagree a little bit with that. If you have a good shot at prevailing and you bring the motion to dismiss, fine. I do have some trouble with the use of the motion practice to 'educate the judge.' First, I'm not sure how effective it is, and also, if the judge gets the idea that this is being done I don't think it's too beneficial for counsel either.

Summary Judgments

ABTL: What about summary judgment motions?

Judge Pfaelzer: That is area which, I think, is really abused. A lot of the court's time is used up on pointless motions where it is obvious there are triable issues of fact. Although it is true that counsel are often seeking to educate the judge by these motions and they sometimes succeed in doing that, the time and expense involved can just not be justified.

Judge Byrne: The motions for summary judgment most disconcerting to us are the ones where it is really very clear as to which way the case is going to go, but there remains some triable issue of fact so that the case must be tried. We don't really have a good procedure to weed out those kinds of cases without the necessity and expense of a trial.

In such cases, I often attempt to get the parties to stipulate the facts before deciding the motion for summary judgment, and then try that one small remaining issue. But as you know, it is sometimes very difficult to get counsel to stipulate. In the Southern District of New York, they have a local rule now, stemming from Judge Pollock's practice, that you cannot file a motion for summary judgment without first informally meeting with the judge. The judge then discusses the case with counsel in an effort to determine whether there is a triable issue of fact. I would think, however, that the determination of whether there is a triable issue of fact often requires a written presentation. Partial summary judgments probably are not requested as frequently as they should be.

ABTL: Do you look favorably on a motion for partial summary judgment that goes to issues as opposed to entire causes of action?

Judge Byrne: Yes, I do. If it's an issue that is going to be very minor in the overall presentation of the case, then it's probably not worth it. But if you take a statute of limitations issue out of the case by a motion for summary judgment, it's very helpful.

ABTL: And of course motions for partial summary judgment for specific causes of action are appropriate, too, if they really lie?

Judge Pfaelzer: Yes, I would certainly agree that such motions are most useful for that purpose.

Petitions for Removal

ABTL: Do any unique problems arise with petitions for removal from state court? There have been recent cases involving Does and how they've been treated. What is the present status of the Does in this court? Are they remanded automatically?

Judge Pfaelzer: Judge Schwarzer in the Northern District of California has written a very good opinion analyzing the proper disposition of cases with *Does**, and I think his argument is very persuasive that the cases should be kept even though *Does* are named. It's a very recent opinion and well reasoned. Also, there is a very recent Ninth Circuit opinion which deals with the effect on diversity of a lack of specification in the identification of the *Does***. Any lawyer involved in a removal case should take a look at that.

Judge Byrne: Another problem in removal or remand matters is the so-called "sham" defendant which destroys diversity. It raises interesting questions about how far the judge can go in testing whether the defendant is a sham.

*Goldberg v. CPC Intern., Inc., 495 F. Supp. 233 (1980)
**Hartwell Corp. v. Boeing Co., 678 F. 2d 842 (1982)

Continued on Next Page

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I think the prevailing rule is that you can't go very far; if there is any basis at all for such joinder, the party will not be considered a sham defendant.

ABTL: What happens later down the line when it becomes obvious that the defendant is a sham?

Judge Byrne: If it's a sham, there should be a motion to dismiss that defendant in the state court. If after the dismissal of that defendant there is diversity, then the action may be removed to the federal court.

Judge Pfaelzer: At any time.

Judge Byrne: I was talking recently to someone about a case where after three weeks of jury trial in state court, one of the defendants was granted a non-suit. This created diversity, and the other defendants then removed the cases to federal court. It was immediately remanded right back.

Injunctions

ABTL: Let's move on to injunctions. Do you find that affidavits normally include evidence which could be introduced if the party were testifying in Court, or are they full of hearsay.

Judge Pfaelzer: We now have a rule that you have to have the parties who file affidavits present in court at the hearing.

Judge Byrne: I believe that rule is going to be changed (pursuant to Rule 3.5.4.1 of proposed local rules for the U.S. District Court). It's not well conceived.

Judge Pfaelzer: It is often difficult to comply with the rule.

Judge Byrne: It seems to me the burden should be on the other party to demand the presence of the witnesses, rather than to have the witness present as a matter of course. In the great majority of TRO and preliminary injunction hearings, witnesses aren't called. In other districts it's quite different, but here there is seldom any live testimony of witnesses at these hearings.

Judge Pfaelzer: One of the chief problems is that attorneys are always putting statements in their own affidavits concerning matters about which they have no personal knowledge, plus all kinds of legal conclusions. By and large, attorneys' affidavits don't amount to anything unless you are in a case where their knowledge or advice is actually an issue. Many attorneys just pay no attention to the rules of evidence when they are preparing affidavits and then they are appalled when their opponents may move to strike all or a portion of the affidavits and the motion is granted.

Judge Byrne: It's interesting to note how seldom motions to strike are made.

Judge Pfaelzer: They should be made more often.

Judge Byrne: I often see affidavits that are absolutely full of hearsay or conclusions, and no objections are made.

ABTL: Do you prefer to have a written motion to strike or objection filed before or at the hearing, or is there a preference?

Judge Byrne: Anything that gives the court the opportunity to prepare beforehand is better.

Judge Pfaelzer: File something very short that moves to strike portions of the affidavits on particular grounds, including a specification of the line and page and a short statement of the ground of objection.

ABTL: We've never had a judge rule on those motions.

Judge Pfaelzer: Oh, but they listen.

Judge Byrne: Well, I'm surprised other judges haven't ruled on them.

Contact with Courts

ABTL: Is direct correspondence with the court appropriate? Is that a problem?

Judge Pfaelzer: It certainly is. Lawyers who should know better write letters telling you something has happened, or they've seen a case, or they want you to know their client is impecunious and needs a decision right away, or the other counsel has done something. These communications create a very bad impression on the judge. If some attorneys find a new case that affects one under submis-

Brevity: Not a Litigator's Virtue

Judge Pfaelzer: There is too much of everything filed in business litigation. Brevity is not one of the virtues of business litigators, who should learn to make everything shorter. The average law clerk will tell you that all papers are too long — not merely because they have to go through them, but because they think the points could be made more concisely.

Judge Byrne: One of the things a judge senses is that many briefs are prepared by different individuals and then put together. This affects the organization as well as the brevity of the papers. Each person may think his or her part is quite brief, but when the parts are combined, the overall brief becomes unnecessarily long. This approach may be necessary in modern day litigation, but an attempt should be made to lessen the ill-effects of it.

Judge Pfaelzer: What we have a lot of in this court is brief writing by committee. The principal thrust of the argument is lost because no one has the responsibility of organizing the material to emphasize the principal thrust. A number of arguments done by several lawyers are put together in one document with no concern for the relative importance of the arguments and their interrelationship. I see that all the time. The style changes from page 7 to page 14 and that's very annoying.

ABTL: Everybody we've ever talked to about this says they are afraid it's that 17th point that's going to carry the day — the result of a couple of Supreme, Circuit or District Court cases that have gone off on an unusual tangent. Now everybody says, 'look, we can't leave anything out.' We guess there is no answer to that.

Judge Byrne: That's right. Frequently, in argument on what counsel perceives to be the main issue, the judge all of a sudden is asking about what was thought to be the weaker issue. The court finds it to be the really interesting point.

sion, they may write a letter to the clerk and request that the attached copy of the case be brought to the judge's attention. There is nothing wrong with that. But this always brings another letter from the other side arguing that the case doesn't have any application and can be distinguished in the following seven ways.

Judge Byrne: I don't find it to be that common a practice but some of it is an exercise of terrible judgment. Copies are almost always sent to opposing counsel — I don't remember seeing any without that. I normally have my court clerk review them first to see if I should even look at them. In any case, the communication is never a part of the permanent file of the court. In this district, we have two files: the original court file and the chambers file. Now, in some districts, like the Northern District of California, they have only one file. When the judge works with the file, he or she gets it from the clerk's office. But here, that letter would most likely go into the chambers file, but it would never be part of the official file.

Interrogatories

ABTL: Let's move on to discovery practice. Do you feel that interrogatories are being effectively used in litigation?

Judge Byrne: One of the problems with rules regarding discovery is that they apply equally to all different types of cases. Our rules address an antitrust case in exactly the same way they address a matter involving forfeiture of a suitcase with customs — the same type of procedures, the same time limitations, the same discovery limitations. That is the weakest part of our system. We must adapt our procedures to suit particular types of cases.

Interrogatories are overused in the majority of cases. On the other hand, in litigation where you have to identify witnesses and documents, they can be terribly important. We have a tendency to want to get rid of interrogatories because we see the abuse, but we have to be careful not to impose upon the litigants more expensive methods of obtaining that same information, such as depositions. We are going to have limitation of interrogatories under our local rules, but the rules provide that additional interrogatories may be propounded upon the request of counsel and order of the court. I believe those requests will be liberally construed, particularly in certain types of cases. I have been placing a limit on the number of interrogatories in some cases for a considerable period of time and have only had a couple of requests for additional interrogatories. Those requests were always granted.

ABTL: Do you find that the 'meet and confer' rules have cut down on motions to compel with respect to interrogatories?

Judge Pfaelzer: Yes. But there is a class of cases so hotly contested on both sides that they cannot come to an agreement on disputed issues. Sometimes the judge can be very helpful in establishing a more informal process than a noticed hearing. In some cases the court does have to intervene just to move them along. I personally think that interrogatories are a very much abused form of discovery. However, I can think of some areas where we should not limit interrogatories to 30: for example, in a Title VII case where the plaintiff does not have the resources to take endless depositions, and the information sought is of a kind which is best suited to being discovered by way of interrogatory. Yet I rarely if ever see interrogatories used in a trial because it is hard to use them effectively. In some cases I wonder if they have a purpose other than to harass.

Judge Byrne: I agree. Interrogatories are seldom effectively used at trial. But you can't evaluate interrogatories as an evidentiary tool; you really have to evaluate them as a discovery tool. If you have an interrogatory response that you want to put into evidence, it seems to me that you should convert it into a request for admission. It makes it a better form of presentation.

Judge Pfaelzer: There is the feeling that unless you have sent your first, second and third sets, you have not done an adequate job for the client. There is an obvious lack of judgment in the use of interrogatories.

Request for Admissions

ABTL: Is the request for admission underused?

Judge Pfaelzer: If you are going to be absolutely concise in the preparation of your case, looking forward to the pretrial order, the request for admission is useful in tying the other side down. On the other hand, if you know that issue is not disputed, and you know you are going to be able to include it in the agreed facts of the pretrial order, it's really unnecessary to utilize requests for admission.

ABTL: We agree that the request for admission is a far better tool than interrogatories. But we never have been able to get anybody . . .

Judge Pfaelzer: . . . to admit anything.

ABTL: They always squirm around it.

Judge Byrne: The federal rules took this into account and provided a solution. If a party fails to admit a fact that is subsequently established without contest at trial, then counsel can come into court and request an order awardings costs. Yet, there is very little follow through on any of these things either by the lawyers or the court after the litigation is over.

Depositions

ABTL: How about the use of telephone conferences with respect to obtaining evidentiary rulings during out of town depositions. Is that an effective tool? How can it be used, or is it used at all?

Judge Byrne: Yes, it's used. It can be effective. Of course, a lot of discovery matters are now being handled by magistrates, but it wouldn't make any difference whether it was a judge or a magistrate. It saves great expense and inconvenience to the parties. If there is an agreement among counsel, they can call up and get a ruling from the judge. Now, there is still a problem with a non-party witness as to whether he or she must comply with the order of the judge in California. But if you have that order, from a practical standpoint, the witness most likely will comply. This procedure clearly would have to be by stipulation of counsel or by order of the court. If there is going to be a deposition taken in Michigan, then counsel can advise the court that some evidentiary problems are anticipated, and request an order that would enable them to obtain a ruling by phone.

Continued on Next Page

Judge Pfaelzer: If that kind of request is made of me with respect to an out-of-state deposition and I know this is the case in which the litigants are locked in battle, I grant it. So do other judges.

Judge Byrne: I have occasionally suggested, particularly for depositions involving foreign country witnesses, that counsel come into my chambers, bring their court reporter, and take the deposition by conference telephone with the understanding that if there is a problem, I'll come in and rule on the evidentiary matter.

ABTL: If the deposition starts in another jurisdiction and no advance order is obtained, and opposing counsel refuses to stipulate, is the attorney out of luck until he or she comes back and gets an order.

Judge Byrne: Let's assume a deposition of a party-witness is being taken in New York and an evidentiary dispute arises. The lawyers call and one side requests a ruling over the phone while the other lawyer requests an opportunity to brief the issue and have a hearing. After I have heard what the issue is, I can advise them how it will be handled. If I decide to handle it over the phone, the court reporter can transcribe argument by counsel and my ruling.

ABTL: So with a party witness, the court can issue the order right there if it wants to.

Judge Pfaelzer: On the phone.

ABTL: And make a record of the ruling with the clerk.

Judge Byrne: Yes.

ABTL: Can the parties call the judge or are they instructed to call the magistrate?

Judge Pfaelzer: In some cases the magistrates handle it, and in others the judges handle it. An early conference with the judge to delineate the scope of discovery is recommended. At some point, if you feel you are going to have problems in the deposition, you should have a conference with the judge and arrive at a plan for disposing of these objections quickly. If you are going to notice motions to compel, it can become extremely costly.

Judge Byrne: In one case some years ago Judge Real traveled around the country with the lawyers. In another case I handled, the lawyers could not ask four questions without getting into a fight. For every one page of questions, there were 30 or 40 pages of argument. They finally agreed upon appointment of a master, who traveled throughout the world with them ruling on objections; it saved a lot of time and money. Unfortunately, the litigants had to pay for the master. But counsel all agreed it was cheaper to pay for the master to go along with them than to have useless depositions.

ABTL: So when this type of dispute develops there are various ways of getting it resolved.

Judge Pfaelzer: Yes. There are more informal procedures than going through the process of filing endless motions to compel.

Judge Byrne: You'll find judges normally willing and anxious to work out some procedure. Judges are becoming equally concerned as counsel and litigants about the cost of litigation and discovery. If there is some way we can cut it down without unduly burdening everyone, we'll do it.

ABTL: How about the use of depositions at trial?

Judge Byrne: For a court trial, I believe the best procedure is for the parties to designate the portions of the deposition each is offering, either by bracketing or any other method, and make sure all of the colloquy among counsel is excluded. The judge should get those before trial; objections should also be made in writing and be susceptible to ruling by the judge, preferably before trial. The individual judge can read the material in a lot less time than is consumed in reading aloud. You may wonder if the court is really reading the excerpts, but there is a similar concern when the judge is listening to material read aloud.

Deposition summaries are really extraordinarily helpful. They are especially helpful in jury cases — particularly where we have thousands of pages of depositions to read to the jury. Counsel should get together, take a 100-page deposition and work out an agreed narrative statement so it may be read to the jury in 10 minutes. If there is some dispute as to how to summarize unclear testimony, those portions of the deposition may be set out verbatim. All of the objections to the deposition testimony should be ruled upon prior to the time the summaries are made.

Our proposed local rules set forth a procedure for designation of deposition testimony to be read verbatim. They also give the judge authority to order summaries. This may be the first local rule around the country that provides for summaries of depositions. Lawyers first blanched at the idea, thinking they would never be able to agree on anything. But I haven't found that they have had that much difficulty. To the jury, it is so much more helpful.

ABTL: The straight narrative form?

Judge Byrne: Yes. The lawyer reads it. Also, counsel can agree, if they desire, to have those summaries go to the jury.

Judge Pfaelzer: One problem is that attorneys in a jury trial don't know how to use depositions in a way that keeps the jury from becoming restless. They think every question and answer will be interesting to the jury. You must cut down on the number of questions and answers so the jury sees the point of what you are asking.

ABTL: In other words, jurors don't pay any attention when it's two lawyers reading questions and responses from a transcript.

Judge Pfaelzer: That's right, unless you have planned it so the testimony is of real signficance. Otherwise that technique is stultifying.

Judge Byrne: It is also terribly time-consuming. Where we know we are going to have three or four days of reading depositions, I've had a magistrate sit as judge, because I will already have ruled on all the objections. I would also tell the trial counsel they need not be present, that somebody from their firm or even paralegals could be there for the reading. But it never worked out all that well. The attorneys become concerned the jury is not going to think

On Using Visual Aids in the Courtroom

ABTL: Is video taping of depositions used effectively, or enough?

Judge Pfaelzer: I haven't had it done very often.

Judge Byrne: I've only had it once, so I really can't tell you. I've heard they are effective.

ABTL: What about the use of video tapes in an audio visual presentation of demonstrative evidence?

Judge Pfaelzer: I have allowed it many times and I find that it is very effective.

Judge Byrne: It's very effective. Videotape presentations are much more easily viewed than movie presentations, particularly because they are easier to stop and restart. We are seeing videotape used increasingly, both to recreate an occurrence, and to portray an actual scientific test. Another advantage videotapes have over motion pictures is that they are quite easily edited. In a case I'm trying now, there has been a great deal of videotapes. I ruled on the objections prior to trial and had the inappropriate portions deleted.

Judge Pfaelzer: The jury will get very angry if, as in 30% of the cases, the lawyer thought it would start, and it doesn't. The jurors are sitting there waiting in anticipation and nothing happens. That gives the impression that the lawyer is totally incompetent and in fact, that is probably the case if such a mistake is made.

Judge Byrne: We sit and sort of laugh about it, but it is just incredible the number of times it happens. Another thing that happens is counsel prepare beautiful models or charts without giving any consideration to how they are going to show them to the jury. I had a case where a very expensive model was built. It cost about $11,000. Unfortunately it was too large to get it into my courtroom. We were able to get it into another judge's courtroom, and we took the jury there, but that killed a lot of its impact. Counsel should give a great deal of consideration to bringing their own support materials, such as easels, into court. They should go into the courtroom prior to trial and see what facilities it has. It can be embarrassing if the plug on your equipment differs from the socket in the courtroom.

ABTL: Do you favor having these visual aids ruled upon by motion or at pretrial conference? Or do most counsel come in and simply start to use them?

Judge Pfaelzer: They let you know the morning before.

Judge Byrne: I want counsel to come in and show me any visual aids. If you are planning to spend significant amounts on a chart, a map, or a model, it is important to obtain an advance ruling from the judge that it can be used at trial and is admissible before the jury. Counsel often get great ideas for demonstrative evidence, but the judge won't let it be used.

This is equally true with regard to opening statements. Time and again, a lawyer will prepare an exhibit that he or she will want to use during an opening statement, yet never discuss it with the court and maybe never even show it to opposing counsel. As a result, the rhythm and effectiveness of the opening statement is gone because counsel have gotten into a big argument over whether the exhibit can be used.

Putting aside the large exhibits and charts, I think it's important to take into consideration how you can best present certain documentary evidence. If, for instance, you have a photograph, a key letter, or an important memorandum, normally both counsel have a copy of it and there is a copy for the witness. Unfortunately, most of the time a copy is not provided for the judge. It is important to give the judge a copy of those documents or pictures so he or she can look at them as they are being used by the witnesses.

Judge Pfaelzer: You see it happen over and over again. A lawyer will examine a witness about a key paragraph of a particular letter and say, 'Look at paragraph 7 on page 1 and now look at paragraph 3 on page 2.' He will examine a witness the entire morning on that document while the jury has no copy of it, has no idea what the contents of it are, and the court is lucky if it has a copy. You've lost the jury in the first five minutes. I've seen lawyers do this for four days. That is a sure way to lose the case because the jury has no concept of what the attorney is trying to prove and they begin not to care either.

that they're interested in the trial, or that deposition testimony is less important than live testimony. This was before the idea of the deposition summary evolved.

Trial Exhibits

ABTL: Do you allow indexes of exhibits to be entered into evidence or delivered to the jurors for their use?

Judge Byrne: If you have a substantial number of exhibits the jury gets an exhibit list. Give consideration to each juror receiving some type of exhibit book that they can utilize while the witness is testifying. The book need not necessarily include all of the exhibits, just the important ones. But counsel must be very careful to clear that with the judge. Don't first present an exhibit book on the day of trial. Let the judge know your intentions beforehand and get a ruling as to what exhibit books the court will allow to be given to the jury.

ABTL: Exactly how is the exhibit book used?

Judge Byrne: A looseleaf binder is provided with some exhibits inserted at the outset and then other exhibits are added as they are admitted. I advise the jurors that they cannot take the book to the jury room during the trial, and they cannot take it home. At a recess, for instance, they just leave the book on their seats. They also are not

Continued on Next Page

allowed to look at it unless counsel or a witness calls attention to a specific exhibit. Otherwise, when they get bored with counsel, they are going to fiddle around with the book.

ABTL: You allow that too, Judge Pfaelzer?

Judge Pfaelzer: I do. But I think the best way to do it is to put the document in an overhead projector and let the jury to see it. Some lawyers blow up the document and put it on an easel, and that's not too bad either. One way or another, the jurors have got to have the document in front of them.

ABTL: Does the document have more impact if it goes into an overhead projector for a short period of time than it does if it's put on a card where it's seen for a longer period of time?

Judge Pfaelzer: I think the overhead projector is a far superior way to do it.

Judge Byrne: I do too. I'm just finishing a case where I permitted counsel to do something I had never seen done before. They gave the jury a series of photographs bound together in a little packet. It was similar to the 'big little books' available when we were kids, where by flipping the corner of each page, you could make a sequence occur. The jury did that, going over the matter picture by picture as the witness testified.

Pretrial Conferences

ABTL: Let's move on now to Rule 9, the pretrial. Do you have any hints as to how to improve the pretrial so the case can be tried more effectively?

Judge Pfaelzer: The thing about pretrials is that lawyers don't know enough about the case. So when you start to question them on what they mean about a given issue, for example, whether it is a real issue, they are not prepared to answer. They just include everything. Often at pretrial conferences, after a long discussion with them, the court will eliminate half of the issues in the case. Of course, that's the purpose of a pretrial, but it seems to me that counsel should have thought that out before they get into the courtroom. A pretrial conference, in my view, should be pointed toward eliminating all of the theories you are not going to pursue and deciding on the principal thrust of the case.

Judge Byrne: I think that if you ask the average lawyer what he or she is most concerned about when preparing a pretrial order, it's whether they are leaving something out. Lawyers are not really thinking about narrowing issues, they are thinking about retaining as many issues as they can. The proposed pretrial orders are written as broadly as possible. The lawyers normally try to throw in an imprecise sentence which enables them to ask the court for leave to add issues in case they forgot something.

The value of the pretrial is that counsel can sit down with the judge and go over what the issues are. Sometimes the judge looks at the proposed pretrial order and knows he or she would like to refine it. But the judge also knows there is a fair chance the case may never be tried and, unfortunately, sometimes lets it get by. It is better to make counsel specify and tie down the issues at the pretrial conference.

ABTL: Does this happen all the time at a pretrial conference — you'll say to the attorney, how did the transaction happen — and, you'll get a glazed look?

Judge Pfaelzer: Yes. And an attitude which is, well, I'll decide how it happened when I get to trial and I'm not there yet.

Judge Byrne: There are very few complex cases where once the trial starts, you don't regret not having required a better pretrial order.

Judge Pfaelzer: That's right. You keep looking at the issues of fact and law. You've got it up there with you on the bench and you wish you had required a much more precise order.

Jury Instructions

ABTL: Do either of you have a common practice of allowing jury instructions in the jury room?

Judge Pfaelzer: In the 9th Circuit I think you are more or less required to send them in.

Judge Byrne: I now send instructions to the jury room if any party asks for them. They don't have to go if all parties agree. There is a proposed change in our local rule for the pagination and captioning of jury instructions so they can be easily put together in a written form that can go to the jury room.

ABTL: Do you prefer patterned or hand-crafted jury instructions — or does it depend on the case?

Judge Pfaelzer: I believe most, but not all, of the judges think you should have patterned instructions. The problem is that the judges don't want to be reversed. They believe that they are much better off using an instruction they know has been approved.

Judge Byrne: I think it depends. The patterned instructions can be supplemented. There is a great tendency for non-patterned instructions to be argumentative, and the lawyers often pick language from an appellate decision and make that the language of the instruction. Recently, the California Supreme Court again criticized that practice.

Next Dinner Meeting

The next ABTL dinner meeting, scheduled for February 1, 1983 at the Hyatt Regency Hotel, will feature a seminar on "Understanding and Dealing with Insurance Problems from the Business Lawyers Perspective."

Panelists will include Raphael Cotkin, Howard N. Wollitz and Thomas W. Johnson, Jr.

The reception will commence at 6:00 P.M. with dinner to follow at 7:00 P.M.

Annual Fall Seminar

The Tenth Annual Seminar has been scheduled for October 7 through 9, 1983, in Palm Springs. The topic will be "Trial Tactics in Business Litigation."

The fifteen panelists will include Justice Otto M. Kaus, Shirley Hufstedler, Judge Irving Hill and Thomas J. McDermott Jr. ABTL members interested in preparing written materials on a topic for the seminar should contact Howard O. (Pat) Boltz, Jr., 1983 seminar chairman, c/o Kadison, Pfaelzer, Woodard, Quinn & Rossi, 707 Wilshire Boulevard, 40th Floor, Los Angeles, California 90017, telephone (213) 688-9000.

Many judges in this district are giving some general instructions to the jury prior to the commencement of trial. I think it's very helpful. In the majority of cases, I am instructing the jury after the close of evidence and prior to argument. This may be done only by stipulation of counsel, because the Federal Rules seem to require that the jury be instructed after argument. Most of the lawyers who have been in my courtroom, in both criminal and civil cases, seem to prefer that instructions be given before they argue.

Voir Dire

ABTL: Are there any special problems presented in conducting the voir dire of a jury?

Judge Byrne: In federal court, the lawyer's participation in *voir dire* is through the submission of written questions prior to trial. It's interesting how infrequently questions are actually submitted. After the examination is completed by the judge, he will normally inquire if the lawyers have any additional questions. There are seldom any requested.

Judge Pfaelzer: That's true. In some cases, if the lawyers had sat down and thought a long time about the case and put the questions together in an appropriate way, they would get some amazing answers from the panel.

Judge Byrne: I think what happens is that lawyers face enough difficulties getting the case ready for trial. They realize that they're not going to be able to ask the questions anyway, so they leave the choice of questions to the judge.

Objections to Evidence

Judge Pfaelzer: I want to say something about objections. Some lawyers create a very adverse impression in the minds of the jury by getting up every two minutes to object. Obviously a lawyer who gets up to object and makes a speech every time he does so is inviting the court to come down very hard on him. I have had more than one juror state that he or she did not like a particular lawyer because he or she was getting up every five minutes and objecting.

ABTL: Even if the objection is well taken?

Judge Pfaelzer: If the impression you give the jurors is that you are an obstructionist, they don't like that.

Judge Byrne: I might disagree a little with that. You have to use your own good judgment. The lawyers who sit in their seats, mumble an objection, don't know why they are objecting, and don't state the grounds for their objection, do not make a favorable impression with the jury.

If you're going to object, get up on your feet and make yourself the center of attention, for a moment anyway. This alerts the judge that an objection is being made, and it also alerts the witness not to answer.

Judge Pfaelzer: Sometimes that's what you got up for in the first place — to tell a witness what the answer should be!

Motions in Limine

Judge Byrne: It depends upon whose witness it is. I think there is an insufficient use of *motions in limine* to take care of some of these problems. I, for one, appreciate the *in limine* motion. It gives the judge a chance to give more thought to the issue. It also lets counsel know whether certain evidence is going to be admitted, or whether they may have to use an alternative method of proof. Time and again, counsel will say, "Well, judge, you sustained that objection, and now I'm going to have to call a new witness." The judge may not allow that.

Judge Pfaelzer: That is absolutely right. Motions in limine are invaluable and should be used much more than they are.

ABTL: Do you appreciate short briefs?

Judge Pfaelzer: Mini-briefs are really helpful to the court — those that are not more than three or four pages long and set forth the law as it applies to a particular issue or sub-issue.

Judge Byrne: The pretrial memorandum of contentions of law and fact seldom includes motions *in limine*. Very little pretrial concern is given to evidentiary questions. The judge is seldom told in advance about an evidentiary problem. You know it's coming, you can usually tell a few questions ahead of time. But the judge is seldom advised of a party's position on an evidentiary matter, or the law that relates to it, before an objection is made at trial.

Opening Statements

ABTL: What about opening statements? Do lawyers often try to sneak in argument?

Judge Pfaelzer: Some judges in this district feel strongly that you are limited only to a statement of what you are going to prove; they will not let you say one other thing.

ABTL: No argument as such?

Judge Pfaelzer: No argument. You will be stopped if you try it.

Judge Byrne: It's a great free shot, but it's not effectively used. The best opening statements are normally made by personal injury lawyers.

Judge Pfaelzer: They are good at it.

ABTL: You limit it to facts?

Judge Byrne: Just facts. You can't argue it. But sometimes the manner and tone of your opening statement can make it sound like an argument. If you can sneak in one or two little quick arguments fast enough, the judge can't stop you. You really have to think about and prepare that opening statement.

ABTL: Anything else?

Judge Byrne: In business cases, where you have so many documents, young lawyers should be taught how to use those documents in court — not only how to show them to the jury, but how to get them into evidence, how to use them to impeach, how to use them to refresh a witness's recollection.

It's also amazing how sloppy the use of depositions can be. I bet you have never tried a case where all the deposition transcripts were filed before trial and available when needed to impeach.

Judge Pfaelzer: Not yet.

Letter from the President

Continued from Page 3

service of the pleading. The rule further requires that such discovery be completed within 45 days unless the time is otherwise extended by court order. Since the 45-day time limit appears to be unreasonably short, the new rule undoubtedly will generate frequent hearings on motions to extend the time.

Another significant new rule with respect to class actions is set forth in proposed Local Rule 5.5 *et seq.* which indicates that the court will not approve a compromise or voluntary dismissal of a class action unless:

(1) Counsel for the purported class shall personally advance the costs of any notice required by the court pursuant to F. R. Civ. P. 23(3), without charge against the purported class or any class representative; or

(2) The class action has been brought in good faith and the application for approval of a compromise or dismissal shows that a class action is not legally maintainable; or

(3) All members of the purported class have agreed to the compromise or dismissal; or

(4) The class action is being dismissed pursuant to F. R. Civ. P. 12 or the court has ruled that the action does not qualify as a class action under F. R. Civ. P. 23.

The above-quoted modifications with respect to settlement or voluntary dismissal of class actions represent a shift in policy and may result in a greater reluctance upon the part of the plaintiffs to initiate class actions.

Proposed Local Rule 23 creates new procedures with respect to an offer to compromise. Rule 23.1 requires the notice of offer to compromise to be filed with the court; Rule 23.5 provides that if the offer is rejected and a judgment is obtained in an amount less than the offer, the offering party shall recover costs. This language is patterned after Rule 68 and would appear to limit recovery of costs only to the party defending the claim. The necessity for Rule 23 is doubtful in light of the comprehensive provisions set forth in Rule 68 of the Federal Rules of Civil Procedure; its adoption may create unnecessary confusion as to the appropriate procedures to be utilized.

Proposed Rule 9.13 authorizes parties, within 45 days of filing the answer, to apply to the court for an exemption from the totality of the pretrial procedures required by Rule 9 for cases which can be tried in two days or less. If the order is granted, the parties are required to meet within five days to prepare and file a comprehensive discovery schedule that will permit the trial to be set within six months. Thirty days prior to trial counsel are also required to meet (and presumably to exchange and file with the court) a detailed narrative of the testimony of the witnesses, the factual and legal issues to be tried, lists of exhibits, deposition transcripts to be used at trial, and a trial brief.

The foregoing is merely illustrative of the changes proposed in the new local rules for federal court. All counsel practicing in that forum should familiarize themselves with the proposed local rules in detail.

In addition, the United States District Court for the Central District has proposed and circulated to various bar associations and committees drafts of proposed rules with respect to qualifications for admission to the federal court. Although the rules specify the types of trial experience which would qualify an attorney for admission to practice before the federal court, generally an attorney will be certified as trial-experienced only if he has three trial experiences within five years preceding the request for certification. These experiences may consist of either acting as lead counsel or assistant to lead counsel in a qualifying trial of a least a full day in scope or the substantial equivalent, such as a preliminary proceeding with testimonial evidence given on the merits.

The Central District has also proposed adoption of a committee on examinations which will have the responsibility to administer written examinations at least twice a year for admission and certification to the federal court.

The state courts also have been active in connection with rules of procedure. In particular, the Judicial Council now has adopted Section 19 of the Standards of Judicial Administration governing the handling of complex litigation in California courts. Essentially, Section 19 provides that the court on its own motion or by motion of any party may determine whether litigation is complex and, having made such determination, may assign the litigation to one judge for all purposes. The rule also contemplates a pretrial conference, with all parties represented, to determine the essential issues in the litigation and to eliminate burdensome discovery procedures. The new rule makes some attempt to delineate which cases may be considered to be "complex litigation" but suggests that the term is not capable of precise definition and indicates that each situation must be examined separately.

From the foregoing it is clear that the courts are attempting to deal with congested court calendars and increasing costs of litigation. Although certain of the proposed new rules may operate to expand, not contract, the number of court hearings and the time and expense of attorneys, they do provide a vehicle for discussion. Members of the bar should join with the courts in attempting to fashion appropriate changes and modifications in court procedures to address the modern-day environment.

— Marsha McLean-Utley

Notice of Membership Dues

Annual dues for ABTL members ($35.00) became due on January 1, 1983, for the year 1983. Law firms sending in dues for two or more ABTL members are asked to identify separately each member for whom dues are being remitted. Please complete the coupon below and mail your check to:

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