

### The Right to Independent Counsel

**I**nsurance Defense — that was once just a group of "PI" lawyers working a very high volume of cases for a very low billing rate. But no longer.

In the past few years, business litigators have increasingly found insurance to be the *ultimate* defense weapon; the carrier pays your fees and you vigorously defend your client. California courts have aided this development by holding in cases such as *San Diego Naval Federal Credit Union v. Cumis Insurance Society, Inc.*, 162 Cal.App.3d 358 (1984), that the insured has the right to select counsel whenever an insurer reserves a right to deny coverage. This rule has been dubbed "the insured's right to independent counsel." The "independent" means free from influence of the insurer, not the insured.



**Bruce Alan Friedman** So how do you structure this defense of insurance? If the carrier appoints you as "independent counsel", who is your true client — the insured or the insurer?

The role of the business litigator as insurance defense counsel is neither easy nor well defined. Being appointed insurance defense counsel puts you on a road fraught with conflicts and uncertainty. The challenge

is to structure that role for the best interests of your client. Over the years, insurers have developed almost a knee jerk reaction to reserving rights to deny coverage, even in instances where they were uncalled for. The carriers sent out a letter in response to the insured's tender of defense, either reserving rights to deny coverage generally under the policy or specifically identifying the policy provisions upon which the reservation was based.

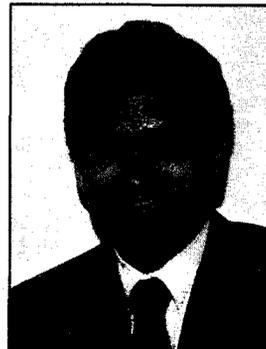
With the advent of the independent counsel rule insurers today are more careful about reserving rights. It is not uncommon now for a carrier to acknowledge its duty to defend and indemnify, designate defense counsel, and then point out one or more of the following: the limits of liability under the policy are "X" and the claim is for "Y", a greater amount; punitive damages are sought and the insurer is prohibited by law, depending upon the jurisdiction, from indemnifying for such damages; or the complaint alleges intentionally tortious conduct (not

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### Defending Wrongful Termination Cases

**T**wo of California's major developments in the 1980's, wrongful discharge litigation and the California Lottery, have much in common. Unbelievably large numbers of people are playing. The players include a broad diversity of the general population, from part-time minimum wage workers to high ranking executives of major corporations. While only a few are winning, the potential recoveries can be in the millions. And, at times, it seems that the process for selecting winners in the wrongful discharge area may be as random as the lottery system is designed to be.

Defending a wrongful discharge case is not easy. The law is extremely confusing, internally inconsistent and ever-changing. Courts have afforded plaintiffs broad latitude to pursue new theories of recovery at or on the eve of trial. Because so many of the events giving rise to such



suits are undocumented, there is a high potential that defense witnesses may not have a strong recollection of the facts, particularly when a period of time has lapsed prior to the filing of the suit or the commencement of trial. A frequent danger is that necessary witnesses also will have had fallings out with the employer defendant and will either be hostile, unwilling to testify or unable to be found.

**Steven G. Drapkin** The potential for a disastrous jury verdict is obvious. Since 1984, several appellate decisions have affirmed large damage awards. Further, because the suits tend to be emotionally charged, the calculus frequently employed for handling and resolving business-related suits may simply be inapplicable. But there is also good news to report. During the past year, appellate courts have been deciding in favor of employers. The most recent case — *Foley v. Interactive Data Corp.*, 174 Cal.App.3d 282 (1985) — applied significant limitations to each of the three recognized exceptions to "at-will" employment. Judges at the trial court level continue to closely scrutinize employment suits. Many demurrers have been sustained and motions for summary judgment granted. Most encouragingly, there have been many voluntary dismissals of wrongful discharge suits and a number of *de minimis* settlements.

This article will describe some of the considerations  
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necessarily excluded by the terms of the policy itself) indemnification for which is excluded under statutory or case law of the particular jurisdiction.

The carrier carefully avoids using the words "reservation" or phrase "reservation of rights." As far as the insurer is concerned, it is simply acknowledging policy obligations and pointing out the limits of the policy and applicable law.

Do these responses constitute a "reservation of rights" giving rise to independent counsel? They may. Traditionally, reservations were based on the terms of the policy itself which might exclude or preclude coverage: the possible applicability of a policy exclusion, an alleged loss outside the policy period, the identity of the insured, location of the loss, or nature and extent of damages. In order to determine whether such matters constitute a reservation for purposes of obtaining independent counsel, look at the underlying rationale for the rule.

Reference to the policy's liability limits ordinarily would not constitute a reservation or present a conflict of interest between the carrier and the insured. However, in a situation where the potential exposure of the lawsuit greatly exceeds the limit of coverage, the insured's economic interest in the outcome of the litigation may be greater than that of the insurer, and an insured should have the right to select its own counsel and to control the litigation.

The same is true with respect to a punitive damage claim. Alone, it does not necessarily give rise to a conflict of interest between the carrier and the insured. However, where punitive damages are likely, the insured's economic interest in avoiding imposition of significant exemplary damages may be greater than the insurer's interest in limiting covered damages at or below the policy limits and, accordingly, the control of the litigation should pass to the insured.

The allegations of intentionally tortious conduct also necessarily raise a divergence of interest between the insurer and the insured. The rationale is that the insurer and its counsel have an economic interest in seeing that liability, if imposed, is based upon the non-covered, intentionally tortious conduct, and not the covered negligence. Obviously, the insured's interests are contrary and such allegations constitute perhaps the classic example of a conflict justifying the insured's right to select its own counsel.

### **Do Not Invite a Reservation**

When tendering defense of a lawsuit to your client's insurer, should you invite a reservation of rights letter to be appointed counsel?

You certainly can highlight the potential conflict in your notification letter to the insurance carrier by pointing out that certain claims may not be covered and immediately demanding independent counsel status. Generally, however, unless your client insists on selecting counsel you should not prompt the carrier to reserve its rights.

The reasons are numerous. An insurer may accept the defense without reserving its rights, and may later be estopped to deny coverage for uncovered claims. Second, alerted to the duty to pay independent counsel, the insurer may accept the tender of defense without reservation, and waive what may be considered *de minimis* coverage defenses. Third, such an approach draws attention to cover-

age issues which the insurer may be compelled to hire counsel to analyze. As a result, your client may be permitted to select independent counsel, but may also face an immediate declaratory relief action over coverage.

Instead, a far more conservative approach is to simply notify the insurer of the lawsuit and request an acknowledgment of the defense and indemnification obligations. Although acceptance of the lawsuit by the insurer without reservation may relieve you of your role as counsel in an interesting case, you will have competently afforded your client protection against the claims at negligible legal expense.

### **Independence of Counsel**

You have now convinced the carrier that your client is entitled to independent counsel. The insurer then provides you with a list of three to five law firms who do not regularly represent it and suggests that your client select truly "independent" counsel, free from the influence of either carrier or insured.

Do not agree to that list. This is not the proper approach by a carrier. It ignores all three underlying principles for the independent counsel rule, while superficially appearing to address the potential conflict of interest of counsel.

First, the right to control the litigation belongs to the party who bears the greater financial risk — your client. Since there may not be insurance coverage for the loss, that right belongs to the insured, who should be permitted to select counsel of its choice. Second, while appointment of "neutral counsel" may appear to address the conflict that would exist by appointing the carrier's "regular" defense law firm, it ignores the defense counsel's long standing legal and ethical duty to serve the interest of the insured — and not the insurer.

Finally, to the extent that the insured's own counsel tries to orient the case towards covered claims, he is doing exactly what he should in terms of fostering the interest and protection of his client who purchased the policy of insurance to protect him from all or a portion of the claimed loss.

After the carrier agrees that your client is entitled to select you as its counsel, what about your compensation? Insurers who are in the business of litigation employ counsel at various rates depending on the nature of the work. Lawyers who regularly represent insurers will accept a reduced hourly rate in return for a high volume of business and prompt payment of fees when billed. On the other hand, insurers, like any major corporation, retain leading law firms in complex high exposure matters.

Are you entitled to be paid by the carrier at your regular hourly billing rate? It depends on the nature of the case, your experience, and all of the other compensation factors usually considered by the courts and the American Bar Association. (See, e.g., ABA Model Rules of Professional Conduct, Rule 1.5.) In other words, do not accept the position that the insurer pays \$75.00 an hour, and your client will have to pay the difference.

While it is unfair for the carrier to expect you to accept a \$75.00 an hour billing rate for a wrongful termination, or a business tort case, it is equally unfair to demand \$250.00 an hour for a fender bender or a premises liability case. In short, compensation is subject to negotiation between you and the carrier; it boils down to what is reasonable compensation for the nature of the litigation.

Like all fee arrangements, the agreement of the carrier to compensate you at the negotiated rate should be set

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## Remembering Tom King

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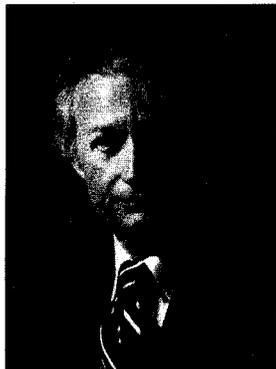


I've written many a story for Tom King but this is the tough one.

Tom edited my first article on a high school newspaper in 1947 and the last one I wrote for the ABTL Report. He won't edit this one because he died in September of a heart attack at the age of 56.

In the summer of 1948, Tom and I stood on the hill overlooking the 18th green at Riviera, jammed among a thousand onlookers at the U.S. Open. He said that one of his ambitions in life was to see an Olympics, a World Series game, a Rose Bowl (no super Bowl then), a heavyweight championship fight and a U.S. Open. Then he apologized for expressing such a modest ambition.

Tom was like that. He had ambitions — they were realistic, they were accomplished with a modicum of fuss and once accomplished, seldom mentioned. Tom was hard to get to know because he was so easy to know. The friendliness and the warmth, the apparent simplicity, allowed you in. But Tom kept his ambitions, his achievements, his real life, extremely close.



Tom was "from" Santa Monica the way all we Californians are "from" the place we first land when we get here. The Santa Monica that Tom hit in 1944 was a rough, semi-isolated, low-income beach town. No yuppies, no BMW's, no Michael's, no class.

Santa Monica High School — "Samohi" -- was a place you stayed away from unless state law required you to go to school

Thomas J. McDermott, Jr. there; when the blacks weren't fighting the whites, the Poles were fighting the Mexicans. The police came into the classrooms one spring morning and arrested half the football team for murder — the killing eventually was pinned on a non-student.

Into that atmosphere in 1947 came Tom King, a Jew from Arkansas who wasn't about to make it on his connections. A walk-on in football, he finished the season as the starting fullback. A reporter on the school newspaper in his first semester, he began his second as the editor-in-chief.

The newspaper that Tom edited was the SAMOHI and it had been judged one of the five best high school newspapers in the United States for the preceding six years, due primarily to the rigid discipline of its faculty adviser, one J. Kenner Agnew. He knew the kind of ability it took

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The apprehension of the mortality of man that was felt on September 16, 1985, upon learning of the disappearance of Benjamin E. ("Tom") King in the Angeles National Forest is indelibly engraved in my mind. As with the Kennedy assassination, it is difficult to dismiss from my memory the exact time and place of my learning of the shocking news. All of us who knew him found it difficult to believe that Tom, an accomplished mountain climber and author of a book on mountain hiking experiences, either would have lost his way or suffered some hiking injury.

Still, we clinged to the hope that only such a minor mishap could have occurred. Unfortunately, our prayerful optimism soon was dissipated when we learned, on September 18, 1985, that Tom died as a result of a massive coronary stroke suffered while hiking.

Tom King's loss is a loss not only to the Los Angeles legal community, the ABTL, his family and friends, but to everyone who shared his zest for experiencing life to its fullest and believes in the basic decency and humanity of man.



Elihu M. Berle

Tom was a law partner but, more importantly, a dear friend. Whether it was discussing legal issues and litigation or skiing and attending sports events together, Tom was always thoughtful and considerate; compassionate without being judgmental; proud of his friends and colleagues, yet extremely modest

about his own accomplishments and successes.

Tom had the unique ability to extract as much as possible out of every moment of life. He loved the challenge of life itself. Whether litigating a tough case against a vigorous combative opponent, writing an article, skiing off the Cornice at Mammoth at full speed, or climbing another Himalayan mountain, Tom became buoyant at the challenge of the occasion and performed to the best of his capabilities.

Though always challenging and testing his limits and the fates constantly, Tom remained a quiet, reserved and decent man. Discussing his loss with various colleagues and friends, no one could remember Tom ever saying a harsh word or expressing a negative thought about another human being. He touched and influenced all of us, not only with his outstanding legal abilities and schol-

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forth in writing in order to hopefully avoid future controversy. The hourly billing rate, frequency of billing and the nature of services to be provided should be stated.

Importantly, the writing should provide that you represent the client, not the insurer, and that no attorney-client relationship exists between you and the carrier who is solely agreeing to pay fees for the representation of your client.

Be careful. Communications with the carrier may not be confidential. Such a writing assists in clarifying your duty to report to the insurer as well as the subject matter of your communications.

### **Services Included Within Compensation**

In general, when retained to defend a client in a lawsuit, we expect to be paid for all services rendered in connection with the suit. Quite often, under the theory that the best defense is a good offense, we file a counterclaim against the plaintiff or a third party complaint against other parties believed to be responsible for the alleged loss. In other instances, the pleading tendered to the insurer for defense is a cross-claim or counter-claim against our client who commenced the litigation as a plaintiff.

Are these services that an insurer must pay independently selected counsel?

Insurers have taken the position that the policy requires only that they *defend* any suit against the insured. Under this position, activities which fall outside of the defense of the claim, including prosecution of cross-claims and third party complaints, analysis of applicable coverage and discussions with the insurer compensating independent counsel with respect to that insurer's coverage, are not required to be paid for by the carrier.

This position presents difficulty in apportioning services between the conduct of the defense and that relating to seeking affirmative relief. With respect to work on coverage matters, it may unnecessarily lead to proliferation of counsel for both client and the insurer.

The insurer must draw the line, and appropriately so, as far as representation by independent counsel of the client in an action between them over coverage relating to the lawsuit.

Although arguments have and will continue to be made that it is unfair for an insurer to turn its resources against the insured in an effort to avoid its obligations at a time when it is contractually obligated to defend the insured, courts have generally required that absent bad faith conduct, the insured bear its own attorneys' fees in litigation over coverage with the insurer.

On the other hand, the insurer's position that they should not have to pay counsel on both sides of a coverage case is a reasonable one. Accordingly, it is safe to assume that independent counsel cannot represent the insured client in coverage litigation against the insurer paying its fees.

This position has been taken by the Second Circuit Court of Appeal in *New York State Urban Development Corp. v. VSL Corporation, et al.*, 738 F.2d 61 (2d Cir. 1984). Although making its decision on the basis of specific policy language, underlying the court's decision is the view that the client's designated counsel who had sued the insurer, could not serve as independent counsel in the defense of the potentially covered action because of counsel's representation of the insured in the coverage litigation.

Other than actual adverse representation against the insurer arising out of the very lawsuit you were retained to defend, the nature of services that will be paid for by the carrier should be subject to negotiation, governed by reason as well as an analysis of those services which benefit both client and insurer.

In terms of cases involving both affirmative relief and defense of claims, counsel and the carrier should negotiate an agreed-upon percentage of fees which will be borne by the carrier and the client.

This should be accomplished at the outset of the representation and placed in the agreement with the carrier. If affirmative relief is the nature of a defense tactic, one would argue for it to be paid for by the carrier. Likewise, if the affirmative relief is against third parties who may be responsible for a share of the loss, this may be beneficial in limiting both the client's and the insurer's ultimate responsibility and should be paid for by the insurer. The same is true with respect to your efforts to get other insurers to either share the cost of defense or contribute to a settlement.

So long as there is not ongoing litigation between your client and the insurer paying your fees over coverage applicable to the lawsuit, there is no necessity for the insured to retain separate counsel to discuss the insurer's coverage at the time of settlement. After all, independent counsel has already engaged in the coverage aspects of the lawsuit in placing the carrier on notice and in negotiating independent counsel status, fees, and the nature of services to be paid for by the carrier.

The insurer is not the client of independent counsel, and absent the need for coverage counsel for the insured due to separate declaratory relief litigation, the insurer should not be permitted to insist that the client obtain another lawyer to discuss the carrier's coverage in connection with settlement of the case.

### **Reporting**

The insurer will undoubtedly request that you provide periodic status reports, including analysis of the case and your opinion of the insured's exposure. Refusal to provide such information and analysis usually results in the carrier pointing to the cooperation clause of the policy and threatening that the refusal constitutes a breach of the insured's policy obligations, which relieves the insurer of its duties under the policy.

Although it is impossible to fully discuss the cooperation clause here, suffice it to say that even in circumstances where the insurer is providing the defense without reservation, an insurer is rarely able to deny coverage based on the insured's failure to cooperate. Under circumstances where the carrier reserves rights, a serious question arises as to whether or not the cooperation clause applies.

A partial answer is provided in the case law establishing the right to independent counsel. In these cases, the insured rejected a defense by regularly designated counsel, and hired its own counsel to defend it. This in and of itself was arguably a breach of the cooperation clause not to mention the prohibition in the policy against the insured's incurring expense without the approval of the insurer. Yet the courts have ignored these policy conditions in establishing the rule and in awarding reimbursement for fees and costs incurred.

In any event, keep the insurer apprised of the litigation status and provide it with pleadings and other documents otherwise obtainable by reviewing the court file. Reporting the general status of the litigation is in the interests

of both your client and the insurer. If you do not keep the carrier informed, you may discover great difficulty in obtaining a timely response when discussion turns to settlement.

Do not provide the insurer with any attorney-client privileged information. Obviously, you should not divulge information that would have an adverse impact on coverage issues. Caution should be taken in billing the insurer in order to avoid disclosure or privileged matters and facts adversely affecting coverage. The insurer is not your client, and you should report accordingly.

So the next time your business client brings in the complaint he was just served with, think carefully about insurance. Structure your case so that your client obtains maximum value from those insurance premiums. If the carrier fails to tender a full defense, aggressively pursue your appointment as defense counsel and faithfully serve your client's interests and not that of the insurance carrier.

—Bruce Alan Friedman

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and strategies that can be utilized in the early stages of defending wrongful discharge suits. Some of these approaches have resulted in suits being resolved long before they were scheduled to go to trial.

### Removal to Federal Court

One of your first considerations is — whether the suit — almost always initially filed in state court — can and/or should be removed to federal court. You must make this election almost immediately because the strict 30 day period for removal (i) probably commences to run upon receipt of the initial pleading, whether or not service of process has been formally accomplished, and (ii) cannot be extended by agreement, stipulation or court order. Moreover, clients often wait until near the end of the 30-day period before hiring you.

Why remove? There are a number of potential advantages. In the event that the case is tried, the federal court requirement that a jury verdict be unanimous frequently will protect an employer far more than the three-fourth's majority requirement of California law. Cases often come to trial far more quickly in federal court, a decided advantage if there is a potential future problem of witness availability.

The pretrial advantages of removal can even be stronger. There is a common perception that federal judges are more likely to grant case dispositive motions than are state court judges. This may be because the "all-purpose" assignment system used in federal court forces judges to carefully reflect more on such motions or because the federal judges have more time and law clerk power to consider the motions than do state court law and motion departments. Furthermore, many of the local federal judges have been very even-handed to employers in wrongful discharge cases. Federal judges also generally are far more likely than state judges to be responsive to federal defenses, such as federal labor law preemption.

Perhaps most importantly, many attorneys who file wrongful discharge suits are not experienced in the complexities of federal court procedure. Many of these lawyers are made extremely uncomfortable by the thought of having to prosecute a suit in the formal federal court environment. For these reasons, removal to federal court frequently has proven the catalyst to a voluntary dismissal or a *de minimis* settlement.

A word of caution. There appears to be a growing split among the California Courts of Appeal, with the Second District tending to decide more favorably for employees than the First District. Compare *Foley v. Interactive Data Corp.* with *Rulon-Miller v. Int'l Business Machines*, 162 Cal.App.3d 241, 208 Cal.Rptr. 524 (1984) and *Khanna v. Microdata Corp.*, 170 Cal.App.3d 250 (1985). The Ninth Circuit seems to be adopting the more pro-employee stance; see *DeHorney v. Bank of America*, 85 Daily Journal D.A.R. 3923 (Dec. 1985).

Therefore, unless and until the California Supreme Court resolves the split, you may get a better result in the state court, such as in the Second District.

Although it may be desirable to remove a case to federal court, it may not be possible. A number of federal judges take a very restrictive attitude toward removal. Make sure your case is, in fact, removable on the basis of diversity of citizenship or federal question jurisdiction.

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(Recent law concerning removal is extensive.) Carefully draft your removal petition to include all necessary allegations. In the light of the fact that some judges have summarily remanded cases, a lawyer removing a case to federal court may want to adopt the unorthodox practice of including pertinent case citations in the body of the petition. It can also be helpful to request, in the body of the petition, that the court issue an OSC if it has any question as to jurisdiction, rather than to summarily remand.

### Arbitration v. Court Action

You may want to avoid court—and juries—altogether.

A provision for arbitration of disputes arising from the employment relationship—whether adopted in a labor-management collective bargaining agreement or unilaterally imposed by a non-union employer—provides a strong basis for arguing that employees are obligated to assert their claims under arbitration procedure rather than in court. Until recently, there has been considerable doubt that the California courts would give full effect to such arbitration requirements, particularly when unilaterally imposed in the non-union workplace. However, two cases decided in late 1985 may indicate otherwise.

In the first case, the Court of Appeal held that the Federal Arbitration Act governed the arbitrability of disputes under employment contracts involving interstate commerce (except those involving workers employed in the transportation industries). *Tonetti v. Shirley*, 173 Cal.App.3d 1144 (1985). The Court further held that doctrines of state law limiting the duty to arbitrate, such as the adhesion contract principle, are preempted by the federal law. In the second case, the California Supreme Court held that federal labor law similarly prohibits state law from interfering with labor-management agreements which require employment disputes to be arbitrated even if the procedure is allegedly unfair or the selected decision maker is institutionally biased. *Dryer v. Los Angeles Rams*, 40 Cal.3d 406 (1985).

Significantly, *Dryer* and *Tonetti* recognized that an employee may be obligated to arbitrate all claims arising out of the alleged breach of an employment contract, including tort claims. *Dryer* additionally held that claims against individual corporate agents similarly must be resolved in arbitration.

In light of *Tonetti* and *Dryer*, counsel defending wrongful discharge suits should determine whether there is an arbitration procedure—no matter how informal—which arguably governs disposition of the case.<sup>1</sup> If so, consideration should be given as to whether the employer would prefer the case to be arbitrated. In many situations, arbitration will be the preferable alternative. (Employers also may want to consider adopting or modifying arbitration provisions in their employment agreements and personnel manuals.)

If you want arbitration, consider seeking dismissal by demurrer or summary judgment. Alternatively, some courts will stay litigation pending the arbitration. A final procedural approach is to file a petition to compel arbitration. Depending on the case, even if it is not removable, you may prefer to file such a petition before a federal court. One reason for doing so is that federal judges may be generally more inclined to adopt a broader concept of "arbitration" than the state judge to whom the case was assigned.

## Discovery

In many cases you should commence the taking of the plaintiff's deposition *immediately*. Many lawyers believe that the deposition generally should be taken prior to use of written discovery such as interrogatories or requests for admission. Also, you may want to begin before you file your responsive pleading.

The importance of the deposition cannot be overemphasized. In wrongful discharge cases, because of the many odd and inconsistent legal doctrines involved, as well as other reasons such as a desire to paint an overly detailed picture of the termination, there often will be allegations in the complaint which may be very helpful to the defense. When apprised of the consequences of such allegations, plaintiffs and their attorneys frequently seek to excise them from amended pleadings. This is often easy to do; a simple claim of "mistake," particularly in an unverified pleading may suffice to convince a court to ignore the earlier admissions. The plaintiff's ability to change an aspect of the story is diminished greatly if it already has been repeated in sworn deposition testimony.

The pre-responsive pleading deposition is also important in other respects. Many lawyers representing plaintiffs are not fully familiar with (or have not specifically focused on) all of the potentially available defenses, including affirmative defenses such as the statute of limitations, privileges or workers' compensation exclusivity. It is extremely important, therefore, to seek to obtain helpful admissions concerning such issues prior to the time that defense counsel educates the plaintiff by way of an answer or a motion. Of course, these considerations also apply to obtaining information as to other potential issues relating to the case that may not yet have been asserted by either party.

A wrinkle with respect to the early deposition strategy is whether to include a notice to produce documents. In many cases, a request for document production at the very outset of a deposition might be counter-productive. The request could result in a plaintiff's lawyer not only reviewing the pertinent documents, but also in preparing the plaintiff for the deposition to a far greater degree than if no documents had been requested. An unprepared deponent, of course, may be a more truthful one. Where documents are harmful to a plaintiff's case the plaintiff may testify falsely in his deposition if the documents have not been produced. Significant advantages can accrue when the false testimony is made apparent.

Although plaintiffs' attorneys generally do not attempt to contest or prevent a pre-responsive pleading deposition, some will refuse to cooperate. Many of these attorneys, however, will cooperate once they are notified that the defense intends to seek an *ex parte* extension of time.

Another valuable form of discovery which has had insufficient use in wrongful discharge cases is the compelled psychiatric examination permitted by CCP §2032

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or FRCP Rule 35. Under such procedures, a plaintiff may be required to meet with a psychiatrist and/or psychologist selected by the defense for purposes of assessing the merits of the emotional distress claim routinely included in these cases. A skilled interviewer, working without interference from the plaintiff's counsel may be able to elicit a large amount of pertinent information.

A final thought concerning the securing of information. In cases where an employee previously initiated administrative charges, such as a claim of employment discrimination or an unfair labor practice charge with the NLRB, the employer may be entitled to obtain statements and evidence submitted by the employee at the investigative stage of the proceedings. Obtaining such information pursuant to an informal request can prove helpful.

#### Reinstatement Offer

Surprisingly few plaintiffs in wrongful discharge suits seek reinstatement. Furthermore, in a number of instances, plaintiffs categorically have refused unconditional offers of reinstatement. Many plaintiffs are more interested in large monetary judgments than in returning to work.

An employer may want to seriously consider offering reinstatement to a former employee who has brought a wrongful discharge suit. This might be a good resolution if, in retrospect, the discharge is viewed as improper, deemed unfair but lawful, or overly harsh. The employer also may wish to offer reinstatement simply because it is extremely confident that the offer will not be accepted. In most instances, the offer can be made effectively without prejudice to the employer's position that the discharge was not unlawful.

If turned down, an offer of reinstatement might prove to be highly significant to the defense. Under federal labor law decisions of the United States Supreme Court, an employee loses any right to continuing back-pay upon rejection of an unconditional offer of reinstatement. *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219 (1982). This is true even when the employer has not admitted fault in the original termination and has refused to pay any monetary compensation to the employee for any work time lost. It is likely that California courts will adopt this federal principle into the body of California wrongful discharge law.

An unaccepted offer of reinstatement, therefore, could result in significantly reduced back-pay exposure. As a practical matter, it could also significantly reduce the risk of large emotional distress and punitive damage awards.

#### Responsive Pleading

There is no stock answer to the question of whether to answer, demur, move to strike or move for summary judgment in wrongful discharge litigation. In many cases, a demurrer can be very effective. Trial court judges have closely scrutinized complaints and have not been reluctant to sustain demurrers. (At times, in fact, there seemingly has been a greater reluctance on the part of some judges to grant summary judgment than to sustain demurrers.) Cases have been dismissed or significantly weakened at the early stages of the litigation. The earlier an attempt is made to seek dismissal of all or part of the case, the more likelihood of the case going to trial is reduced. Aside from an evaluation as to a low possibility of success in demurring, considerations for not demurring include legal costs, a desire not to educate the plaintiff as to weaknesses in the case, and a fear that a dismissal on demurrer might lead to a detrimental appellate court decision.

In light of the fact that many plaintiffs are now filing unverified complaints, the option of filing a general denial is frequently available.

Whether or not use of the general denial is appropriate or desirable in a particular case, great care should be exercised in the investigation and preparation of the employer's affirmative defenses. There are a number of defenses which can be waived if not asserted in the answer. Among such defenses are the statute of limitations, statute of frauds, arbitration requirement, various privileges, failure to mitigate damages, workers' compensation exclusivity, federal labor law preemption and the right of rescission.

Some of the potentially available defenses have not yet been considered or ruled upon in reported appellate decisions. For instance, as the result of amendments to the Labor Code effective January 1, 1983, many employer attorneys contend that the "implied" exception to the workers' compensation exclusivity doctrine for claims of intentional infliction of emotional distress, first recognized in *Renteria v. County of Orange*, 82 Cal.App.3d 833 (1978), and refined in cases such as *Hollywood Refrigeration Sales Co. v. Superior Court*, 164 Cal.App.3d 754 (1985), has been legislatively abrogated.

Any attorney handling wrongful discharge litigation also should be familiar with the fact that decisions rendered by administrative agencies which conduct very informal hearings, such as the Unemployment Insurance Appeals Board or Workers' Compensation Appeals Board, may be accorded collateral estoppel effect for or against an employer.

An employer also may want to investigate its legal and factual bases for asserting a cross-complaint against the plaintiff-employee.

Depending on the facts of the case, a well-pleaded cross-complaint could have a salubrious effect on the overall litigation. Such an approach can lead to an increased focus on the employee's conduct, rather than that of the employer, and may demonstrate to an employee that there may be a great downside risk to pursuing the suit.

Bases for potential employee liability can include misappropriation, breach of fiduciary duty and even negligence. A particularly interesting possibility is to investigate whether the employee obtained the job, in the first place, by misrepresenting (or omitting) material facts to the employer. If so, the employer could consider bringing a cross-complaint for fraud. (Even if fired for reasons having nothing to do with this fraud, it also can be persuasively argued, as a defensive position, that the employer has the right to rescind the employment contract and, thus, undercut any of the employee's claims arising from termination of the employment relationship.)

Removal, arbitration, discovery, demurrer and cross-complaint are all strategies to be considered at the beginning of your defense. But they are important initial decisions, because by picking the right strategy you can quickly eliminate the spectre of protracted wrongful discharge litigation which not only can cost your client tens of thousands in legal fees, but potentially far more in an ultimate judgment.

—Steven G. Drapkin

(Author's Note: The California Supreme Court have just agreed to hear *Foley v. Interactive Data Corp.*, supra.)

<sup>1</sup> The concept of arbitration is a very broad concept under the law. For instance, an informal hearing conducted before a committee composed of supervisors and co-employees, with neither party represented by counsel, likely would qualify as an arbitration hearing. See *Painters Dist. Council No. 33 v. Moen*, 128 Cal.App.3d 1032, 1036-37 (1982).

## McDermott

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and he chose Tom, promoted him over a staff of some 20 other writers, and made him editor-in-chief to keep that number one rating. Tom kept it.

The SAMOHI was put to bed every Thursday night in a small, filthy print shop where the student reporters did everything, including set their own type. Tom presided over a group of frantic, semi-literate adolescents trying to produce *The New York Times* by hand in a basement. He rewrote, edited, set type and calmed us all, his manner that of a courtly gentleman presiding over a raucous but familial gathering. He knew how to write, he knew how to edit, he knew how to gain respect yet be gentle and kind. He was 17 years old.

Tom went on to Oregon University, UCLA Law School, the California Attorney General's office and Buchalter, Nemer, Fields, Chrystie & Younger, where he was a partner. He was elected to the American College of Trial Lawyers two years before he died. He was president of the UCLA Law Alumni Association, wrote and lectured for CEB and was a prime mover in this ABTL Report, editing it from 1980 to 1984.

As a lawyer, Tom was tough. I told him once, that he was too tough, tried too many cases that might have been settled. He replied, "That's what my partners tell me, I'm too tough, too stubborn." He paused and grinned. "When I don't settle, I'm not stubborn, I'm right."

Tom's specialty was complex business litigation, but since he seldom talked about his cases with me, I can't give you any war stories. One night he mentioned that he had to finish one of his chapters for the CEB Book on Condemnation. Another time he asked me what I knew about computers because he was beginning to litigate in that area. Three months later he was talking about "source" codes and "object" codes like an old IBM programmer. When we did a CEB program together on contracts, he sprung a theory of damages so imaginative and complex it would have pleased Williston.

We only litigated as adversaries once and I looked forward to the fight perversely. By then I'd known Tom for 20 years and always as a decent, honest human being. But now I'd see his true character, the one that only shows itself when you're down in the trenches. His true character was the same, the one I'd known all along — straightforward, honest, tough, aggressive and ultimately reasonable. By the conclusion of the case, we were closer friends, the issues were resolved and our clients were even speaking to each other again.

Tom was a fine athlete, an expert skier, and a mountain climber. His book on mountaineering, *In the Shadow of the Giants*, was published by A. S. Barnes in 1981 and detailed some of his climbs in the context of alpine feats of the past. In my copy Tom wrote, "So what would Agnew say???" Agnew being our demanding journalism mentor mentioned above. I think I know. He would have said, "Thank God one of you became a real writer."

"Tom was the victor," one of his closest friends said. "He died on a mountain top in a glorious setting on a glorious day, just as he would have wanted — only 30 years too soon."

E. B. White, whose gentle sophistication and well-crafted sentences sometimes remind me of Tom, put it right in *Charlotte's Web*: "It is not often that someone comes along who is a true friend and a good writer."

Tom was a good writer, a good lawyer and a true friend. For those of us who wrote with him, lawyered with him and were friends together, life will not be the same.

—Thomas J. McDermott, Jr.

## Berle

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arship but with his high personal moral code, his personification of the dignity of man.

His contributions of time and effort to the community include Tom's membership on the Los Angeles County Commission of Judicial Procedures and his service as a volunteer referee for State Bar Court, an arbitrator for the American Bar Association, a member of the editorial board of the Los Angeles Bar Journal, and a panelist for Continuing Education of the Bar. Additionally, Tom wrote chapters for CEB publications on condemnation and civil procedure.

Tom was an active member of the University of California at Los Angeles Law Alumni Association and served as its president from 1959-1960. In his memory, a Benjamin E. King Scholarship Fund at UCLA Law School has been established by Tom's family and friends.

When the Association of Business Trial Lawyers was founded in 1974, Tom became one of its early active supporters and participants. He served on several ABTL committees, was a panelist on a number of ABTL programs, and wrote for the *ABTL Report*. Tom was elected to the Board of Governors of ABTL and was an enthusiastic adviser and caring critic to the ABTL leadership. Because of his commitment to the goals of the organization and his interest in written legal scholarship, Tom became the editor of the *ABTL Report*. Under his tutelage, the newsletter expanded its contents and coverage achieving recognition in the legal community among practitioners as well as academicians.

In memory of Tom — and in recognition of his long lasting contributions to the ABTL and legal community in general — the Board of Governors is honored to announce the formation of the Benjamin E. ("Tom") King Memorial Writing Competition. The competition will be an annual event open to all law students from accredited schools in California. Students will be requested to write an article on a topic relating to business litigation — an article between 3,000 and 5,000 words (approximately 15-20 pages) to be written in the conversational, informal style of ABTL articles rather than the formal prose of a law review article.

A three person committee appointed by the President of the ABTL, including the editor of the *ABTL Report*, would then select the winning entry by June 30, 1986.

The author of the winning entry will be invited to the annual ABTL September dinner meeting and presented with the \$1,000 Benjamin E. ("Tom") King Scholarship and a plaque commemorating the award. The winning article will also be published in the *ABTL Report*.

The Board of Governors believes that the writing Competition Scholarship is a fitting tribute to the memory of our brother at the bar, Tom King. We ask those ABTL members who are active in law school alumni associations or are acquainted with current law students to encourage participation in the Benjamin E. ("Tom") King Writing Competition.

—Elihu M. Berle