ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

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Letter from the President

As ABTL enters its nineteenth year, the time is ripe for assessing our organization, its accomplishments, and its goals for the future. That this assessment takes place at an unsettled time for our profession is an understatement.

In this election year, one party's national convention has seen lawyer bashing elevated to an art form (and business trial lawyers can take little solace that much of the ammunition was directed at "tort" lawyers — we practice tort law too!). At the same time, we face a funding crisis on the state and local levels which threatens, in a way not within recent memory, the very operation of our judicial system. And if that were not enough, we face major challenges on how to conduct our litigation practices in the face of a troubled economy and increasing client demands for higher quality services at lower costs.

Richard R. Mainland

Before considering how ABTL can best serve its members in light of these legal/political storms and storm warnings, it is essential to remember the growth and present strength of ABTL. Founded by a small group of foresighted litigators in 1973, the Association has grown into one of the preeminent trial lawyers associations in the state. The central idea of ABTL's founders was sound: that *business* trial lawyers have interests and concerns unique to their practices, separate and distinct from lawyers engaged in other kinds of trial work, and that our business trial practices are enhanced by participation in an organization devoted *exclusively* to concerns of the business litigator.

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INSIDE

Getting Visual Information Before the Jury in the Opening Statement

Your goal is simple: to make your opening statement as credible and persuasive as possible. To do so, you plan to integrate visual material with your oral statement. But what will your trial judge allow?

Twelve local judges answered that question (their views are summarized on page 3). This article provides a summary of the applicable law, together with steps you can take to improve your ability to get visual information before the jury.

Laurence D. Jackson

A Valuable Persuasive Aid

You can place persuasive and credible information before the jurors at their most impressionable moment by using visual aids in the opening statement. The importance of the opening statement has been documented repeatedly by studies finding that 80 to 90 percent of jurors reach their final decision by the conclusion of the opening statement. (Donald E. Vinson & Robert F. Hanley, *Do Not Ignore This Opening Statement*, Litigation, Winter 1989, at 1, 2, 54 and 55.) Jury researchers have found that jurors are inclined to reach a view on the case as quickly as possible. The opening statement is generally the first opportunity to create that view. Jurors then try to fit the evidence presented into the view they have already formed and will resist changing their overall view. Consequently, persuading the jurors in the opening statement can give your client an important advantage.

Visual information in the opening statement can be invaluable in building credibility, simplifying positions, and communicating facts. There can be no better way to build the credibility of your statement of your opposing party's position than to show the jury that position in a blow-up of a letter signed by your opponent.

Jury research has shown that jurors tend to view statements in documents as facts, not as mere evidence of a fact.

Visual aids can simplify your message as well. A graph showing profits turning to losses contemporaneously with the defendants' tortious conduct communicates in one glance causation and damage arguments that could only be conveyed orally with much more effort and attention.

Finally, an oral statement combined with visual aids can be expected to communicate more effectively than an opening state-

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ment that is only spoken. In this age of television and *USA Today*, a visual presentation should both enhance jurors' initial understanding and make the opening statement more memorable.

The Law — Good News and Bad

The first step in planning exhibits is to consider the law that the judge will rely on in deciding whether to allow the visual presentation. The good news is that all reported decisions, both California and Federal, have upheld the trial court's decision to permit the use of a visual presentation in opening statement.

The bad news is that the issue is very much in the discretion of the trial judge. Consequently, it is impossible to predict with certainty whether a particular visual aid will be usable.

The California Code of Civil Procedure specifies the right of both litigants to make an opening statement in Section 607, but does not delineate what is permissible in an opening statement. No California Rule of Court addresses the issue.

Only two reported California decisions have dealt with the use of visual aids in opening statement. In both *People v. Green*, 47 Cal.2d 209, 215 (1956), and *People v. Kirk*, 43 Cal.App.3d 921, 929 (1974), the trial court permitted the use in the opening statements of diagrams and maps that were not admitted into evidence at the time of the opening statement. In both cases, the visual aids were received in evidence during the trial.

On appeal, the California Supreme Court and Court of Appeal found no error in the trial court's decision to allow use of the visual presentations in the opening statements. Neither court had to reach the issue of whether it would have been reversible error to have allowed the use of a visual aid that never came into evidence. Nonetheless, the California Supreme Court commented that "even where a map or sketch is not independently admissible in evidence it may, within the discretion of the trial court, if it fairly serves a proper purpose, be used as an aid in opening statements." 47 Cal.2d at 215.

On the other hand, in the California Judge's Benchbook, Civil Trials, § 3.10(8), judges are advised that visual or demonstrative evidence should not be permitted in opening statement unless it has been pre-admitted into evidence.

The Los Angeles Superior Court Civil Trials Manual § 37.1 prohibits use of charts, photos and other graphic devices in opening statements except when the device has been pre-admitted into evidence, stipulated to, or "when leave of court has first been obtained." No further standard is set forth for when leave should be granted. Blackboards and paper for illustrative purposes may be used in opening statements with prior approval of the court (§ 37.2).

The Federal courts and commentators have scarcely touched on the use of visual aids in opening statements. Treatises by Moore, Wright and Miller, and Weinstein do not address the issue. Only two reported federal court decisions appear to have dealt with it. In *U.S. v. De Peri*, 778 F.2d 963, 978-79 (3rd Cir. 1985), *cert. denied*. 475 U.S. 1110 (1986), the court held that it was not prejudicial error to allow the government to use in its opening statement a chart containing information later received into evidence. In *U.S. v. Rubino*, 431 F.2d 284, 289-90 (6th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971), the court held that it was not prejudicial error to allow the use of a chart in the opening statement that was never admitted into evidence. The chart used a fictitious hypothetical to illustrate upcoming expert testimony.

The case results reflect the wide discretion accorded the trial judge to regulate opening statements. For example, in *De Armas v. Dickerman*, 108 Cal. App. 2d 598 (1952), the court determined that "it was within the discretion of the court to permit the reading of statutes [in opening statement]," while in *Williams v. Goodman*, 214 Cal. App. 2d 856, the court found that the trial court acted within its discretion in prohibiting a discussion of the law in opening statement. Because this is an issue in the discretion of the trial court, the current views of local judges should be of particular value in planning the use of visuals in opening statements.

Steps to Getting Visuals Before the Jury

Overcoming objections and the court's hesitancy to allow visuals requires advance planning, beginning with discovery designed to minimize the largest stumbling block: the lack of foundation objection. Both depositions and requests for admissions can be effective in laying a foundation for some visuals before trial.

A trial readiness conference can be invaluable in pre-admitting visual evidence as well as streamlining other aspects of the trial. Although many courts now hold a status conference shortly before trial, there is no California Rule of Court or Los Angeles Superior Court rule that places on the agenda resolving evidence objections or pre-admitting exhibits. Even local rule nine of the U.S. District Court does not specify that the court will resolve evidence objections at the pre-trial conference.

Nonetheless, there appears to be a trend toward using the final status conference to resolve evidence disputes and pre-admit exhibits. Some counties now require this as part of their local rules. The Honorable G. Keith Wisot, Judge of the Los Angeles Superior Court and an instructor in the trial management course taught at the California Judge's College, suggests in that course that judges use the final status conference for this purpose and require counsel to meet and confer in advance to narrow the issues. The trial management course panel now suggests that visuals be allowed in opening statements provided that foundation objections are overruled in advance as part of such a trial readiness conference. Consequently, even if the local rules do not specify that the court hear evidence objections before trial begins, the judge may be receptive to counsel's suggestion that this be done as part of a trial readiness conference.

Additional steps to overcoming objections include early preparation of visuals and early disclosure to opposing counsel with supporting information. This information should be designed to eliminate foundation objections or make them appear to the judge to be weak objections. Despite the position taken in the California Judge's Benchbook, a number of judges are willing to allow visuals in opening statement in the face of unresolved foundation objections. Consequently, minimizing the force of foundation objections should enhance your chances of being able to use the visual in opening statement.

Finally, consideration should be given to preparing in advance multiple versions of visuals. This may avoid the problem of the court sustaining an objection to one aspect of a visual immediately before the opening statement starts and then barring any use of the entire visual because that one aspect cannot be removed before the opening statement must be given.

—Laurence D. Jackson

Local Judges Polled on Exhibits in Opening Statements

ABTL Report polled 12 local judges to determine their reactions to specific visual aids. The poll results showed consensus on some issues and a diversity of viewpoints on others. Judges of the Los Angeles Superior Court and the U.S. District Court, Central District, reviewed seven visual aids proposed for use in a typical business litigation case alleging unfair competition. The seven aids were designed to raise in varying combinations and to varying degrees some of the typical objections made to visual presentations proposed for use in opening, for example, lack of foundation, improper argument, prejudicial impact and lack of relevance.

Most judges, eight out of 12, would not allow use in opening statements of a blowup of an incriminating memo objected to on foundational grounds, even with counsel's representation that the secretary who purportedly typed the memo, now a disgruntled former employee, would authenticate it. Nonetheless, three judges would allow it, despite a foundational objection based on expert testimony to be introduced during the trial that the typewriting was not done on the former secretary's typewriter. Two of those three judges would read a cautionary instruction to the jury.

Half of the judges would allow use of a blowup of a contract excerpt, a noncompete clause, even over objections to the contract's enforceability and the selectivity of the excerpt. Two of the six judges who would allow it would do so with a cautionary instruction. Three judges wouldn't allow it and three would allow it only if the contract would be determined in limine to be admissible despite the claim that it was unenforceable as an unreasonable restraint of trade.

Seven out of 12 judges would allow use of photos to identify witnesses as part of an organizational chart only if the judge could determine in advance that the photos were not dark or distressful images of the adverse parties and their witnesses. Three judges would not allow photos regardless. The photos were viewed by a number of judges as improper argument due to counsel's selection of the images to be used. Only one judge would allow use of photos without qualification.

A party desiring to use a chart to show losses and projected profits would be stopped by eight of the judges based on foundation objections to the qualifications and methodology of the expert who prepared the chart. Only one of these judges would even allow the part of the chart depicting only past profits and losses.

A proposed chart grouping evidence according to the ultimate issue to be proven with that evidence was rejected by nine of the judges as essentially being an argument of the case and therefore inappropriate for opening. Nonetheless, three judges would allow it.

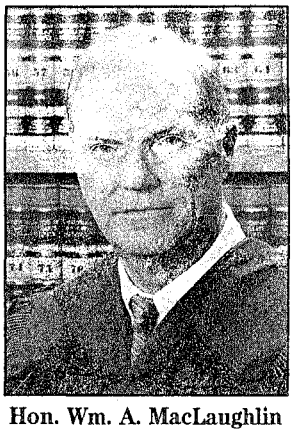
Ten out of 12 judges would prohibit an attorney from demonstrating the difference between two competing products by cutting them open during the opening statement. Many of these judges viewed this as not being a statement of the evidence, but evidence itself.

Nine of the judges would prohibit the showing of a videotaped demonstration of how two competing products performed differently in a staged test. For these judges, the proponent's representation that expert testimony would authenticate the tape could not overcome fundamental objections to the test's fairness and methodology.

—Laurence D. Jackson

Closing Argument In Perspective

A theme is one of the most important elements of the presentation of your case at trial. It is a thread of logic and motivation that is introduced in your opening statement, drawn through the evidence and confirmed in your closing argument. It is the product of the application of an understanding of human nature to your analysis of the issues and evidence and should be chosen carefully to appeal to the logic and instincts of the jury. Properly selected and presented, it can cause the jury, however carefully it abides by the continuing admonition to form no opinions until the conclusion of the case, to want to accept your side of the issues. Juries, and judges as well, want to be fair and won't be particularly impressed by arguments and evidence that don't cause them to *feel* that the conclusion you are urging is fair. Nevertheless, too many attorneys forget this very human decision-making process and focus on issues and details that fail to appeal to a sense of fairness.



Hon. Wm. A. MacLaughlin

Use your opening statement and use it effectively. It is not limited to a sterile recitation of expected testimony but may be a full discussion of the evidence *and* the issues and, thus, can be an effective introduction to your theme which, in turn, should be the beginning of a process that can predispose the jury to your position.

Advance your theme through the evidence. Admittedly, most cases are adventures in which the evidence will sometimes alternately disappoint and surprise you but the consistency of your theme should never be an adventure. It's not always possible to present your evidence chronologically, or in an uninterrupted and narrative manner, because of conflicts in the schedules of witnesses and the court. The facts are often complex and the documentary evidence voluminous and the latter is often presented, either by stipulation or by testimony, without sufficient explanation of its relevance. The sheer volume and length of documents may obscure their relevance and importance, but your theme is the lifeline you've given the jury, and if you remain focused in relating your evidence to it, the jury will have a much greater opportunity to progress with you to the desired conclusion.

It may have been at one time that closing arguments were a distinct, and nearly separate, part of the trial process — a show of brilliance by the orators of the day. In today's world of complex litigation, the opportunities for oratory may be less, but the opportunities for persuasion are perhaps greater because the knowledge gained through discovery permits greater predictability in the evidence and the opportunity to begin selling the logic and appeal of your theme to the audience from the beginning.

If you believe that juries really do not form any opinions on the merits of the case until it has finally been submitted to them, your closing argument may still represent an isolated and last opportunity to persuade. If you believe, as many do, that juries have at least sensed, if not decided, the outcome they seek, the closing argument becomes the last, albeit highly important, step in the process of

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Closing Argument in Perspective

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persuasion. It is the opportunity for you to provide the logic to the jury which will help it justify what you have caused it to want to do, to assure that the evidence has been received in the proper perspective and to confirm your credibility for having delivered what you promised.

To accomplish this, remember that you must retain the jurors' interest in your case and in what you say. To the extent that you failed to do so in the presentation of the evidence, your client's chances of success are diminished, and to the extent you fail to do so in your closing argument, any chance of success could be lost.

Such lost opportunities are often due to a lack of focus in the argument, a failure to limit the details, and a simple failure to entertain. Don't let the other side cause you to lose the impact of your case — bring the theme to a conclusion. In doing so, remember that juries can't possibly retain the details that you've spent several years mastering. Concentrate on the points important to your theme and the evidence that is important to those points. A few clear and concise well-documented arguments will be far more effective than multiple points that drown in detail.

Above all, however, understand that you have an audience to sell. Attorneys are so often eager for the fight, and driven by the need to prevail over their opponent, that they forget to communicate on levels that have meaning to the jury. As a group, they perform a most difficult function, spending day after day listening, but not participating, and often listening to evidence that is repetitive and not readily understandable. No wonder a jury's collective attention span deteriorates. If your closing argument is more of the same, you may lose the effect of what you attempted to build by the evidence.

Talk with them, not at, or to, them. Entertain while you make your points, and the points will often make themselves. Remember the story of Peck, employed as a dockhand on a ship in Lake Michigan, who disappeared. Had he jumped ship or otherwise, unaccountably, disappeared? His heirs claimed that he had been lost overboard and drowned and, in an action to collect the proceeds of a life insurance policy, presented the testimony of a cook from another ship who testified that he had been down in the galley peeling potatoes when he just happened to look out the porthole to see his friend Peck floating by. The cook testified that he told his captain about it a day later.

In his closing argument, the attorney for the insurance carrier, knowing that the outcome of the case rested on the cook's credibility, decided against mere argument to attack the veracity of the person who didn't bother to report the mysteriously missing Peck until a day later. Instead, the attorney set out a trash can in front of the jury, took out a potato from his pocket and began to peel it as he whistled a tune. Looking out of an imaginary porthole he exclaimed, "What is this? If it isn't my old friend Peck. I must tell the Captain about that tomorrow. For now, I'll just peel my potatoes." No further argument was necessary.

At least in general terms, you should have prepared and rehearsed your closing argument before trial as it will assist you in developing the focus on where you're going and how you're going to get there. Throughout the trial, continue to rehearse in your mind the changes and refinements that are necessary to reflect the record so that you make the adjustments necessary to arrive at the conclusions that you gave the jury at the beginning. As you do this, and your argument takes its final form at the conclusion of the evidence, remember that the best argument rarely takes as long as the lawyer thinks it should as your case should have sold itself. Confirm your theme, polish it to give the jury logical reasons to do what you have caused them to want to do, and sit down. Your job is done.

— Hon. William A. MacLaughlin

Letter from the President

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Building on this central idea (and long before MCLE) ABTL put its main focus on educational programs, which have expanded to bimonthly dinner meetings and multi-day annual seminars. Our educational programs continue to draw first-rate attorneys and judges as faculty and attract larger crowds than ever. These programs justifiably enjoy a reputation as the best of their kind anywhere.

We have also succeeded in fostering a collegial atmosphere i which our members, both junior and senior, can exchange views and experiences with each other, and with judicial officers from the state and federal bench. Speaking for myself, these personal, informal interchanges stand out in my memory as some of the best experiences with ABTL. And we continue, of course, to serve our members and the legal community by publication of *ABTL Report*, now a well-recognized publication celebrating its 15th Anniversary, presently under the superb leadership of its editor, Vivian Bloomberg, and other able volunteers.

ABTL has also been active in supporting the justice system, particularly those programs impacting business litigators and their clients. From the outset of the Trial Delay Reduction program in Los Angeles County, ABTL has supported the efforts of "fast track" judges to make the program work, and has actively participated in a Bench-Bar Committee that meets regularly to address concerns of both judges and trial lawyers over operation of this program. ABTL members also serve regularly as settlement officers in the highly successful Joint Association Settlement Officer program (JASOP). The Association's support of the judiciary has been reciprocated, with judges serving on our Board, participating actively in our legal education programs, and attending our dinner meetings.

These core activities of ABTL have made our organization successful. Surely the most telling affirmation of the "ABTL idea" was the founding of the hugely successful Northern California ABTL in 1991, to be followed by a San Diego ABTL this year. But in these tumultuous times, are the traditional ABTL activities enough? Ou immediate past President, Mark Neubauer, thought not, and put new emphasis on ABTL Committees, covering subjects such as Legislative Analysis, Trial Delay Reduction, Alternative Dispute Resolution, Experts, Federal Courts, Insurance and In-House Counsel Relations. These Committees give more of our members an opportunity to participate actively in ABTL and I will strongly support their work this year.

Looking at the history of ABTL, however, it must be said that the Association has had little impact on one major area affecting our members' practices: *legislation and rule-making affecting business litigation.* Significant legislative developments have been enacted, virtually without input from — and sometimes without the knowledge of — ABTL as an organization or our members individually. The *Cumis* legislation (Civil Code Section 2860) enacted in 1987, the 1983 summary judgment statute amendments, and the major changes in California's discovery statute are just a few examples that come to mind. Even more recently, ABTL had little voice in the 1991-92 effort to enact major legislation mandating certain Alternative Dispute Resolution procedures in all state court actions. (Although the legislation failed to pass, it is sure to reappear in modified form.) And, California Rules of Court continue to be proposed and promulgated, affecting matters of concern to us all, such as private-judging and ADR, without meaningful input from ABTL.

My own view is that ABTL must become more involved in th legislative and rule-making process. But we must approach this involvement with recognition of the diversity of our membership. ABTL has never been a close-knit group of like-minded lawyers, as perhaps we imagine the plaintiff's personal injury bar to be. Diversity is one of ABTL's *strengths*, with active members from large

firms, small firms, and sole practitioners, from lawyers who sue insurance companies and those who defend them, from plaintiffs' class action lawyers and members of the business defense bar. In short, there is no "profile" of a "typical" ABTL member other than "business trial lawyer."

At the same time, I believe ABTL *does* represent a membership that has much in common. Our clients, whether plaintiffs or defendants, want their days in court. They want prompt adjudication. They want qualified, motivated judges who care. And they want judges with the time and energy to deal with complex cases of critical importance to the business community. Moreover, many of our clients, while favoring *voluntary* ADR techniques for quick and cost-effective dispute resolution, resent being pressured — subtly or not so subtly — into a parallel justice system where their cases are decided, but at the litigants' expense.

Major forces are at work in today's society that directly impact our professional lives and the interests of our clients, and I believe that ABTL should no longer treat these developments — particularly those in the legislature and the Judicial Counsel — with benign neglect. The need for an ABTL voice is perhaps most dramatically illustrated by the current crisis in the funding of our judicial system. While ABTL's voice may be small when compared with larger, better financed bar associations, I believe it should be heard in support of a system which, with its faults, remains essential to our economy and our system of government.

By this column I would ask for the views of our members on the role ABTL should play in this important arena. Let me have your thoughts!

—Richard R. Mainland

Maui Seminar to Focus on ADR Techniques

ABTL's 19th annual seminar, scheduled for October 23 to 27, 1992, at the Four Seasons Resort on the Island of Maui, will offer timely and important information on alternative dispute resolution techniques.

In these difficult economic times, more and more businesses are demanding that lawyers cut costs by using alternative, and often novel, dispute resolution techniques. Approved for 12 MCLE credits, this ABTL program will explore practical and tactical considerations that can arise in designing and conducting ADR procedures in a complex commercial case.

The faculty of distinguished jurists and trial lawyers will include the Hon. Malcolm M. Lucas, Chief Justice of the California Supreme Court, as well as the Hon. H. Walter Croskey, 2d District Court of Appeal; Eli Chernow, Los Angeles Superior Court; Edward Stern, San Francisco Superior Court; and John J. Zebrowski, Los Angeles Superior Court.

Three teams of trial lawyers will conduct a mini-trial. Before the trial begins, each team will reveal its strategy and a panel of experts will discuss ways to maximize insurance benefits for your client. After the trial concludes, it will be used as the foundation for a settlement conference.

For further information, contact Chrystal Council at (310) 839-3954 or Rose Korkos at (213) 626-3399.

Making Things Stick in Arbitration: Res Judicata and Collateral Estoppel

Res judicata precludes relitigation of *claims or causes of action* which were actually raised, or which could have been raised, in a prior proceeding. Collateral estoppel precludes relitigation of specific *issues* actually decided in a prior proceeding. Both present unique problems in the arbitration context.

First, it is often difficult to determine the exact nature of the claims and issues decided in arbitration proceedings. Arbitration rules typically require that the parties file only limited, "bare bones" claims describing the underlying dispute. Hearings and testimony are not transcribed unless one or more of the parties undertakes to pay for a reporter. Arbitrators are permitted, and sometimes encouraged, to decide cases without making specific findings of fact. Res judicata and collateral estoppel will apply to an arbitration award, however, only if it is possible to determine which claims were before the arbitrator and which issues he or she decided.

Joseph S. Dzida

Second, it is often not possible to resolve an entire dispute in a single arbitration proceeding. Parties to the dispute may not be parties to the arbitration agreement. Though they may be joined as parties in related court proceedings, they cannot be compelled to arbitrate. Furthermore, some arbitration agreements may provide for separate arbitration of different parts of a dispute, or arbitration of some parts but not others. Since the decision in the first proceeding to become final may be given res judicata or collateral estoppel effect in later or concurrent proceedings, the choice of where that first decision is made, and the identity of the parties that will be directly bound by that decision, becomes critical.

This article discusses practical ways to make the theories of res judicata and collateral estoppel actually work in the arbitration context.

General Principles

Both res judicata and collateral estoppel apply to decisions reached in *private* arbitrations under state law. *Thibodeau v. Crum*, 4 Cal. App. 4th 749, 755 (1992) (res judicata); *Sartor v. Superior Court*, 136 Cal. App. 3d 322, 326-28 (1982) (collateral estoppel).

Both doctrines also apply to state judicial arbitrations, where no trial de novo is requested and, as a result, the judicial arbitration award becomes final. *State Farm Mutual Automobile Insurance Co. v. Superior Court*, 211 Cal. App. 3d. 5, 12-15 (1989).

Finally, both apply to arbitrations under federal law. *E.g., C. D. Anderson & Co., Inc. v. Lemos*, 832 F. 2d 1097, 1100 (9th Cir. 1987). However, federal courts, including bankruptcy courts, have discretion in determining the preclusive effect of arbitration proceedings and may refuse to apply res judicata or collateral estoppel where necessary to "directly and effectively protect federal interests." *Hays and Co. v. Merrill Lynch*, 885 F. 2d1149, 1158-59 (3d

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Cir. 1989) (bankruptcy courts may exercise such discretion to promote and protect the policies and federal interests underlying the bankruptcy laws).

If judicial confirmation of an arbitration award would merely be a pro forma exercise, an unconfirmed award may still have preclusive effect. *Thibodeau v. Crum, supra*, 4 Cal. App. 4th at 758-61 (award that was not confirmed due to intervening bankruptcy stay is still entitled to preclusive effect).

An arbitration award, like a final judgment in judicial proceedings, collaterally estops and is res judicata as to the parties to the arbitration, as well as persons in privity with such parties. Successors in interest, assignees, insurance companies, principals and the like all may be in privity with a party to the arbitration, even though they were not formally joined in the arbitration proceedings. See 7 Witkin, *Cal. Proc.* (3d ed.) "Judgment," §§ 287-297 for a discussion of the meaning of "privity."

Strangers to an arbitration proceeding may not assert the res judicata effect of the arbitration award in later litigation brought by or against parties to the arbitration (or persons in privity with such parties). Res judicata prevents relitigation of a claim or cause of action that is " the same" as one already litigated, or one which could have been litigated, in an earlier proceeding. Claims or causes of action involving different parties are necessarily not "the same." 7 Witkin, *Cal. Proc.* (3d ed.) "Judgment," §§ 298-300.

However, unlike res judicata, collateral estoppel may be asserted by such strangers. Collateral estoppel precludes relitigation of issues. It does not require identical parties in each proceeding. It requires only that the assertion of collateral estoppel be made against a party who litigated and lost an issue decided in the original proceeding (or persons in privity with that party).

The assertion is "defensive" when the strangers who assert collateral estoppel are sued by a party who previously litigated and lost the issue. The assertion is "offensive" when the strangers are doing the suing. *Bernhard v. Bank of America*, 19 Cal. 2d 807 (1942) (example of "defensive" collateral estoppel); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (example of "offensive" collateral estoppel permitted at discretion of court when fairness criteria are met).

Just as arbitration awards may be given preclusive effect in *later* litigation, arbitrators, in deciding disputes submitted for arbitration, may give preclusive effect to decisions in *earlier* litigation. As a practical matter, however, arbitrators (who often are not attorneys) may lack knowledge of the principles of res judicata and collateral estoppel and may make errors in applying these principles.

In California, errors of law made by arbitrators in applying these principles cannot be set aside by a court even if the errors appear on the face of the award and even if the errors would result in substantial injustice. *Moncharsh v. Heily & Blase*, 92 Daily Journal D.A.R. 10607, 10609-17 (1992). Federal courts follow a "manifest disregard" standard. An arbitrator's failure to apply properly res judicata and collateral estoppel may be challenged in federal court only if the record reflects that the arbitrator decided the case with "manifest disregard" of the doctrines. *R.M Perez & Associates, Inc. v. Welch*, 960 F. 2d 534, 539-540 (5th Cir. 1992) (mere failure to interpret or apply "offensive" collateral estoppel doctrine to prevent relitigation of damages issue in RICO/securities law violation case did *not* constitute "manifest disregard").

The party asserting preclusion has the burden of proving that a particular claim or issue is identical to one previously arbitrated. *Clark v. Bear Stearns & Co., Inc.*, 92 Daily Journal D.A.R. 7917, 7918 (9th Cir. 1992). However, the party challenging an assertion of collateral estoppel may have the burden of proving that he or she did not have a fair and full hearing on the issue at arbitration. *Universal American Barge Corp. v. J-Chem, Inc.* 946 F. 2d 1131, 1136-38 (5th Cir. 1991) (so holding, but discussing arguments to the contrary); and *Khandar v. Elfenbein*, 943 F. 2d 244, 247 (2d Cir. 1991).

Making a Record

If no adequate record exists of the issues and claims litigated in arbitration, relitigation is always a possibility. Res judicata and collateral estoppel apply to arbitration, but only if it is possible to determine which claims and issues the arbitrator decided. *Clark v. Bear Stearns & Co.*, 92 Daily Journal D.A.R. 7917, 7918 (9th Cir. 1992). Therefore, to make things stick in arbitration, *make a record.*

The best way to accomplish this is to go beyond the minimum requirements of the rules. For example:

- If the rules require only "bare bones" claims, file a more detailed statement of the claim instead.
- In your claim, go beyond a prayer for general monetary relief to request a determination of specific, key factual or legal points (in a manner akin to declaratory relief). An arbitrator's award must "include a determination of all the questions submitted to the arbitrator the decision of which is necessary in order to determine the controversy." Cal. Code Civ. Proc. § 1283.4.
- Request a preliminary hearing or conference with the arbitrator to clarify the issues before trial and memorialize the results in an order or other writing.
- If the stakes justify the expense, pay for a reporter.
- Even though specific findings of fact are not required, explain your need for such findings to the arbitrator and request them anyway. *E.g., Clark v. Bear Stearns & Co., supra,* 92 Daily Journal D.A.R. at 7919, n.4.
- After the award is handed down, request clarification of the award if necessary. Cal. Code Civ. Proc. § 1284 (sets a 30 day time limit for such motions); *Sandler v. Casale*, 125 Cal. App. 3d 707, 713 (1981)(regarding clarification of an award); 9 U.S. C.S. § 11.
- If all else fails, obtain a post-award declaration from the arbitrator if he or she will provide one. Extrinsic evidence, including the affidavit of the arbitrator, is admissible to show what matters were submitted for decision and were considered by the arbitrator. *Sapp v. Barenfeld,* 34 Cal. 2d 515, 523 (1949); *Sartor v. Superior Court*, 136 Cal. App. 3d 322, 327 (1982).

Procedural Strategies

A final decision reached in one forum may be given res judicata or collateral estoppel effect in later litigation in another forum. Therefore, it is sometimes good strategy to seek a stay of litigation in one forum until an issue or claim is resolved in another.

To utilize a favorable arbitrator's decision in a court proceedir seek a stay of the related court litigation pending the final outcome of arbitration proceedings (permitted under Cal. Code Civ. Proc. § 1281.4; 9 U.S.C. § 3).

Similarly, to utilize a judicial decision in a related court arbitration, seek a stay of the arbitration pending the final court decision.

Because arbitration is preferred, however, an arbitration rarely will be stayed. California Code of Civil Procedure § 1281.2 allows such a stay, but only where the other court litigation involves issues that are not subject to arbitration, and the resolution of those issues may make arbitration unnecessary. Federal law does not have a similar statute, but such stays have been granted. *E.g., Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983) (federal court may order stay of federal suit seeking arbitration in deference to parallel state court litigation, but only if there are exceptional circumstances justifying surrender of federal jurisdiction).

Note, however, that a state court's order staying arbitration may be preempted by the Federal Arbitration Act if the dispute involves interstate commerce or some other ground for federal jurisdiction. *The Energy Group v. Liddington*, 192 Cal. App. 3d 1520, 1526 (1987); *Cf. Volt Information Sciences, Inc. v. Board of Trustees*, 489 U. S. 468, 478-79 (1989) (no preemption, however, where parties contracted that their arbitration agreement would be governed by law of state where stay is issued).

To make things stick in arbitration, if possible, join all parties who should be bound by the decision. In order to obtain a single final decision which will be given preclusive effect, separate arbitrations may also be coordinated through consolidation or even class action procedures. Cal. Code Civ. Proc. § 1281.3 (consolidation). *Keating v. Superior Court*, 31 Cal. 3d 584, 608-614 (1982) (class arbitrations) (partially reversed on unrelated grounds in *Southland Corporation v. Keating*, 465 U.S. 1 (1984)).

Finally, potential indemnitors may be bound to the terms of an arbitration award if they received notice and had an opportunity to appear and defend. Cal. Civ. Code § 2778(5) and (6); 14 Cal. Jur. 3d. (3d ed. 1985) "Contribution and Indemnification," §§ 70 and 71. *See also Universal American Barge Corp. v. J-Chem, Inc.*, 946 F. 2d 1131, 1138-1140 (5th Cir. 1991) (the common law practice of "vouching" a potential indemnitor into an arbitration, by giving notice and an opportunity to defend in order to bind the indemnitor to the terms of the award).

Conclusion

Arbitration does not have to become a process "so convoluted in the course of time that no man or woman alive could hope to sort it out," as the Ninth Circuit recently described its potential. *Clark v. Bear Stearns & Co., Inc., supra*, 92 Daily Journal D.A.R. at 7917. With some careful planning and quick scrambling, you can make things stick in arbitration through the application of res judicata and collateral estoppel.

—Joseph S. Dzida

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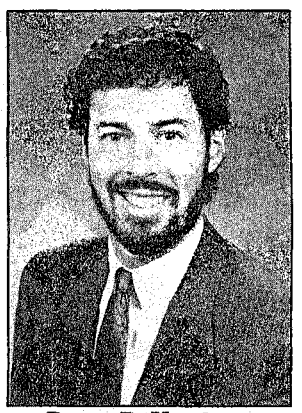
Factors Relevant to Evaluating Current Employee Discharge Claims

With the current state of the economy, many employers find it necessary to cut operating costs by eliminating unnecessary expenses. Because the largest expense found in the budget of most businesses is personnel and payroll expenses, it is not surprising that employers are choosing to reduce costs by eliminating unnecessary positions or, in some cases, implementing company wide reductions in force ("RIFs"). Such staff reductions are generally accepted as lawful and permissible exercises of managerial discretion. *See, e.g., Schneider v. TRW*, 939 F.2d 986 (9th Cir. 1991); *Malstrom v. Kaiser Alum. & Chem. Corp.*, 187 Cal.App.3d 299, 314-15 (1986).



Barry B. Kaufman

However, even economically motivated discharge decisions are not immune from potential "wrongful termination" liability. There are a number of factors which experienced labor attorneys often look to in evaluating whether the decision to lay off or discharge an employee is subject to successful challenge:

1. *Replacement of the Discharged Employee*: Courts generally do not view it as within their province to second guess how employers spend their money. For this reason, legitimate decisions to eliminate staff through layoffs and RIFs are generally not subject to challenge. However, if there are temporary fluctuations in demand for the employer's product or services such that the employer hires a replacement to perform the same (or substantially similar) duties as those that were performed by the laid off employee, the issue arises as to whether the layoff/discharge decision was truly appropriate and necessary.

In such circumstances, the plaintiff-employee's lawyer may argue that hiring a *new employee* to perform the duties that were supposedly unnecessary is flatly contrary to the articulated justification for the discharge — to save money by cutting payroll costs. Hiring a replacement also creates a "fairness" (or, conversely, "bad faith") argument which generally manifests itself in the question, "Why didn't the employer offer to re-hire the laid off employee?"

Lawyers representing plaintiff-employees should also look to whether the employer merely "shuffled the deck" at the time of the layoff by, for example, transferring existing employees to take over the duties performed by the laid off employee, and hiring *new employees* to replace the "transferred" or "promoted" existing employee.

2. *Number of Affected Employees*: The current recession provides most employers with an easy to understand justification for terminating employees — the need to "reorganize" through elimination and consolidation of positions. As noted above, the courts generally find this entirely lawful. Thus, if the prospective client is one of a large number of employees who has been selected for layoff, the burden of establishing "pretext" may be so insurmountable that it makes no practical sense to pursue a "wrongful discharge" claim. On the other hand, if the prospective client is the

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only employee who was selected for layoff, the reasons for that subjective determination may be scrutinized and challenged (*i.e.*, why was that employee selected to be laid off as opposed to some other employee with less experience, qualifications or seniority?). When such triable issues of fact exist, the case becomes one that can withstand summary judgment which, of course, gives it enhanced value.

3. *Existence of Handbook Policies/Employer Practices*: Many courts look to the written policies and handbooks of the employer and construe the promises and representations contained in them to be contractual in nature. *See, e.g., Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 681-82 (1988) (stating that an agreement to limit the grounds for termination may be inferred from the employer's personnel manual or policies); *Hejmadi v. AMFAC, Inc.*, 202 Cal. App. 3d 525, 541 (1988); *Burton v. Security Pacific Nat. Bank*, 197 Cal. App. 3d 972, 978 (1988).

Surprisingly, very few employers have written policies regarding layoffs and reductions in work force. If such written policies are contained either in employee handbooks or in general operating policies (even those not actually distributed to employees), an issue regarding breach of "express" or "implied" contract may arise if the employer fails to satisfy the standards articulated in those policies. Such provisions when excerpted from the employer's handbook make wonderful jury exhibits. The plaintiff can have them blown up on 4' by 6' posters with highlighting to mark the promises that were not fulfilled.

4. *Existence of a Protected Classification*: Various state and Federal statutes protect employees from discrimination on the basis of protected classifications such as race, ancestry, religion, national origin, physical handicap, gender, age, medical condition or marital status. In light of the elimination of tort damages to remedy routine employment discharges (*see Foley v. Interactive Data Corp., supra*, 47 Cal. 3d at 663, 700), lawyers representing the plaintiff-employee should examine whether potential statutory discrimination liability may be present. Such claims may add substantial value to the case through the availability of emotional distress damages and punitive damages under the newly-enacted Civil Rights Act of 1991 and the California Fair Employment and Housing Act. *See Commodore Home Systems Inc. v. Superior Court*, 32 Cal. 3d 211, 220-21 (1982).

5. *Length of Employment*: Obviously, the longer an employee's tenure, the more likely it is that termination may be viewed as unfair. Juries are often sympathetic to the 15-year or 20-year employee who, despite years of dedicated service, suddenly finds himself or herself unemployed and faced with the prospect of locating a new job in this economy.

6. *Employee's Performance History*: The *Foley* decision reaffirmed the principle codified in Labor Code Section 2922 that all employment in California is presumed to be "at will" unless the parties have reached some other agreement. In practice, an "at will" defense has not provided much protection for employers from wrongful discharge suits ever since the 1981 decision in *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981). There, the court articulated several factors from which the existence of an implied contractual obligation to not terminate without "good cause" may be found to modify the original terms of the employment agreement. Plaintiff's lawyers may rely on *Pugh* in arguing that, even though the original employment may have been "at will," there subsequently arose an implied "good cause" requirement.

As noted above, economic layoffs and RIF's generally satisfy a "good cause" standard. However, most businesses typically suffer from the inability of their supervisory and managerial level employees to document cases of non-performance by their subordinates. This often creates disputes about whether the plaintiff-employee was ever counselled or warned about the "performance problems" which the employer claims were the reasons for (or a factor in) the decision to select that particular employee for layoff or discharge.

7. *What Did the Employee Sign*? If an employee signed an express "at will" acknowledgment during the course of his or her employment providing that the employment could be terminated "at any time, for any reason," and that no contrary arrangement could be entered into "without an express written agreement signed by an authorized officer of the company," any breach of contract claim may be precluded by the parole evidence rule. This issue often depends on whether the writing signed by the employee was an "integrated" document. *See, e.g., Malstrom v. Kaiser Alum. & Chem. Corp., supra.* Such "at will" acknowledgments provide no defense, however, to claims for statutory discrimination or "wrongful termination in violation of public policy."

8. *What Did the Employer Say*? To the extent that the employee was promised certain things at his initial employment interview or during the course of his employment which turn out to be untrue, the employee may assert a claim against the employer for fraud, negligent misrepresentation and, of course, breach of contract.

What management tells the discharged employee when he or she is informed of that decision may also influence the potential exposure of the employer. If a supervisor tells the employee that he or she is being terminated because the position is being "eliminated," it is natural to expect that no one else will occupy that position now or in the future. However, if someone else is hired to fill the same position a few months later, the discharged employee will believe that the employer lied about the reasons for termination. Thus, the employee could have a basis for contending that the articulated justification was but a "pretext" and the "real reason" was unlawful discrimination.

9. *Ability to Sustain Burden of Proof*: Some of the best cases on their face end up being disposed of through summary judgment if the employee cannot come forward with documents or other witnesses to corroborate his position. A knowledgeable plaintiff's lawyer will not find particularly appealing a case that boils down to his client's word versus the employer's word since the employer can generally offer several witnesses to support the company's position. Thus, employees who are well liked amongst their peers are often best situated as prospective plaintiffs in employment disputes. They can produce other witnesses to substantiate the broken promises and representations allegedly made to them.

10. *Public Policy Concerns*: Since the Supreme Court defined the tort cause of action for wrongful termination in violation of public policy in *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167 (1980), it has been important to ask whether there is a possibility that the motivation for the layoff/discharge decision was to silence a whistleblower — that is, to stop an employee from reporting unlawful activities of the employer.

11. *Plaintiff's Economic Damages*: Generally, most employees who consult a lawyer in connection with a possible wrongful discharge suit want the attorney to take their case on a contingency fee basis. Obviously, the emotional distress and punitive damage that may be available to the successful plaintiff as remedies for discrimination or public policy claims are impossible to predict or quantify with any degree of certainty. Because many employment cases settle for some measure of lost wages and benefits, it is important to examine the prospective client's provable economic

damages to determine whether the case is worthwhile to pursue.

12. *The Possible "Grudge" Factor*: Sometimes, employment lawsuits are filed not because the employer did anything wrong but because the employer did something (even unintentionally) which gives the impression that the employer just doesn't care about the affected employee. Consequently, the employee may be motivated to get even with the employer for taking an adverse action against him. Other times, plaintiffs may be motivated to file a lawsuit in the hopes of getting a windfall through a large wrongful discharge judgment.

Unfortunately, even experienced plaintiffs' lawyers can be duped into accepting representation based on the one-sided story painted by his client. For this reason, it is critical that counsel explore whether there may be some "hidden agenda" behind the prospective client's interest in securing legal representation in an employment lawsuit.

All employment cases are different and require analysis on a case-by-case basis. This article highlights some of the factors that may create liability issues in employment layoff or discharge cases. It is important to remember it does not provide an exhaustive list of other considerations unique to the particular employment situation.

—Barry B. Kaufman

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The Anti-Competition Clause in the Legal Context

Throughout the United States, practitioners of almost every business and profession may agree to be bound by, and will be held to, reasonable contractual restrictions on the conduct of their business or profession after their withdrawal from a business or professional partnership to compete against their former partners. *See Business Torts Reporter*, Vol. 4, No. 5, pp. 147-148. Only attorneys are exempt from such restrictions. In California, Rules of Professional Conduct, Rule 1-500, renders unenforceable any partnership or other agreement expressly restricting an attorney from practicing law upon withdrawal from a law partnership. Moreover, two recent California Appellate decisions have considered the question of whether Rule 1-500 also voids withdraw-and-compete restrictions in attorney partnership agreements which do not expressly prohibit competition, but which involve only economic disincentives such as forfeiture of partnership benefits in the event of subsequent withdrawal to compete.

Joel Mark

In *Haight, Brown & Bonesteel v. Superior Court*, 234 Cal.App.3d 963 (1991), the Second District Court of Appeal held that economic forfeiture clauses in law partnership agreements are permitted under Business and Professions Code § 16602, in the same general manner as they are appropriate with respect to other business and professional partnerships, and concluded (as virtually a singular voice against a sea of opposite authority) that a clause in a law partnership agreement which provided for the forfeiture of certain economic benefits by any partner who withdraws to compete does not violate Rule 1-500 unless it is proven as a matter of fact that the forfeiture is so significant that it operates to prohibit the withdrawing partner from *all* future practice.

An opposite result was then reached by the Fourth District Court of Appeal in *Howard v. Babcock*, 5 Cal.App.4th 1561 (1992). In a decision accepted for review by the State Supreme Court, the Fourth District held (consistent with the vast majority of other jurisdictions) that any forfeiture of economic benefits, upon withdrawal from a law partnership to compete, violates Rule 1-500 as a matter of law. As Justice Sonenshein wrote for the Court: "For several reasons, we believe *Haight* is wrong....Lawyers cannot be treated the same as business people or other professionals."

This article dares to ask, along with the *Haight* Court: Why not?

The central premise upon which the *Howard* decision is based is that the business of lawyering is entirely different from all other economic pursuits. Justification is invoked from no less a preeminence than Abraham Lincoln, who observed in perhaps a more pastoral time in our history, that lawyers, unlike any other group of professionals, have only their time and advice as "stock and trade." Lawyers cannot be compared with other professionals, such as doctors and accountants, because they can sell no goodwill, and

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because of the "personal and confidential relationship existing between [lawyer] and...client [which] places...a [law] partnership in a class apart from other business and professional partnerships." Apparently, any economic disincentive visited upon withdrawing partners would so profoundly impinge upon the rights of clients to choose their lawyers that all such provisions are void as against public policy as a matter of law.

The courts, denying enforcement of withdraw-and-compete forfeiture clauses in law partnership agreements, have not failed to recognize that the remaining partners have legitimate economic reasons to enforce such clauses; but, these courts nevertheless have denied enforcement because they have concluded that such clauses would place an impermissible chill upon the right of the client to choose counsel, a right which is said to far outweigh the legitimate economic interests of the remaining partners (*see, e.g., Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95, 550 N.E.2d 410 (1989), and because the firm has no protectable property interest in its clients which the court can enforce (*see, e.g., Williams & Montgomery, Ltd. v. Stellato*, 195 Ill.App.3d 544, N.E. 2d 1100 (1990)).

The rationale for denying enforcement of withdraw-and compete forfeiture clauses against attorneys is well-intentioned and appealing, especially to the departing lawyers; but, is it any longer consistent with modern economic realities affecting the legal profession?

In an era when lawyering is more and more practiced as a business, are lawyers in fact "a class apart" from all other professionals who provide personal and business services to their clients? Other professionals bring to their practices the same notion of "professionalism" as do members of the legal profession; clearly, lawyers have no monopoly on nobility in their professional pursuits. The ethical obligations which physicians embrace, such as their Hippocratic oath, require them to refrain from abandoning their patients, just as legal ethics prohibit abandonment of clients by lawyers. Clients of other professionals, such as doctors and psychologists, also enjoy by law a "personal and confidential relationship," just as they enjoy with members of the legal profession. Evidence Code §§990, 1010. Neither do other professionals have any greater "stock and trade" than do lawyers; all essentially are in service businesses and attract clients as much by their personal skills and reputations as by any other means. And, can it be argued seriously that the personal and business pursuits which bring clients to other professionals, such as doctors, accountants and architects, are somehow less important as a matter of law than the affairs for which legal advice is sought. In fact, they most often are the identical pursuits.

Recent economic changes affecting the business of practicing law also have brought about changes in the laws regulating lawyers, which changes have recognized that lawyers are not "a class apart" from other professionals. In at least one jurisdiction, the District of Columbia, attorneys now are accorded a limited right to be in partnership with non-lawyers. California permits non-lawyers to own stock in law corporations, and several other jurisdictions also permit non-lawyers to be officers or shareholders of professional law corporations, including Illinois, Oklahoma, Washington and Kentucky.

It also is interesting that some of the same courts which have refused to enforce withdraw-and-compete forfeiture clauses against lawyers nevertheless have recognized in numerous other contexts that lawyers are not that much different from other professionals. Goodwill in a law partnership was recognized in *In re Marriage of Green*, 213 Cal.App.3d 14 (1989). Attorneys for some time have been subject to a statute of limitations similar to other professionals (*see Neel v. Magana*, 6 Cal.3d 176 (1971)) and, consistent with other professionals generally, lawyers recently have been held liable for emotional distress caused by their negligence (*see Juday v. Rotunno*, 225 Cal.App.3d 1571 (1990)) and have seen their self-regulatory ethical canons become admissible as evidence of their negligence. (Compare *Mirabito v. Licardo*, 232 Cal.App.3d 96. (1992), with *Wilhelm v. Pray, Price, Williams & Russell*, 186 Cal.App.3d 1324 (1986).)

If there is any trend in all of this regulatory and judicial activity, it would appear to be away from the notion that lawyering is "a class apart" from other service businesses, not toward it.

Furthermore, is the client's right to effective counsel really violated by withdraw-to-compete forfeiture clauses?

In Lincoln's day, when lawyering was more the noble profession than its critics would give it credit for today, and when a state such as Illinois may have had only 50 lawyers, perhaps every lawyer was unique. No doubt lawyering remains an honorable profession and litigators, in particular, are the last of the great knights in service to justice. But if there has been one palpable change in the profession in the last 20 years it is the proliferation of these knights to a staggering number.

Lawyers seemingly outnumber practitioners of almost all other professions. Clients are seldom left without alternatives when it comes to selecting a lawyer.

Additionally, even if the clients' choices are affected adversely, do the rights of the clients of the withdrawing partner truly outweigh the economic rights of the remaining partners so as to justify their entire nullification?

While the right to effective counsel is a fundamental right, the right to a particular lawyer is not.

Avoidance of the appearance of impropriety, even in the absence of an actual conflict of interest, has denied many clients the representation of the first counsel of their choosing. *See, e.g., Truck Ins. Exch. v. Fireman's Fund Ins. Co.*, 92 Daily Journal D.A.R. 690 (1992). In the area of insurance defense, Civil Code §2860(c) limits the insured's choice of counsel by limiting the hourly fees that insurers must pay to independent counsel. What is that limitation if not an economic disincentive which limits the right of the insured to choose particular counsel?

A final premise invoked in support of decisions such as *Howard* is that, if the courts permit restrictions upon the withdrawing partner, they improperly would recognize that the remaining partners have a property right in the firm's clients. In other words, these courts seek to ignore the modern reality that attorneys move from one firm to another by selling their "book of business." The bigger and more portable the better.

Can the courts continue to ignore the double detriment suffered by the remaining partners? They not only lose the withdrawing partners' clients, but also the opportunity to accept representations adverse to those clients.

In fact, neither side in the dissolution has any "right" to the clients. *See* State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 1985-86; Los Angeles County Bar Association, Formal Ethics Opinion No.

405. The choice should be for the client to make, wholly apart from the economic detriment to either side. Thus, the *Haight* Court may be correct in concluding that economic disincentives are void only when they are so severe that they operate to prohibit competition upon withdrawal altogether, but not when the impact is merely to cause the withdrawing partner some economic discomfort upon withdrawal to compete.

The *Howard* case now is before the California Supreme Court and the same issue is currently before New York's highest court. When this issue is considered by these courts, their opinions should and must address the fundamental question of whether it is appropriate any longer to apply a different standard to the legal profession than to all other businesses and professions.

When any professional withdraws, restrictions on competition will visit some detriment upon the professional's clients. But partnership agreements with such clauses have been upheld and enforced in virtually every other professional setting. Perhaps it is time for lawyers to admit that they are not a class apart from the rest of the business world.

—Joel Mark

Cases of Note

Insurance

CGL insurers won a long-awaited victory in *Bank of the West v. the Superior Court of Contra Costa County*, 92 Daily Journal D.A.R. 10597 (July 30, 1992). The California Supreme Court ruled that the typical comprehensive general liability insurance policy does not provide coverage for advertising injury claims arising under the Unfair Business Practices Act (Bus. & Prof. Code §§ 17200, *et seq.*).

The Second Circuit Court of Appeal provided needed guidance regarding the scope of the duty to defend in *Montrose Chemical v. Superior Court*, 92 Daily Journal D.A.R. 10154 (July 22, 1992). The court held that there is no duty to defend where extrinsic facts conclusively eliminate any potential for coverage, even where the complaint may suggest that potentiality. In so holding, the court rejected decisions which have been interpreted as requiring the insurer to defend if the complaint suggests the basis for a duty, even if factual investigation seemingly eliminates that prospect. (*See CNA Cas. v. Seaboard Surety*, 176 Cal. App. 3d 1 (1986).)

Discovery Sanctions

Attorneys refusing to extend professional courtesies to opposing counsel in the scheduling of discovery should beware that they may be sanctioned under Code of Civil Procedure § 128.5. The First District Court of Appeal recently affirmed an award of sanctions in *Tenderloin Housing Clinic, Inc. v. Sparks*, 92 Daily Journal D.A.R. 10397 (July 29, 1992). There, counsel: (1) scheduled three discovery motions to be heard at a time when he knew opposing counsel would be unavailable; (2) scheduled depositions on days when he knew opposing counsel would be out of the country on a long-planned vacation; (3) failed to produce witnesses for depositions after he forced opposing counsel to return from her vacation early to attend dispositions; and (4) reset a hearing in violation of a stipulation so that the opposition to the hearing would be due while opposing counsel was out of the country. In upholding the sanctions award (which included the costs incurred by opposing counsel in returning from her vacation early), the court noted that an attorney has an obligation not only to protect his client but also to respect legitimate interests of fellow attorneys. Thus, even if an attorney uses legitimate discovery procedures, but *times* them to be intentionally inconvenient, he may be sanctioned for harassment under Section 128.5.

Trial Procedure

In *Tongil Company, Ltd, v. The Vessel "Hyundai Innovator"*, 92 Daily Journal D.A.R. 9544 (9th Cir., July 9, 1992), the Ninth Circuit held that the proponent of business records at trial must establish applicability of the business records exception to the hearsay rule by an offer of non-hearsay testimony. During a bench trial at which no live witnesses appeared, the District Court allowed the plaintiff to establish the foundation for numerous business records by submitting two declarations. In reversing judgment in favor of the plaintiff, the Ninth Circuit held that the trial court erred in admitting the declarations (which were themselves hearsay) and the business records.

Attorney Malpractice

Mary Lee Wegner

In *Laird v. Blacker*, 2 Cal. 4th 606 (1992), the California Supreme Court held that Code of Civil Procedure § 340.6(a), the one-year statute of limitation for attorney malpractice, is *not* tolled during the time when a client appeals the underlying judgment on which the claim of malpractice is based. The court rejected plaintiff's contention that the statute of limitations was tolled until her injury (the dismissal) became "irremediable." The court noted that a plaintiff sustains "actual injury" when she suffers entry of an adverse judgment or a final order of dismissal.

The Ninth Circuit held that a lawyer has a duty of care to act competently to discover and prevent harm to the public caused by his client's misrepresentations. *Federal Deposit Ins. Co. v. O'Melveny & Meyers*, 92 Daily Journal D.A.R. 9067 (9th Cir., June 30, 1992). The court reversed the District Court's entry of summary judgment in favor of the law firm defendant, rejecting O'Melveny's argument that it had no duty to uncover and reveal its client's fraudulent activities. The court held that there was a material issue of fact regarding the firm's duty to correct false and misleading statements made by the savings and loan to potential investors. The court also held that the FDIC was not estopped by the doctrine of unclean hands from litigating its claim against the law firm because the inequitable conduct of the savings and loan could not be imputed to the FDIC as a receiver.

Emotional Distress

The California Supreme Court held that a mother can recover damages from her doctor for negligent infliction of emotional distress caused by injuries to her child during labor and delivery. *Burgess v. Superior Court*, 92 Daily Journal D.A.R. 9608 (July 13, 1992). A mother whose child experienced severe brain damage during labor and delivery sued her attending physician, claiming that the doctor's negligence had caused not only the baby's injuries, but her distress as well. The trial court granted summary adjudication in favor of the doctor, concluding that the mother could not recover as a "bystander" to the injuries under *Thing v. LaChusa*,

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48 Cal.3d 644 (1989), because she had been under anaesthesia when the injuries occurred. The appellate court vacated the adjudication, holding that *Thing* was not controlling because the doctor had a preexisting duty to the mother. In allowing the plaintiff to pursue her cause of action, the Court found that the doctor had a preexisting duty to both the mother and the baby and that a doctor's allegedly negligent treatment of a baby during labor and delivery necessarily implicated the mother's participation. Thus, the mother was not required to prove that she was a qualified "bystander."

Liability of Corporate Officer

In *Dubravetz v. Pillsbury, Inc.*, 92 Daily Journal D.A.R. 10177 (July 23, 1992), the Ninth Circuit held that, under California law, a corporate officer may be personally liable for damages in tort to the extent he participated in or otherwise directed the tortious activity. The plaintiff in Dubravetz claimed that the president of Haagen Daz and various corporate entities had violated RICO and the New York Franchise Sales Act and had committed fraud by misrepresenting to the plaintiff the start-up and operational costs associated with the purchase of a Haagen Daz franchise. Although the District Court granted summary judgment to most of the defendants, the Ninth Circuit reversed, finding that there was at least a material issue of fact as to whether Haagen Daz' president knowingly participated in a conspiracy to supply false information to plaintiff about the anticipated profitability and costs associated with the purchase of a franchise.

Punitive Damages

Only July 23, 1992, the California Supreme Court agreed to review the decision of the Court of Appeal in *Wallersheim v. Church of Scientology*, 4 Cal. App. 4th 1074 (Mar. 20, 1992), to uphold California's procedure for reviewing the propriety of punitive damages and reduce to $2.5 million a $30 million award in favor of the plaintiff, a former Church of Scientology member, for the Church's alleged infliction of emotional distress. (Review granted at 92 Daily Journal D.A.R. 10282 (July 23, 1992).) In *Wallersheim*, the Court of Appeal, in a case on remand from the United States Supreme Court, noted that California's punitive damage review process complies with Federal constitutional due process requirements in that it requires the reviewing court to examine: (1) the degree of reprehensibility of the defendant's conduct; (2) the relationship between the amount of the punitive damage award and the actual harm suffered; and (3) the relationship of the punitive damage award to the defendant's financial condition.

In *Central Pathology Service Medical Clinic, Inc. v. Superior Court*, 92 Daily Journal D.A.R. 10744 (July 31, 1992), the California Supreme Court held that the punitive damage limitations set forth in Code of Civil Procedure § 425.13 (a), which are applicable to medical malpractice actions, also extend to intentional torts arising out of the rendition of any medical service. Section 425.13(a) requires a plaintiff claiming damages for a health care provider's alleged professional negligence to obtain an order from the trial court allowing the filing of a punitive damage claim. The statute further provides that such an order will issue only when the plaintiff has proved a likelihood of success on the merits by submission of affidavits showing a substantial probability of success. In so holding, the Supreme Court specifically disapproved *Bommareddy v. Superior Court* (which had ruled that Section 425.12(a) did not apply to intentional torts).

Professional Liability

In a stunning victory for accountants, the California Supreme Court ruled that auditors owe no general duty of care to non-clients. *Bily v. Arthur Young & Co.*, 92 Daily Journal D.A.R. 11971 (Aug. 27, 1992). The Court overturned a $4.3 million judgment in favor of investors in the Osborne Computer Corp., viewed as a high-flying investment opportunity in 1983, until its bankruptcy in September of that year.

Plaintiffs in the case claimed that they relied on audits by Arthur Young & Co. (a Big Six accounting firm that has since merged into Ernst & Young).

Regardless of whether the accounting firm was negligent, the Supreme Court held that the plaintiffs were not entitled to judgment because they were not owed a duty of care. Thus, the state Supreme Court reversed a 30-year trend toward increased liability for professionals in California.

The Court carved out two exceptions to the auditor's general immunity from liability to non-clients. First, an auditor can be held liable for negligent misrepresentation to a plaintiff who relies on a report intended to be used in a particular transaction. Second, any reasonably foreseeable third party can sue for intentional fraud.

Torts

In twin decisions, the California Supreme Court held that the assumption of the risk doctrine barred recovery for injuries suffered in a touch football game and a water skiing accident. *Knight v. Jewett*, 92 Daily Journal D.A.R. 11765 (Aug. 24, 1992) (touch football); *Ford v. Gouin*, 92 Daily Journal D.A.R. 11785 (Aug. 24, 1992) (water skiing). The continued vitality of this doctrine had been questioned in light of the Court's adoption of comparative negligence 17 years ago in *Li v. Yellow Cab*. The scope of the doctrine is still unclear because of the Court's murky opinion which led Justice Kennard to pen a sharply worded dissent, stating that the majority effectively abolished the defense without acknowledging that it was doing so. (92 D.A.R. at 11776-77.)

The Court criticized appellate courts which have drawn a distinction between plaintiffs who reasonably encounter a known risk and those who unreasonably encounter such a risk. Instead, the Court instructed that the distinction should be drawn between cases in which the defendant has no duty of care (termed "primary assumption of risk") and those where the defendant owes a duty of care but the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty (termed "secondary assumption of risk"). (92 D.A.R. 11769.)

Where there is primary assumption of risk—that is, where the defendant owes no duty of care—the defense operates as a complete bar to recovery, regardless of whether the plaintiff's conduct was reasonable or unreasonable. Where the defendant owes a duty of care, the case would involve contributory negligence and would be merged into the comparative fault scheme. (*Id.*)

Sanctions

A substantial sanction of $20,000 was awarded against defendants for attempting to appeal an interlocutory order. *Papadakis v. Zelis*, 92 Daily Journal D.A.R. 11728 (Aug. 24, 1992). The court required payment of $10,000 to the plaintiff and $10,000 to the clerk of the court to cover costs and for purposes of deterrence. Previously, sanctions of $10,000 had been awarded against the same defendants.

— Mary Lee Wegner