

ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

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Letter from the President

Those of you who attended our February 6 dinner meeting were made aware by Judges Hupp, Stotler and Takasugi of the important changes contained in the pending amendments to the Local Rules for the Central District of California. These amendments, and particularly proposed Local Rule 6, follow the trend of expanded early pretrial disclosure exemplified by recent federal rules amendments, some of which were not "opted into" by this district when they were originally enacted. The local and federal rules changes, taken together, will undoubtedly have a significant impact on the way in which business litigators handle their litigation in federal court.

As currently proposed, Local Rule 6 requires that, at the early meeting of counsel, the parties exchange the names and addresses not only of all individuals with knowledge of the facts supporting the allegations of the pleading, but those with knowledge which rebuts the material allegations of the pleadings filed by the opposing party. The obligation to disclose such rebuttal evidence has also been extended to the identification of documents. Any party claiming damages is required to provide a computation of the amounts, along with documents or other evidentiary material on which it is based. Insurance policies which provide for indemnification or reimbursement of any judgment must also be identified. All of these disclosures must be made in writing, signed by an attorney of record, and served on all other parties. The obligations to disclose witnesses and documents are continuing, and sanctions are available for violation of the rule, including witness or evidence preclusion. Finally, the rule provides that no party may seek discovery from any

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A Mediator's Thoughts on How to Mediate More Effectively

In a mediation, the parties and their counsel attempt to negotiate a voluntary agreement to settle an existing dispute. Professor Roger Fisher, Director of the Harvard Negotiation Project, defines a "good outcome" of a mediation as either:

1. no agreement, or
2. an agreement, which contains the following elements:
 - a. the result is better for each party than the alternative of continuing the dispute,
 - b. the result satisfies the substantive interests of the various parties (however defined), at least acceptably,
 - c. the agreement embodies an elegant solution that is the best among the options considered,
 - d. the process was credible: no participant feels taken advantage of, and
 - e. any commitments for future action are realistic and legally enforceable.



Lester J. Levy

Although some would view this as a rather lofty wish list, experience has shown that these goals are achievable. Keeping these elements in mind as you prepare for and participate in the mediation can increase the chances that the result will be favorable to your client.

Prepare to Negotiate

Mediation is a powerful tool, which, if successful (as more than 80% are), will lead to a settlement. Thus, the result of a mediation can be as significant as the conclusion of a trial or the grant of a motion for summary judgment. Mediation, therefore, warrants a comparable level of preparation.

Preparing to mediate, however, differs from trial preparation in a few key ways. First, you are preparing to *negotiate*, to attempt to persuade the other side of the superiority of your case and your solution. Second, mediation requires that all parties agree to a particular settlement. The proposed agreement must, at a minimum, satisfy certain fundamental interests of the opposing parties — whether purely financial (*e.g.*, the net settlement amount), business-related (*e.g.*, the retention of certain valuable contracts) or emotional (*e.g.*, the need for an apology or some recognition of fault by the other party). The art of mediating

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effectively includes not only fine advocacy, but the ability to craft winning solutions that are acceptable to opposing parties. Some would say that this is the essence of good lawyering.

Assess the Case From Your Adversary's Point of View

To fully prepare for mediation, one needs to gather as much information as possible about the perspectives of opposing clients and counsel. Some of the most effective mediative presentations that I have witnessed discuss the other side's views and respond to them before making an offer or proposal for settlement.

The following is a checklist of questions to consider:

1. Who on the other side is the key decisionmaker?
2. Is there someone on your side who could best communicate with that person?
3. Why has your opponent chosen mediation?
4. How do they view the case? If you believe there to be important misconceptions on their part, how can the mediation serve to educate them (*e.g.*, with expert presentations)?
5. What financial, business or personal interests must be met for there to be an agreement?
6. Are there particular issues or impediments to settlement that need to be addressed before an agreement can be reached?

Make Sure that All Necessary Decisionmakers Will Be Present

For a mediation to conclude as efficiently as possible, all necessary decisionmakers should be present to hear the presentations and proposals, evaluate offers and demands and formulate responses. Having important decisionmakers on telephone standby is extremely inefficient and can prevent the parties from reaching closure. In a recent mediation of a wrongful death claim, the parties agreed that the insurer for the defendant located on the east coast — a critical party — could participate by telephone. The mediation proceeded expeditiously (on the west coast). As sometimes occurs in mediation, the defendant indicated that it would not increase its offer until the plaintiff reduced its demand below a certain dollar figure. This was done to communicate to the plaintiff the defendant's view of the range in which the case could settle. It was also done to stop the symmetrical movement toward the mid-point between the last offer and demand. After much deliberation, the plaintiff acceded to the defendant's request and reduced its demand accordingly.

Unfortunately and unbeknownst to the parties at the mediation, the defendant's decisionmaker in the east was no longer reachable (it being 6:00 p.m. there) and the negotiations ground to a halt. With the defense unable to increase its offer, all parties were extremely frustrated. The plaintiff felt betrayed, questioned the credibility of the process and reconsidered its reduced demand. Although the case settled several days later, a lot of unnecessary time was spent "smoothing over" the effect of that unfortunate turn of events and bringing the parties back into the negotiation.

Prepare Important Contractual Language in Advance

Where it is likely that specific contractual language will be necessary to settle a case, it can be extremely helpful to prepare that language in draft form and introduce it at the appropriate time in the mediation. For example, agreeing on the scope of a release can be one of the most difficult parts of settling a complex case, so don't wait until the end of the mediation to draft and present your proposed language to the other side.

The scope of release and indemnity provisions are often raised at the tail end of lengthy negotiations, when the parties believe that a settlement in principle has been reached. Beyond the disappointment and inconvenience of returning to the bargaining table to negotiate this significant and often emotionally-charged term, introducing the release at the end of a negotiation can severely jeopardize the settlement. It can cause the parties to backtrack in their negotiating positions and lead to renegotiation of previously "settled" issues in exchange for the requested release. At worst, it can terminate settlement discussions after hours, perhaps days, of negotiation.

For example, in a recent mediation, the parties spent two days negotiating the financial aspects of a settlement. The defendant's request for indemnity at the end of the second day of negotiation was met with cries of "we never contemplated indemnifying you for this; we have been negotiating over a release, not indemnity." The request for indemnity sent the negotiations into turmoil with the parties accusing one another of bad faith bargaining. Although an agreement was ultimately reached, it took weeks of additional discussion. Had indemnity been raised earlier as part of the defendant's "substantive" settlement proposals, the plaintiffs could have evaluated it in the context of the other terms. This would also have avoided the inefficiencies in reaching closure and the breakdown of communication that resulted from the perception that a new term was raised at the end of the negotiating session.

By contrast, in another recent mediation, the scope of the release and its settlement value were negotiated throughout the mediation. In that insurance coverage dispute, the insured offered to settle its claims against various carriers for different amounts depending on the breadth of releases provided. The inclusion of the release as a substantive deal point throughout the negotiation provided an analytical framework for the discussions and avoided the surprise of injecting a new term at the eleventh hour.

Opening Presentations Should be Directed to the Opposing Parties

Most mediations begin with a presentation by each party representative that lays out that party's view of the case and proposal for resolving it, followed by a discussion among counsel, clients and the mediator. Opening presentations and the discussions that follow are important for the simple reason that, in many cases, they constitute the first time that clients and counsel — for both sides — will have met for the sole purpose of discussing settlement. Indeed, even in the most heavily litigated cases, these presentations can be the first time that the clients hear a cogent presentation of the other side's case. The presentations can educate all participants in a straightforward, credible and nonconfrontational way.

The tone and content of the presentations are also important. The most effective presentations are made in a reasoned, business-like manner, without unnecessary posturing and threats. Threatening words only detract from the positive content of the presentation, alienate the other side and decrease their willingness to consider the proposal being made. Further, the presentation — which should be delivered in what we refer to as the mediation tone — should explicitly or implicitly recognize the substantive interests of the opposition and be directed to the decisionmakers on the other side.

Consider Bringing Experts

It is often helpful to include persons with particular subject matter expertise in the mediation, either as presenters themselves or as support in the negotiations. This is becoming a more

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common practice in larger, more complex cases. In environmental cases, for example, the consultants who investigated the contamination and authored the remediation plan can be helpful in presenting one's scientific case or responding to arguments made by the other side. Similarly, in a recent insurance matter, it was very helpful to have the in-house psychologist explain a company's policies in evaluating and administering claims for psychological injuries. In contrast, in a real estate matter, it was an *impediment* to settlement that neither party brought along its expert appraiser who performed analyses at issue in the mediation. Finally, where the size and complexity of a case justifies it, it is often very helpful to hire a neutral expert to assist the mediator in understanding, and testing, the strengths and weaknesses of the parties' positions.

First Offers or Demands Must Be Justifiable

The first offer or demand in a mediation should be justified by the facts and law of the case and consistent with the negotiation history, if any, among the parties. Unreasonable opening offers or demands can doom the mediation from the start. For example, in a recent personal injury case, the plaintiff made a settlement demand of \$75,000 before the mediation. Hearing nothing from the defendant, he made a statutory offer to compromise, under C.C.P. section 998, at a slightly higher amount. At the beginning of the mediation, the defendant offered \$25,000 (in addition to \$10,000 already paid for defendant's medical treatment) as its opening offer.

In response to that offer, however, the plaintiff demanded \$150,000, claiming that its case had improved by 100% since the \$75,000 demand was made. The plaintiff had great difficulty, however, justifying such a drastic increase. The defendant believed that the plaintiff had not come to mediate in good faith. The increased demand altered the playing field so dramatically that reaching a settlement was impossible. Whether plaintiff had not properly evaluated its own case or had merely chosen an overly aggressive negotiation style, the perceived lack of credibility of that offer effectively forced the other side from the bargaining table.

A Last, Best and Final Offer Should Be Made with Care

It is important to enter a mediation knowing one's bottom line. This should represent the point beyond which it is better for you not to settle — taking into account the risks of an adverse verdict and the transactional costs of going forward with the dispute. By contrast, we commonly refer to one's BATNA (the Best Alternative To a Negotiated Agreement) as the "best" realistic course of action (and probable result) available to a party if an agreement cannot be reached (*e.g.*, continuing to litigate or dropping the suit). Keeping your bottom line and BATNA in mind while mediating will stop you from ending the negotiations too early or going too far. One's bottom line should be modified, however, if new information learned in the mediation suggests that a change is appropriate.

Similarly, a "last, best and final" offer or demand must be credible and should be made only after all other options have been considered (and rejected). In labor-management negotiations, the "first, fair and final offer" has been found to be an unfair labor practice. In "legal" mediations, opening with one's final offer can also be seen as unfair. Even when well-intentioned (*i.e.*, to speed up negotiations), it is the antithesis of negotiation. Delivering an ultimatum ordinarily alienates the other side, escalates the conflict and poses an obstacle to resolution. Moreover,

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Who Is Your Client?

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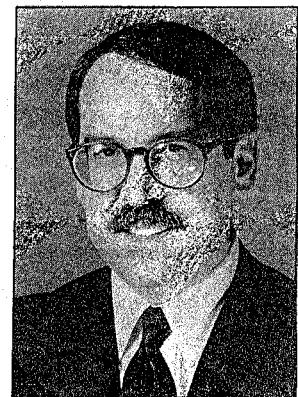
he growth of legal malpractice claims in California makes it imperative that you know your obligations to your client under the Business and Professions Code and the Rules of Professional Conduct.

But who is your client?

Two recent Court of Appeal decisions demonstrate that it is not always easy to know. The appeals courts expanded the attorney-client relationship in those cases, and in doing so created a host of surprising issues for the unsuspecting lawyers.

Limited Partnership

In *Johnson v. Superior Court*, 38 Cal. App.4th 463 (1995), the Fourth District Court of Appeal held that the lawyers for a limited partnership also had an attorney-client relationship with the individual limited partners. Therefore, the Court ruled, the partnership's lawyers owed the partners an "implied duty" of care, the breach of which could give rise to liability.



John W. Amberg

The defendants in *Johnson* were the law firm of Sheppard, Mullin, Richter & Hampton and one of its partners who represented a Hawaii limited partnership (MHP), its corporate general partner (TEI), and the general partner's controlling shareholder (Manchester). The limited partnership was an investment and tax shelter whose sole asset was an improved ground lease in an industrial park. In June 1989, Manchester wrote to the MHP limited partners on behalf of the general partner TEI, offering them an opportunity to sell their investment interests to MHP or, if they elected not to sell, to contribute more capital. Manchester's letter did not disclose that MHP had committed to buy the ground lease from the owner on very favorable terms, and that Manchester had granted himself an option to buy the valuable property from MHP if the limited partners did not contribute more capital. In fact, the partnership agreement made no provision for such capital calls.

During this time, Sheppard, Mullin was representing MHP in the partnership's acquisition of the leasehold. In July 1989, Manchester asked the law firm to draft a second letter to the limited partners purportedly to help TEI discharge its fiduciary duty of full disclosure. The letter drafted by the lawyers presented the same alternatives to the investors — sell out to MHP or contribute more capital, although the lawyers knew that there was no requirement for additional capital assessments. The letter contained no indication that it had been prepared by the partnership's counsel.

In response, all of the limited partners but one elected to sell their interests and the partnership was dissolved. After Manchester sold the leasehold for a substantial sum, the limited partners sued, charging, *inter alia*, that the lawyers were liable for professional negligence, breach of fiduciary duty, constructive fraud and conspiracy.

The Superior Court granted summary adjudication in the lawyers' favor on the ground that, although they were counsel to

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the partnership, as a matter of law, no duty of care or loyalty was owed to the individual limited partners.

On the plaintiffs' petition for a writ of mandate, the Court of Appeal considered three alternative bases for imposing liability on the lawyers: (a) on public policy grounds that an attorney may owe a duty of care to an intended beneficiary of his services despite the absence of any contractual relationship (*Goodman v. Kennedy*, 18 Cal.3d 335 (1976)); (b) that an attorney for a fiduciary assumes his client's duties to the beneficiaries (*Morales v. Field, DeGoff, Huppert & MacGowan*, 99 Cal. App.3d 307); or (c) that the limited partners were "co-clients" with the partnership, and therefore, were full parties in the attorney-client relationship and entitled to the same loyalty and care by the lawyers. The *Johnson* Court rejected the first two more limited grounds, but embraced the third.

The "Goodman v. Kennedy" Theory

Just as any person may be liable to a third party for the foreseeable conveyances of his negligence, so an attorney may, under certain circumstances, be liable to a non-client for negligent advice. As articulated in *Biakanja v. Irving*, 49 Cal.2d 647 (1958), and quoted in *Goodman v. Kennedy*, the courts will apply a balancing test that weighs the extent to which the transaction was intended to affect the injured party, the foreseeability of harm to him, the certainty that he suffered injury, the closeness of the connection between the attorney's conduct and the injury, the moral blame attached to the attorney's conduct, and the policy of preventing future harm. *Goodman v. Kennedy, supra*, 18 Cal.3d at 343.

Applying this test, the *Johnson* Court found that Sheppard, Mullin owed no duty to the MHP limited partners for the stated reasons that there was not a sufficiently "close connection" between the lawyers' service to Manchester and the investors' damage, and that it had not been Manchester's intention to benefit the limited partners through the attorneys' advice. 38 Cal. App.4th at 471-72. Of course, it is the defendant lawyer's intention, not his client's, that the test is concerned with, but the distinction hardly mattered, as the Court noted: "Here there is no contention that [the lawyer] did not perform the service for which Manchester hired him — indeed, the contention is that he performed too well, assisting Manchester in his purpose of swindling his partners." 38 Cal. App.4th at 472.

Much more significant is the *Johnson* Court's misapplication of a key element of the test: the criterion is not whether the defendant lawyers intended to *benefit* the plaintiffs (an unlikely event in a case of alleged fraud and breach of fiduciary duty), but rather whether by their advice to the general partner, the lawyers merely intended to *affect* them. *Goodman v. Kennedy, supra*, 18 Cal.3d at 343. There is no doubt that by writing the misleading letter for TEI, the lawyer intended to "affect" the limited partners. Once the intention to affect the intended victim's is found, how remote is the connection between the attorney's letter and the plaintiffs' damage? By rewriting the test, the Court of Appeal missed an opportunity to apply the public policy articulated in *Goodman v. Kennedy*, and to limit its holding to the facts of the case.

Duty Based on Representation of a Fiduciary

The *Johnson* Court next considered whether, by representing a fiduciary, Sheppard, Mullin had assumed concomitant fiduciary duties to the limited partners. Earlier cases had held, in effect, that when an attorney undertakes to represent a trustee, he vicariously assumes the trustee's fiduciary duties to the beneficiary. See, e.g., *Morales v. Field, DeGoff, Huppert & Mac-*

Gowan, supra. The Court of Appeal, however, analyzed Sheppard, Mullin's alleged duty in terms of the lawyers' degree of direct contact with the limited partners, which it found lacking.

Moreover, it held that no fiduciary duty on the part of the lawyer would arise when the interests of the fiduciary and his beneficiaries were adverse. See, e.g., *Skarbrevik v. Cohen, England & Whitfield*, 231 Cal. App.3d 692 (1991). The Court contrasted the situation that existed between Manchester and TEI, on the one hand, and the limited partners, on the other, with the *Morales* case, in which the attorneys for the fiduciary had assured the beneficiaries that their interests would be protected. However, the purported distinction between the cases is not obvious because the *Johnson* Court failed to consider the fact that the MHP limited partners did not know that Manchester's interests were adverse to their own when they received the gulling letter drafted by the general partner's lawyer. Whether that evidence, considered in context, would give rise to a fiduciary duty is unclear, but the Court may have missed another opportunity to decide the case on a basis limited to its facts.

Implied Attorney-Client Relationship

Instead of resting its decision on either of the two narrower grounds, the Court of Appeal held that Sheppard, Mullin had an attorney-client relationship with the limited partners by virtue of its representation of the partnership, even though the lawyers had never met the limited partners and the limited partners were unaware of the lawyers and had never requested any legal advice from them. This broad ruling subjected the lawyers to the full range of duties owed by a lawyer to his client, and to liability to the limited partners for their unwitting violation.

The *Johnson* Court acknowledged that mere representation of a partnership does not automatically constitute representation of the individual partners. *Kapelus v. State Bar*, 44 Cal.3d 179 (1987); *Responsible Citizens v. Superior Court*, 16 Cal. App.4th 1717 (1993). However, it then considered five factors to determine whether Sheppard, Mullin had represented the MHP limited partners: (1) the size of the partnership (representation of a partnership of few members may suggest individual representation of the members); (2) the nature and scope of the attorney's engagement; (3) the kind and extent of contacts between the attorneys and the individual partners; (4) the attorney's access to financial information relating to the individual partner's interests; and (5) whether the totality of the circumstances implies an agreement not to accept other representations adverse to the individual partner's personal interests. 38 Cal. App.4th at 476-77.

None of these factors appeared particularly compelling, but the *Johnson* Court nonetheless concluded that an attorney-client relationship had existed, based upon the nature of the lawyers' representation. Specifically, it noted that Sheppard, Mullin was retained not merely to represent the adverse interests of the general partner TEI and its principal Manchester, but rather to represent the partnership, whose rights the individual partners could enforce derivatively. That this analysis begged the key question — whether the lawyers also represented the limited partners — was revealed in the penultimate paragraph of the opinion:

This is a case, we are convinced, in which the undertaking by [the lawyer] to represent the partnership, generally imposed upon him an obligation of loyalty to the partnership and to all partners in terms of their entitlement to benefits from the partnership. Whether this constituted an attorney, literally, for the individual limited partners, is of no great moment. He had a duty to the partnership to look out for all the partners' interest, and if this could not be accomplished because of conflicts of interest among them he had a duty to terminate the representation (or obtain appropriate waivers of the conflict). (Emphasis added; citation to Rule of Professional Conduct 3-310 omitted.)

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Unfortunately, the *Johnson* Court's conclusion suggests that even where no attorney-client relationship exists, the lawyer may still be required to comply with Rule 3-310 ("Avoiding the Representation of Adverse Interest") and obtain waivers from non-clients — surely a quixotic result.

Attorney's Duty to a Client's Insurer

The attorney-client relationship was also expanded in the insurance context in a case of apparent first impression in California. In *Unigard Insurance Group v. O'Flaherty & Belgum*, 38 Cal. App.4th 1229 (1995), the Second District Court of Appeal held that an insurer has standing to sue for malpractice the appointed counsel for its insured. This must be contrasted with a case in which a conflict of interest exists between the insurer and its insured under Civil Code §2860, and the insurer has reserved its rights regarding coverage. In that situation, the insured may select *Cumis* counsel who represents the insured independently of the insurer. As a result, the insurer's rights against the insured's *Cumis* counsel for malpractice are limited to breaches of statutory duties under Section 2860 (d) and (f), such as the duty to provide the insurer with non-privileged information. See *Assurance Co. of America*, 32 Cal. App.4th 78 (1995).

However, when no actual or apparent conflict exists between insured and insured, and the insurer has not reserved its rights with respect to coverage, the Court of Appeal found that the interests of the insurer and insured converge in expectations of competent representation. Quoting the Michigan Supreme Court, the *Unigard* Court held that this expectation would not substantially impair the attorney's ability to make decisions that require a choice between the best interests of the insurer and the best interests of the insured. Therefore, it concluded, the attorney has a "dual attorney-client relationship with both insurer and insured." 38 Cal. App.4th at 1237.

What Should the Lawyer Do?

We all know that we should have engagement letters with our clients, that it is usually advisable to write a letter when we decline to represent someone or when we terminate a relationship, and that written consents may be required if we represent multiple clients on the same or similar matters. But how do we protect ourselves against the client who never telephones or never walks through the office door — the "implied" client or the "client-by-operation-of-law"?

- *Know the law.* Understand that, as a California lawyer, you may owe a duty of care to intended beneficiaries of your work, whether or not they are your clients, and that under some circumstances, you may be found to have an attorney-client relationship with them.
- *Know your duties.* Know the professional and ethical duties under Business and Professions Code §§6068, *et seq.*, and the Rules of Professional Conduct.
- *Consider your audience.* Consider the foreseeable recipients of your written work product and, where appropriate, include language expressly stating whom you are acting for and whom you are not. Advise third parties to obtain advice from their own counsel, and put it in writing.
- *Obtain written waivers.* And do it at the outset of the representation or as soon as the possibility of a conflict arises.
- *Don't Make Unwarranted Assumptions.* Don't assume that a third party is not your client. As these recent cases illustrate, you could be surprised.

—John W. Amberg

Did the Supreme Court Miss the Boat on Attorneys' Fees?

On October 2, 1995, the California Supreme Court surprised the bar with its disposition in *Trope v. Katz*. A unanimous Court affirmed the Court of Appeal's holding that an attorney who represents himself *in propria persona* may not recover attorneys' fees pursuant to Civil Code § 1717.

In a nutshell the Court concluded that Civil Code § 1717 was never intended to create an unfair advantage in favor of litigants who represent themselves, merely because they happen to be attorneys. Why, the Court asks, should a lawyer's time be any more valuable than a doctor or architect who represents himself in litigation? Each person necessarily is investing time and effort which interferes with the litigant's ability to practice his or her profession. Hence, it would be unfair for an attorney litigant who represents himself to recover attorneys' fees under Civil Code § 1717 when non-attorney litigants may not recover for the value of their time and effort.

The Court also emphasized its belief that the language of Civil Code § 1717 requires a litigant to actually "incur" or "be liable" for attorneys' fees in order to recover them. According to the Court, an attorney litigating *in propria persona* cannot be said to "incur" an obligation for his time and his lost business opportunities.

The Court's decision in *Trope* appears at first glance to be a flawless application of stare decisis and legal reasoning. Closer scrutiny, however, reveals a Court that is somewhat troubled with the result it reached. It has practically invited the legislature to amend Civil Code § 1717 because it is constrained by the unambiguous language of a statute imbued without a shred of legislative history to support any exception for attorneys who represent themselves. Further, Justice Mosk went to great lengths to ensure that the holding was a narrow one. Significantly, the Court deliberately left unanswered the question of whether a litigant can recover attorneys' fees if it was represented by its own in-house counsel a la *Garfield Bank v. Fob*, 25 Cal. App. 4th 1804 (1994), stating that "nothing in our opinion should be read as endorsing or precluding such an award." Finally, the Court expressed no opinion in connection with "equitable exceptions" (*i.e.*, common fund, substantial benefit and private attorney general theories of recovery) to the American rule.

The Supreme Court's holding in *Trope* seems to be aimed primarily at the sole practitioner who represents himself in relatively small time commercial litigation. To the extent sole practitioners desire the legislature to amend Civil Code § 1717, they should look at footnote 13 of the opinion in *Consumers Lobby Against Monopolies v. Public Utilities Com.*, 25 Cal. 3rd 891, 906 (1979) decided 11 years after the legislature enacted Civil Code § 1717. There the Court remarks that:

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"[T]he logic of past decisions that do not allow an attorney to recover fees when he appears on his own behalf is unclear. Although such an attorney does not pay a fee or incur any financial liability therefor to another, his time spent in preparing and presenting his case is not somehow rendered less valuable because he is representing himself rather than a third party. Accordingly, it would appear he should be compensated when he represents himself if he would otherwise be entitled to such compensation, absent a showing in a particular case that such an award would place his interests in conflict with those whom he represents."

The problem now of course, is getting around the Supreme Court's apparent conclusion that it is somehow unfair to allow attorneys to recover attorneys' fees when they represent themselves when non-attorney litigants cannot. There are, fortunately, plenty of examples where the Court has upheld the right of parties at arms length to agree to specific, even onerous terms in a written agreement. For example, liquidated damages provisions are now uniformly upheld so long as, *inter alia*, timely performance is a material term of the agreement. Further, forfeiture provisions are also uniformly upheld where the terms of forfeiture are clearly articulated in a written contract. Thus a partnership agreement may legally provide for the forfeiture of a partner's interest, should the partner fail to contribute capital or other consideration deemed by the partners to be essential to the continued viability of the partnership.

There is no meaningful or legitimate public policy which can be relied upon to prevent attorneys from being able to contract for the recovery of reasonable attorneys' fees where the terms of the agreement make clear that such fees may include the time spent by an attorney who represents himself. Indeed, if anything, in most small commercial cases, an attorney who represents himself *in propria persona* may save considerable legal and judicial time. The ultimate cost to the non-prevailing party in such a case could be significantly less.

Absent legislative amendment of Civil Code § 1717, there is still a hole in the Court's narrow holding large enough to drive a truck through. The Supreme Court deliberately passed up the opportunity to rule on whether a corporation may recover attorneys' fees when it is represented by in-house counsel. Presumably the Court was troubled by any endeavor to rationally distinguish in-house and outside counsel for purposes of ascertaining the right to recover attorneys' fees pursuant to Civil Code § 1717. Any such distinction would certainly be both artificial and controversial.

If a corporation may recover attorneys' fees under Civil Code § 1717 where it is represented by in-house counsel, is there any logical reason why a law corporation, a legally distinct corporate entity, should not also be permitted to recover attorneys fees when one of its attorney employees represents it in litigation? Will the Supreme Court discriminate against law corporations simply because they predominantly employ attorneys? What about title insurance companies with large contingents of in-house counsel or entertainment conglomerates with even larger contingents of in-house counsel? Will the Supreme Court find a way to allow these entities to recover attorneys' fees when they are represented by their own attorney employees yet deny such recovery to law corporations?

The Supreme Court no doubt anticipated the foregoing Hobbesian choices when it shrewdly decided to dodge the in-house counsel dilemma. However, the fact that the Court heard argument on the issue and decided not to address it may indicate that it could not reconcile its decision with what the panel

believed the outcome would be vis-a-vis in-house counsel. This is a most compelling reason to urge the legislature to amend or at least clarify Civil Code § 1717. Indeed, if corporations and law corporations may recover attorneys' fees, why not law partnerships, or sole practitioners? There are simply no clear lines of demarcation to guide courts in the future. Absent amendment or clarification of Section 1717, all of us face continued uncertainty and sole practitioners face Supreme Court sanctioned discrimination vis-a-vis recovery of self representation attorneys' fees.

—Larry C. Russ

A Mediator's Thoughts

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based on convention and practical experience, the recipient of a "first and final" offer will probably not believe it to be so.

Listen To The Other Side And Remain Flexible

Because mediation is a process not only of persuasion, but of education, you can hear things from opposing counsel, their clients and the mediator that you might not otherwise hear in a deposition, court proceeding or more traditional settlement conference. By listening for new information and real and potential points of resistance, you can gain a better understanding of the interests that must be satisfied for the opposition to agree to your proposal. Remaining flexible enough to incorporate this information into any settlement proposal will increase the chances of success.

A good example of this occurred in a recent mediation of a dispute between medical providers and the parents of a minor child whose treatment violated the religious beliefs of the parents. The monetary offers and demands were very far apart — reflecting a disparate valuation of the case — and there was not much confidence in the room that the case could settle. During the course of the mediation, however, it became apparent that the parents were less concerned about money than their belief that doctors and hospitals did not consider their religious convictions in deciding among available treatment options. To satisfy that interest, the hospital offered the plaintiffs time and space to educate its medical professionals about these issues. This offer, together with a significantly reduced financial settlement, allowed the case to settle. By creatively incorporating information learned in the mediation, the defendant modified its proposal for settlement without compromising its own interests.

—Lester J. Levy

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Is It Too Late to Settle? Problems with Settlement After Adjudication

Great news!" exclaims Young Hotshot Lawyer, calling you from an appellate settlement conference. "Not only did Sally Plaintiff accept our number, but she's agreed to stipulate to having the appellate court reverse the judgment!"

You breathe a sigh of relief. The problem wasn't the amount of Sally's judgment. It was the risk that Joe Claimant, the plaintiff in a related and much bigger case against your client Ogre Corp., would be able to use the judgment as collateral estoppel. You get ready to call Ogre Corp.'s president to tell him that the prospects for *Claimant v. Ogre Corp.* are a lot brighter.

Stop. They're not.

If Joe Claimant's lawyer knows what she's doing, you should be very worried about the prospect of explaining to your client after the *Claimant v. Ogre Corp.* trial why, in spite of the stipulated reversal of *Plaintiff v. Ogre Corp.*, you couldn't stop the judge from applying collateral estoppel. The fact is, it may have been too late to prevent that result long before you reached the Court of Appeal.

Adverse rulings in cases like Ogre Corp.'s, where the result can reach beyond the specific dispute, create a strong urge to settle in a way that avoids collateral estoppel. But this seemingly simple goal is not at all simple to achieve. And, perhaps most problematic, the parties may not know whether they've achieved the goal until a later lawsuit tests the effectiveness of the settlement.

The Fluid Concept of Finality

Young Hotshot Lawyer is confused by all this. Didn't he learn in law school that collateral estoppel requires a "final judgment" under *Bernhard v. Bank of America*, 19 Cal.2d 807, 813 (1942)? And didn't the California Supreme Court recently direct Courts of Appeal to honor the parties' stipulated reversals of judgments (*Neary v. Regents of the University of California*, 3 Cal.4th 273, 277 (1992))? And won't the reversal eliminate the only arguable "final judgment" in *Plaintiff v. Ogre Corp.*?

Well, yes — sort of. But "finality" in the sense in which lawyers frequently use it — meaning that the adjudicatory process has been carried all the way to the end — is not what counts. Section 13 of the Restatement (Second) of Judgments states the rule this way:

"The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." (Emphasis added.)

Federal courts frequently use a comparable formulation: "'Finality' in the context here relevant [issue preclusion] may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." *Lummus v. Commonwealth Oil Refining Co., Inc.*, 297 F.2d 80, 89 (2d Cir. 1961), cert. denied, 368 U.S. 986 (1962).

In short, "finality" is not a bright line, but rather a danger zone whose boundaries are vague.

"I understand all that," says Young Hotshot Lawyer, "but we're talking about a *settlement*. Can't we just eliminate the problem by stipulating to have the court vacate any prior rulings?"

Maybe — but then again, maybe not. The rules of the game aren't clear.

Problems with Appellate Settlements

Parties face substantial obstacles in crafting an appellate settlement that avoids collateral estoppel. The task is complicated by the fact that California and federal courts follow diametrically opposite philosophies on what appellate courts should accede to when parties ask them to reverse or vacate a trial court judgment.

One thing is clear: The parties cannot just dismiss the appeal and then stipulate to vacate the trial court judgment or dismiss the case. Dismissing the appeal simply makes the trial court judgment final and immune to any kind of alteration. At that point, regardless of what the parties may agree to, it is highly unlikely that the trial court has the legal power to vacate the judgment or dismiss the case. See *Nave v. Taggart*, 34 Cal.App.4th 1173, 1177 (1995) ("Once a trial court makes a decision after regular submission, it has no power to set aside or amend its ruling for judicial error except under appropriate statutory proceedings"); *McClain v. Rush*, 216 Cal.App.3d 18, 26 (1989).

The minimum necessary procedure is to persuade the Court of Appeal to vacate or reverse the trial court judgment. Counsel should be aware, however, that the propriety of stipulated reversals is a highly controversial topic that has generated strong sentiments in both articles and decisions. The philosophical debate is beyond the scope of this article; for some extensive discussions and collections of citations see *Norman I. Krug Real Estate Inv., Inc. v. Praszker*, 22 Cal.App.4th 1814 (1994); Howard Slavitt, *Selling The Integrity Of The System Of Precedent: Selective Publication, Depublication And Vacatur*, 30 Harv. Civ. R.-C.L.L.Rev. 109 (1995); Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the 20th Century*, 41 U.C.L.A. L.Rev. 1471 (1994).



Robin Meadow

The California Rule: Policy Favors Stipulated Reversals

In *Neary v. Regents of the University of California*, 3 Cal.4th 273 (1992), the California Supreme Court held:

"[A]s a general rule, the parties should be entitled to a stipulated reversal to effectuate settlement absent a showing of extraordinary circumstances that warrant an exception to this general rule." *Id.* at 277.

Despite this strong language, parties seeking to avoid collateral estoppel should not assume they can automatically get that result, for several reasons:

- The Supreme Court took pains to emphasize that *Neary* did not present collateral estoppel implications. The Court expressly did "not decide...whether potential collateral estoppel should be a factor in deciding whether to depart from the strong presumption in favor of allowing the parties to settle their dispute by seeking a stipulated reversal." *Neary*, 3 Cal.4th at 284. The First District Court of Appeal has decided that collateral estoppel is a relevant factor; it requires parties seeking a stipulated reversal to file a joint declaration of counsel "disclos[ing] whether the judgment sought to be reversed may have collateral estoppel or other effects in potential future litigation and, if so, whether any

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third parties who might be prejudiced by stipulated reversal of the judgment have received notice of the motion therefor." (First Dist. Court of Appeal, local rule 8.)

- *Neary's* strong philosophical support for stipulated reversals has not found widespread support. The Supreme Court itself has retrenched somewhat. In *State of California, ex rel. State Lands Comm'n. v. Superior Court*, 11 Cal.4th 50 (1995), the court distinguished *Neary*, refusing a stipulation for dismissal of an appeal because of the importance of the opinion's subject matter. And the Courts of Appeal seem to be in open rebellion, often finding reasons (at least in published opinions) to avoid full compliance with stipulations. See *Lucich v. City of Oakland*, 19 Cal.App.4th 494, 500-03 (1993) (refusal to dismiss appeal when court notified of settlement the day after argument and settlement not concluded until after opinion issued); *People v. Barraza*, 30 Cal.App.4th 114, 116-21 (1994) (in criminal case, court refused to implement stipulated change in judgment); *Praszker*, 22 Cal.App.4th 1814 (stipulated reversal denied as to one defendant on public interest ground; extended discussion regarding stipulated reversals); *Lara v. Cadag*, 13 Cal.App.4th 1061, 1065-66 (1993) (opinion published notwithstanding dismissal pursuant to stipulation). (In yet another case, since depublished, the Court of Appeal published an opinion despite a request for dismissal, because it believed the issue involved was important. *Wicker v. Oosten*, 37 Cal.App.4th 331, 342 (1995), depublished 11/2/95.) At one point there was even a legislative movement to overrule *Neary*.
- There is little likelihood of relief if a Court of Appeal refuses to comply with a request for a stipulated reversal. *Neary* does not suggest that the Supreme Court is willing to devote any resources to reviewing Court of Appeal denials. And since most Court of Appeal decisions are not published and most rulings on stipulated reversals are unlikely even to generate opinions, there is no way to monitor how the courts are implementing *Neary* or to predict how a particular panel will respond to a stipulation.

The Federal Rule: Policy Disfavors Stipulated Reversals

The federal counterpart to a stipulated reversal is "vacatur": The reviewing court typically vacates (rather than reverses) the lower court's judgment. Although the Circuit Courts evidently used to grant this sort of relief somewhat routinely, the Supreme Court severely curtailed the practice in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, ____ U.S. ___, 115 S. Ct. 386 (1994). Reaching exactly the opposite conclusion from the California Supreme Court in *Neary*, the Court held:

"[M]ootness by reason of settlement does not justify vacatur of a judgment under review. This is not to say that vacatur can never be granted when mootness is produced in that fashion. As we have described, the determination is an equitable one, and *exceptional circumstances* may conceivably counsel in favor of such a course. It should be clear from our discussion, however, that those *exceptional circumstances* do not include the mere fact that the settlement agreement provides for vacatur...." 115 S.Ct. at 393 (emphasis added).

This restrictive language would seem to eliminate stipulated reversals as a settlement option in most cases. Nevertheless, the Supreme Court left the door slightly open:

"Of course even in the absence of, or before considering the existence of, extraordinary circumstances, a court of appeals presented with a request for vacatur of a district-court judgment may remand the case with instructions that the district court consider the request, which it may do pursuant to Federal Rule of Civil Procedure 60(b)." *Id.*

Either by this mechanism or by finding "exceptional circumstances," courts continue to allow vacatur. *E.g., Motta v. District Director of I.N.S.*, 61 F.3d 117, 118 (1995); *Nahrebeski v. Cincinnati Milacron Mktg. Co.*, 41 F.3d 1221, 1222 (8th Cir. 1994); *Alexander v. Perrill*, 872 F.Supp. 722 (D.Ariz. 1995). For its part, the Ninth Circuit recently reaffirmed its decision in *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982), stating:

"[W]hen an appellant renders his appeal moot by his own act [which includes settlement], our established procedure is not to vacate the district court's decision automatically, but to remand so the district court can decide whether to vacate its judgment in light of 'the consequences and attendant hardships of dismissal or refusal to dismiss' and 'the competing values of finality of judgment and right to relitigation of unreviewed disputes.'" *Dilley v. Gunn*, 64 F.3d 1365, 1370-71 (9th Cir. 1995) (reviewing non-settlement mootness), quoting *Ringsby*, 686 F.2d at 722.

The Unpredictable Effect Of A Stipulated Reversal

If the parties are fortunate enough to be able to obtain a stipulated reversal or vacatur, will it protect them against collateral estoppel? The limited case law on the subject provides little comfort or predictability. For example, while *Neary* directed California Courts of Appeal generally to honor stipulated reversals, it did not express any views on the effect of a stipulated reversal. Rather, the Court said:

"[A] stipulated reversal is not an attempt to erase or rewrite the record of a trial. Everything that has happened to date in this litigation — including the jury verdict against defendants — is and will remain a matter of public record, even after a stipulated reversal. No one is proposing that the record in this case be destroyed or sealed. The record will reflect that the reversal was pursuant to a settlement and stipulation. There will be no inference that the jury or trial court erred. Whatever conclusions the public wishes to draw from the litigation can still be drawn after the reversal. To remove any possible doubt in a case of a stipulated reversal, the appellate court can explicitly state in its order that the reversal is pursuant to settlement and does not constitute either approval or rejection of the trial court's judgment." *Neary*, 3 Cal.4th at 282-83.

See also Praszker, 22 Cal.App.4th at 1825 (in reversing pursuant to stipulation, court noted that "[s]aid reversal does not represent a considered rejection by this court of the judgment below").

Those cases that have addressed the question raise serious doubts about whether a stipulated reversal can ever provide infallible protection against collateral estoppel. The seminal case in California is *Louie Queriolo Trucking, Inc. v. Superior Court*, 252 Cal.App.2d 194 (1967), which, although it involved a trial-level rather than an appellate settlement, has provided the analytical framework for both arenas. *Queriolo* involved a truck that fell into an excavation. In Case 1 the truck driver sued the excavating company and prevailed on liability in a bifurcated trial. The company then settled with the driver, who agreed to set aside the jury's verdict and to dismiss his lawsuit with prejudice. In Case 2, the truck's owner sued the excavating company for damage to the truck, seeking to use the liability verdict in Case 1 as collateral estoppel. The trial court refused, but the Court of Appeal disagreed. It found the necessary "final judgment" in the dismissal of Case 1, even though the dismissal favored the excavating company. Combining the dismissal with the fact that the excavating company had paid to settle the case, the court concluded that collateral estoppel was appropriate.

Queriolo Gains General Acceptance

Although *Lea v. Shank*, 5 Cal.App.3d 964, 973 (1970), disagreed with this result, *Queriolo* appears to have gained general acceptance as other cases have built upon it. Most significantly, *Sandoval v. Superior Court*, 140 Cal.App.3d 932 (1983), found

collateral estoppel without the need for *Queriolo*'s tortured efforts to find a "final judgment." In Case 1, a jury found a product defectively designed and awarded \$262,500 in damages. The manufacturer, Deere, appealed. The case settled during the appeal for \$218,837. In the settlement agreement Deere expressly disclaimed liability, and both the appeal and the underlying action were dismissed. Case 2 involved the same product, and the plaintiff urged collateral estoppel against Deere on the basis of the judgment in Case 1.

Although *Sandoval* involved a settlement during appeal, the court found it necessary to discuss the conflict between *Lea* and *Queriolo* because of the California rule that a judgment is not final for collateral estoppel purposes if an appeal is pending (in other words, for analytical purposes, the pendency of the appeal in *Sandoval* meant that the judgment was no more "final" than it was in *Lea* and *Queriolo*). *Id.* at 936-40. Rejecting *Lea* in favor of *Queriolo*, the court adopted Section 13 of the Restatement (Second) of Judgments as the test of finality for collateral estoppel:

"The requirement of finality of judgment is interpreted strictly, as indicated above, when considered for purposes of appellate review or application of bar or merger. Issue preclusion, however, is a different matter. 'But to hold invariably that kind of carry-over is not to be permitted until a final judgment in the strict sense has been reached in the first action can involve hardship — either needless duplication of effort and expense in the second action to decide the same issue....' (*Id.*, § 18, com. g.) The Restatement cautions: 'Before [giving carry-over effect], the court should determine that the decision to be carried over was adequately deliberated and firm, even if not final in the sense of forming a basis for a judgment already entered. Thus preclusion should be refused if the decision was avowedly tentative. On the other hand, that the parties were fully heard, that the court supported its decision with a reasoned opinion, that the decision was subject to appeal or was in fact reviewed on appeal, are factors supporting the conclusion that the decision is final for the purpose of preclusion.' (*Ibid.*)"

Id. at 936.

Although for various reasons *Sandoval* ultimately did not apply collateral estoppel, its Restatement test has been adopted by other California courts. *E.g., Producers Dairy Delivery Co. v. Sentry Ins. Co.*, 41 Cal.3d 903, 911 (1986); *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1992) 34 Cal.App.4th 244, 278; *McClain v. Rush*, 216 Cal.App.3d 18, 28 (1989). Under this line of authorities, the intervention of a settlement while an appeal is pending will ordinarily not prevent the judgment from being treated as "final" for collateral estoppel purposes.

Federal authority is comparable. In *Bates v. Union Oil Co.*, 944 F.2d 647 (9th Cir. 1991), cert. denied, 503 U.S. 1005 (1992), the parties settled Case 1 while the appeal was pending, and the Court of Appeal vacated the trial court judgment in an order that said nothing about issue preclusion. In Case 2, the trial court applied collateral estoppel and the Court of Appeal affirmed. The court said that, in order for the parties to avoid collateral estoppel, the trial court in Case 1 must balance the *Ringsby* factors in deciding whether to vacate the judgment, but the *Bates* trial court had not done so. *Bates*, 944 F.2d at 651-52. Since the Court of Appeal order vacating the judgment in Case 1 said nothing about issue preclusion, it was within the discretion of the trial court in Case 2 to apply collateral estoppel.

Although *Estate of Portnoy v. Cessna Aircraft Co.*, 612 F.Supp. 1147, 1150-53 (S.D. Miss. 1985), came out the other way, the court nevertheless clearly believed that collateral estoppel is available even if the judgment in Case 1 has been vacated. In *Portnoy*, Case 1 settled after judgment, while the defendant's appeal was pending. The defendant dismissed its appeal and —

in a proceeding obviously structured to avoid collateral estoppel — the trial court granted a new trial (it "reconsidered" its original denial of a new trial motion). The trial court in Case 2 refused to give collateral estoppel effect to the findings in the vacated judgment in Case 1. It did so under orthodox collateral estoppel principles, applying the factors in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330-31 (1979) (a decision frequently cited in both California and federal courts) to conclude that applying collateral estoppel would be unfair. The court also did not feel it should second-guess the trial court's determination in Case 1 that it was appropriate to grant a new trial. But the important feature of *Portnoy* is not the court's ultimate refusal to apply collateral estoppel, but rather the way the court reached its result: It assumed that, as an general proposition, collateral estoppel could apply, notwithstanding the prior settlement and the order vacating the prior judgment.

Problems with Trial-Level Settlements

Young Hotshot Lawyer is now thoroughly despondent. "We should have just settled at trial, shouldn't we? Then we would have been OK."

Well, maybe. But, as *Queriolo* shows, avoiding collateral estoppel is not necessarily easier just because the case is still in the trial court. Under *Queriolo*, if there has been even a partial adjudication, the settlement may come too late.

Federal authority also recognizes the possible collateral estoppel effect of trial court determinations where a case is settled before judgment. The leading decision is *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1187-94 (5th Cir. 1982). There the parties settled Case 1 after findings but before judgment, stipulating to an order withdrawing the findings and dismissing the action with prejudice; the court in Case 2 refused to apply collateral estoppel, but the Court of Appeal reversed. (Although the decision was later vacated in connection with other issues, see 460 U.S. 1007 (1983), it is nevertheless frequently cited on collateral estoppel questions.) See also *Zdanok v. Glidden Co.*, 327 F.2d 944, 955 (2d Cir. 1964), cert. denied, 377 U.S. 934 (1964) (liability determination was collateral estoppel even though damages had not been ascertained, following Restatement rule); *Aetna Casualty & Sur. Co. v. Jeppesen & Co.*, 440 F. Supp. 394, 402-05 (D. Nev. 1977) (applied collateral estoppel to settlement reached after determination of liability in bifurcated trial, citing and following *Queriolo*).



Robert Olson

If collateral estoppel can be triggered by a jury verdict on a bifurcated issue, why not after summary judgment, summary adjudication, or other pretrial ruling that involves a dispositive determination — perhaps even an issue-preclusion sanction in a discovery dispute? There are few guideposts, beyond the basic principle that there should be some factual adjudication before collateral estoppel will operate. See *Clovis Ready Mix Co. v. Aetna Freight Lines*, 25 Cal.App.3d 276, 282-83 (1972) (dismissal with prejudice pursuant to a pre-adjudication settlement did not support collateral estoppel).

For instance, the Ninth Circuit recently rejected partial summary judgment as a basis for collateral estoppel, saying that "[w]e do not view the partial summary judgment on the same plane

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with the exhaustive decision, after full trial, given collateral estoppel effect in *Borg-Warner v. Avco Corp.*, 850 P.2d 628 (Alaska 1993).¹ *St. Paul Fire & Marine Ins. Co. v. F.H.*, 55 F.3d 1420, 1425 (9th Cir. 1995) (applying Alaska law). (In *Borg-Warner*, the Alaska Supreme Court upheld application of collateral estoppel where the parties settled Case 1 after trial, at a point where the trial court had issued its decision but had not yet entered judgment.) In contrast, in *McClain*, 216 Cal.App.3d 18, summary judgment in Case 1 was sufficient for collateral estoppel even though the case was later settled and purportedly dismissed during the appeal. *See also Harris Trust & Sav. v. John Hancock Mut. Life Ins. Co.*, 970 F.2d 1138, 1146 (2d Cir. 1992), *aff'd*, 114 S.Ct. 517 (1993) (collateral estoppel denied where partial summary judgment was withdrawn pursuant to settlement and the withdrawal order stated partial summary judgment was to have no preclusive effect); *Hartley v. Mentor Corp.*, 869 F.2d 1469, 1471-73 (Fed. Cir. 1989) (collateral estoppel allowed as to summary judgment followed by settlement before entry of judgment); *Ossman v. Diana Corp.*, 825 F.Supp. 870, 875-78 (D. Minn. 1993) (collateral estoppel allowed as to partial summary judgment followed by settlement, where district court refused to vacate partial summary judgment despite parties' request that it do so). Other types of adjudications are of equally uncertain effect. *See, e.g., Wellons, Inc. v. T.E. Ibberson Co.*, 869 F.2d 1166, 1168-69 (8th Cir. 1989) (arbitration award that was neither confirmed nor vacated given preclusive effect despite settlement; "collateral estoppel applies when the issues have been fully adjudicated regardless of a subsequent settlement agreement").

What these cases suggest — and what should give counsel pause in assembling settlements — is that Case 2 courts will decide whether to apply collateral estoppel on a case-by-case basis, second-guessing the decision-making process in Case 1. For instance, one can envision a partial summary judgment in Case 1 that would address the Ninth Circuit's concerns in *St. Paul Fire & Marine* — such as a ruling after extensive discovery and a full presentation of the facts, so that further litigation would not yield further information — and that therefore could serve as a proper basis for collateral estoppel.

Possible Strategies

"But if any adjudication increases the risk of collateral estoppel, can you ever settle safely?" asks Young Hotshot Lawyer, now seriously — and properly — concerned about the settlement he's negotiated. The only accurate answer is, "Maybe." The decisions suggest that the courts will probably look at several variables:

The nature of the adjudication. A trial court judgment, a jury verdict, or an arbitrator's award will probably support collateral estoppel, because these are determinations that both trial and appellate courts have only limited power to overturn. On the other hand, a judge's decision on an early motion for summary adjudication or partial summary judgment may be given less weight because the court would have been able to revisit that determination *de novo*. But see Cal. Code Civ. Proc. § 1008 (limiting circumstances in which trial courts may revisit issues decided in pre-trial motions).

Whether the adjudication was vacated as a part of the settlement. Although vacating the adjudication is no guarantee of avoiding collateral estoppel, failing to do so will almost certainly permit collateral estoppel.

Whether the parties intended to avoid collateral estoppel. Several cases indicate that courts may treat collateral estoppel as

a matter of contract interpretation, denying collateral estoppel if that goal appears to have been an element in the parties' settlement. *E.g., Hughes v. Santa Fe Int. Corp.*, 847 F.2d 239, 241-42 (5th Cir. 1988); *Estate of Portnoy*, 612 F.Supp. 1147. This conclusion, however, seems questionable.

The amount of the settlement as a proportion of the amount sought or previously awarded. If the settlement after adjudication in Case 1 closely approximates the damage award or the plaintiff's demand, the court in Case 2 may be more likely to find collateral estoppel. *See Sandoval*, 140 Cal.App.3d at 940 & n. 5. On the other hand, if the settlement is for twenty cents on the dollar, the court may view the initial adjudication as more tentative or weak.

In approaching settlement, counsel should consider the following:

- Seek an order granting a new trial on all issues, but dismiss the case before the trial court rules (unless it is clear the trial court will grant the motion for reasons other than just the parties' agreement). The ideal setting would be for the losing party to move for a new trial and then settle the case before the trial court rules — in other words, at a time when the sufficiency of the adjudication remains unclear and the court has the full power to grant a new trial. (Note that a motion for a new trial is available in a variety of contexts, not just after an actual trial. *See* 8 B.E. Witkin, *California Procedure*, Attack on Judgment in Trial Court §§ 21-23, pp. 422-425 (3d ed. 1985).)
- In seeking vacatur in federal court, be sure the trial court explicitly evaluates the Ringsby factors and relies on its conclusions in vacating the adjudication.
- Build language into the settlement agreement that recites the nature and strength of arguments that the "losing" party might have marshalled to attack the adjudication. This language could help convince a later court not to apply collateral estoppel because the adjudication is questionable.

Although collateral estoppel will usually be a defense concern, there are some strategic considerations for plaintiffs as well:

- Discovery should elicit not just other judgments against the defendant in similar fact situations, but also cases that may have been settled in a way that leaves the defendant exposed to offensive collateral estoppel.
- Settlement strategy should take into account whether the defendant has a collateral estoppel concern that the plaintiff can — for a price — address.
- Settlement considerations may also influence the plaintiff's efforts at early adjudication. For example, if the defendant is very concerned about the impact of collateral estoppel, the plaintiff might find it *harder*, rather than easier, to settle after an adverse adjudication, since then the defendant may be forced to pursue the case to the end. For the same reason, however, a highly persuasive summary adjudication motion might open a settlement door, because the defendant cannot afford the collateral estoppel risk of losing that motion.

Of course, litigants can rarely choose the timing of settlement. But if collateral estoppel is a concern, the litigation game plan must take into account the fact that the risk increases as the case progresses. For both defendants and plaintiffs, it is important for counsel to identify and discuss with their clients the impact of possible collateral estoppel on the conduct of the case and on their settlement posture.

—Robin Meadow and Robert Olson

Cases of Note

Discovery

Service of an unverified response to a discovery request does not result in waiver of objections even where that response contains substantive information. *Food 4 Less Supermarkets, Inc. v. Superior Court*, 95 Daily Journal D.A.R. 15696 (Court of Appeal, Nov. 28, 1995). The Second Appellate District held that an unverified response to a document demand only rendered the fact-specific portion of the response untimely but did not result in waiver of the objections asserted.

Disqualification

In *Cho v. Superior Court*, 95 Daily Journal D.A.R. 14192 (Oct. 19, 1995), the Second Appellate District of the Court of Appeal held that a law firm must be disqualified from representation of a party in an action when it employs a former judge who formerly presided over the action and received ex parte confidences during settlement conferences from an adverse party to the action.

Recovery of Attorneys' Fees

In *Santisas v. Goodin*, 95 Daily Journal D.A.R. 14169 (Oct. 20, 1995), Division Two of the First Appellate District held that a

party who successfully defends a tort action arising from a contract which entitled the prevailing party to an award of attorneys' fees may recover such fees as an element of costs even where the plaintiff dismisses the suit voluntarily, criticizing Division Four's antithetical ruling in *Jue v. Patton*, 33 Cal. App. 4th 456 (1995).

A retainer agreement which provides that the attorney shall have a lien against any settlement or judgment can be enforced against any recovery in the subject action even though the client's personal obligation to the attorney was discharged in bankruptcy. In *Saltarelli & Steponovich v. Douglas*, 95 Daily Journal D.A.R. 15121 (Court of Appeal Nov. 14, 1995), the Court of Appeal held that, since neither the client nor the trustee in bankruptcy took steps to avoid or disallow the lien, the lien survived the bankruptcy discharge.

Recovery of Costs

In *Science Applications International Corp. v. Superior Court*, 95 Daily Journal D.A.R. 14505 (Oct. 27, 1995), the Fourth Appellate District held that a prevailing party may not recover as costs computerized document control and data base charges under the discretionary costs statute, Code of Civil Procedure § 1033.5(c)(4).



Denise M. Parga

Removal

In *Northern California District Council of Laborers v. Pittsburgh-Des Moines Steel Co.*, 95 Daily Journal D.A.R. 15055 (9th Cir. Nov. 13, 1995), the Ninth Circuit Court of Appeal held that a defect in the removal procedure must be raised within 30 days after the filing of the notice of removal regardless of whether a timely motion to remand has been filed. In this case, a motion to remand was timely filed. However, the motion was made on the ground that a forum selection clause between the parties required that remand to Superior Court. The defect in the removal procedure was raised for the first time in the reply papers. According to the Ninth Circuit, the defect in the removal procedure was not timely raised.

Insurance

In *Aceves v. Allstate Insurance Co.*, 95 Daily Journal D.A.R. 13909 (Ninth Cir. Oct. 16, 1995), the Ninth Circuit held that under California law an insurance carrier cannot waive the one-year contractual limitation for initiating suit against the carrier. In this case, Allstate confirmed coverage without raising the time bar. The Court of Appeal held that such conduct did not constitute a waiver of the time limitation.

Sanctions

A trial court could not issue a terminating sanction solely because a litigant failed to pay monetary sanctions. *Newland v. Superior Court* 40 Cal. App. 4th 608, 47 Cal. Rptr. 2d 24, 95 Daily Journal D.A.R. 15,672 (Cal. App. 2 Dist., Nov. 27, 1995) modified, 1995 WL 723245 (Dec. 6, 1995).

Letter from the President

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source until that party has made the initial disclosures described above to the party from whom discovery is sought (with the sole exception of discovery required in connection with applications for temporary restraining orders and preliminary injunctions).

The ABTL Board of Governors, at its December 1995 meeting, approved the submission of Comments to the District Court on the proposed rules, based upon the recommendations of the ABTL's Federal Courts Committee and its Local Rules Subcommittee. In an effort to provide meaningful input, the ABTL chose not to debate the overall merits of a system of broader early disclosure, because of our belief that the outcome of that debate has already been determined. Rather, the Comments focused on specific improvements and corrections of inconsistencies which would improve the efficacy of the proposed Local Rules changes.

Expert Witnesses

Perhaps the most significant of the ABTL's Comments related to the early disclosure requirement as it pertained to expert witnesses. Consistent with the current rules, Rule 9.4.6 requires pre-trial disclosure of expert witnesses, along with production of expert reports required by the federal rules, in connection with the pretrial conference. Under the new Rule 9, a plaintiff must designate and provide reports no later than eight weeks prior to the discovery cutoff date, and the defendant is required to do likewise no later than five weeks prior to that date. However, Local Rule 6.2.1 provides that the early meeting witness disclosure obligation, which I summarized above, also applies to any *expert* witness disclosures required under the federal rules. If applied as written, this rule literally would require each party at the early meeting of counsel to identify all witnesses retained or specially employed to provide expert testimony in the case, "and to submit a comprehensive report of their opinions, supporting reasons, exhibits, qualifications, and compensation." By contrast, the applicable federal rule itself does not require such disclosure until 90 days before trial.

The ABTL Comments assert that it would be a mistake to include expert witnesses in this early disclosure rule. Such a requirement would undermine the policy of the federal attorney work product rule because it would penalize counsel who diligently prepared their cases by retaining consultants early. For retained experts, the proposed rule by its terms would be unworkable. For example, it would literally require not only early initial disclosure of the witness' identity and background, but also detailed disclosure of the witness' opinions, even in preliminary stages of the engagement, and supplementation of such disclosure every time the witness formed a new or revised opinion. The proposed change would also create many opportunities for unnecessary disputes concerning timeliness and completeness of the expert witness disclosure. Even if a party's disclosures otherwise complied with Local Rule 9.4.6 and Rule 26(a) of the Federal Rules, the witness could be subject to exclusion because the initial or supplemental disclosures under Local Rule 6.2.1 were later found not to be timely or complete enough.

Implementation Expected Shortly

As of the date of this writing, the proposed local rules have not yet been implemented, although it is expected that they will be shortly. Hopefully, the ABTL's Comments, which focused on application of the proposed rules changes to complex business litigation, will prove to have assisted the District Court in the process of finalizing these local rules changes.

The ABTL is also currently involved on other fronts relating to the administration of justice which are likely to have an impact upon its membership. As many of you know, there has been a great deal of discussion about the California jury system in the wake of the O.J. Simpson verdict. Legislation and Constitutional amendments are pending or anticipated that may change important aspects of this system. On January 12, 1995, the State Bar of California held a forum in Los Angeles to address a variety of issues, which include jury pool, jury selection, peremptory challenges, jury size and unanimity, and jury functions. Bob Fairbank, former ABTL President, represented the organization at the forum, and we expect to continue to be involved in these ongoing discussions.

A long with numerous other bar association leaders statewide, I have and will continue to participate in a number of conferences regarding the Governor's recent budget proposal for court funding. The budget seeks to fix the contribution of counties to trial court funding at set levels, with the remainder to be provided by the state. It proposes various solutions to the burdens which the "three strikes" law has placed upon the civil trial system, and perhaps most importantly, provides for funding for 22 new judgeships, to be financed largely by a variety of increased and new filing fees. The dialogue concerning this proposal is likely to continue for months, and the ABTL will continue to stay informed and involved.

—Jeffrey I. Weinberger

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