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Letter from the President

Last June, the ABTL Board held a dinner honoring three of its immediate past presidents, Mark Neubauer, Richard Mainland, and Bruce Friedman. As they stood to accept our gratitude for their years of hard work and outstanding contributions to the ABTL, I was struck by how each of them expressed virtually the identical sentiment: that



Jeffrey I. Weinberger

of all the law-related activities they have engaged in, the ABTL provided the most rewarding and enriching experiences of their careers. This type of comment is by no means limited to past presidents. Many of our members have told me that the ABTL dinner program is the one legal event outside of the office that they do not want to miss. Judges whose participation I have sought in our programs regularly volunteer their views of the high quality of ABTL's programs and members. The ABTL formula has also proven successful in Northern California and

San Diego, where our colleagues have achieved a high level of institutional recognition in a remarkably short period of time.

As I pondered what my goals for the ABTL should be this year, the old adage "if it ain't broke, don't fix it" kept recurring in my mind. It is important periodically to identify the building blocks of the ABTL's success, if for no other reason than to avoid inadvertently weakening them simply in the name of change. First on this list is focus: the ABTL is uniquely devoted to the concerns of business litigators, and emphasizes trial tactics and skills in complex business cases where real world experience

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The Manual for Complex Litigation

Amid the demonstrated benefits of "fast track" direct calendaring lies at least one potential drawback — the fast track can have a tendency to limit the judicial attention directed toward complex litigation. The uniquely complex case is intruding into a daily menu of "fast food" justice and is not always easily digestible. The daily processing of the great mass of more prosaic cases, cases more easily transformed into disposition statistics, tends to divert immediate judicial attention away from the complex case. Cases settle, among them complex cases, and one of the verities of fast track judicial life is the less time expended on a case that will settle without judicial effort, the better. There is a risk to application of this maxim, however. Lack of judicial attention can permit a complex case to metastasize into a cauldron of litigation inefficiency, possibly resulting in prolonged litigation and increased expense when early judicial intervention might have efficiently structured the case for settlement (or at least for streamlined trial).



Hon. John J. Zebrowski

Although there is no substitute for the input of judicial time, case management techniques can mitigate the time constraints and distractions of fast track. Most of these techniques were pioneered in the direct calendar environment of Federal court, initially in antitrust cases, eventually expanding to mass torts, securities and environmental litigation, and other areas.

In 1969, the Federal Judicial Center published the *Manual for Complex Litigation*, advocating the then-novel and somewhat controversial concept of active judicial management of complex cases. By 1985, when the broadened *Manual for Complex Litigation*, Second appeared, the idea of judges participating in the management of complex cases was much more accepted. This year brings the *Manual for Complex Litigation*, Third (the "Manual") updating and refining the previous work. The *Manual* is available from the Government Printing Office.

The *Manual* is based upon the Federal Rules of Civil Procedure ("FRCP"), and in some instances its recommendations are not consistent with state practice. In other instances, the recommendations of the *Manual* are mandated by state practice, and no special judicial attention is required. In some respects the *Manual* is overly generic or platitudinous or describes case

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handling techniques that are unrealistically deluxe. Nevertheless, the *Manual* is a valuable resource for complex litigation in state as well as Federal court. Cf. *Manual* at 5-6. It contains useful ideas plus citations to instructive authority on techniques for effective management of a complex case notwithstanding the distractions of fast track.

This review briefly samples and summarizes the 568-page manual.

Organization

The *Manual* is organized into four parts. Part I, "Introduction," sets forth the purpose and use of the *Manual*, and cites to other useful writings on litigation management.

Part II, "Management of Complex Litigation," forms the heart of the *Manual*. It begins with "General Principles" that motivate case management and proceeds through "Pretrial Procedures," "Trials," "Settlement," "Attorneys' Fees" and "Judgments and Appeals."

Part III (untitled), in addition to courtroom technology, deals with specialized procedures for specific categories of cases: class actions, "multiple litigation" (cases pending in different Federal courts, or in both state and Federal courts, or concurrent civil and criminal litigation), criminal cases, antitrust, mass torts (of both the single-locus mass disaster and the multiple-locus mass toxic tort or defective product variety), securities and takeover litigation, employment discrimination litigation, patent litigation, CERCLA and Civil RICO actions.

Part IV (also untitled) provides checklists (for pretrial review, development of discovery plans, special appointments and referrals, etc.) plus sample case management and other orders.

What is Complex?

Early on the *Manual* considers "What is complex litigation?" Notwithstanding earlier (abandoned) efforts at a restrictive definition, the *Manual* finds some definition "important to understanding the objective of this manual," since "there is always a risk that complexity may be introduced simply by calling litigation 'complex'." Hence the *Manual* offers a "functional definition" of complexity. *Manual* at 3. The *Manual* identifies the "defining characteristic" of complex litigation as simply the need for judicial participation with counsel in case management. Litigation involving many parties in numerous related cases or litigation involving large numbers of witnesses and documents and extensive discovery are offered as examples of "complex litigation." On the other hand, "litigation raising difficult and novel questions of law, though challenging to the court, may require little or no management, and therefore may not be complex" as the term is used in the *Manual*.

The goal of case management, according to the *Manual*, is to bring about "a just resolution as speedily and inexpensively as possible." *Manual* at 10. The practical need for judicial management to achieve a just, speedy and inexpensive resolution is thus identified as the test for complexity.

In its treatment of the "what is complex" question, the *Manual* is similar to the Standards of Judicial Administration Recommended by the Judicial Council (January 1, 1995) (the "Standards"). Section 19 of the *Standards*, entitled "Complex Litigation," defines complex litigation in subsection (c) as "those cases that require specialized management to avoid placing unnecessary burdens on the court or the litigants. Complex litigation is not capable of precise definition but may involve, for example, multiple related cases, extensive pretrial activity, ex-

tended trial times, difficult or novel issues, and post-judgment judicial supervision, or may concern special categories such as class actions; however, no particular criterion is controlling and each situation must be examined separately."

Early Judicial Management

The *Manual* proposes early collaboration of judge and counsel to develop and implement a plan for the conduct of pretrial proceedings and trial in the complex case.

"Judicial supervision is most needed and productive early in the litigation," *Manual* at 11, (just when the fast track may be, unfortunately, the least likely to provide it). Cf. *Standards*, subsections (a), (f) and (g), "judicial management should begin early"; "time limits should be established early"; "a preliminary trial conference ... should be conducted at the earliest practical date." Once the court's attention has been focused on the case, the *Manual* provides an arsenal of litigation management techniques ranging from discovery and motion scheduling and sequencing orders, early issue identification methods, development of case management programs, anticipation of compliance problems and formulation of prophylactic measures, possible appointment of special-function counsel (lead, liaison, settlement, trial), attorney compensation systems when needed, work-product and attorney client privilege protections to facilitate exchange of information, joint or parallel orders in related litigation, orders to streamline protracted trials, etc. Cf. *Standards*, subsections (f), (g), (h) and (i) (generally stating in cursory fashion that "methods of sound judicial management" should be used, and enumerating some categories).

Time Constraints

Citing judicial time as the scarcest resource involved in litigation, the *Manual* urges "...judges to use their time wisely and efficiently and to make use of all available help. Time pressures may lead some judges to think that they cannot afford to devote time to civil case management. It is true that the extra attention given by the judge to a complex case can encroach upon the time immediately available to attend to other matters. But judges have found that an investment of time in case management in the early stages of the litigation will lead to earlier dispositions, less wasteful activity, shorter trials, and, in the long run, to economies of judicial time and a lessening of judicial burdens." *Manual* at 10.

Issue Identification

"The *sine qua non* of management of complex litigation rests on the definition of the issues in the litigation. Unless the controverted issues have been identified and defined, the materiality of facts and the scope of discovery (and later trial) cannot be determined... Probably the most important function the judge performs in the early stages of litigation management is to press the parties toward identification, definition, and narrowing of issues." *Manual* at 47. Cf. *Standards*, subsection (h), a principal object of the preliminary conference is "to expose at an early date the essential issues in the litigation." The *Manual* suggests a variety of techniques to "facilitate" issue identification in the complex case: nonbinding statements of counsel, periodically updated; contention interrogatories or contention-and-evidence statements; cause of action element lists; pleading refinements; early preparation of proposed findings or jury instructions; severance, bifurcation or multi-furcation; etc.

Discovery

"Discovery in complex litigation, characterized by multiple parties, difficult issues, voluminous evidence, and large num-

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bers of witnesses, tends to proliferate and become excessively costly, time consuming, and burdensome. Early and ongoing judicial control is therefore imperative for effective management." *Manual* at 54.

Citing the "principle of proportionality" which underlies the legal test for discoverability in the FRCP (which is not materially different in state practice), the *Manual* emphasizes that even in complex litigation, the "no stone left unturned" approach is not always necessary. "Early identification and clarification of issues...is...essential to meaningful and fair discovery control." *Manual* at 55. Issue definition plus discovery sequencing are offered as the foundation for a cost-effective discovery plan. Cf. *Standards*, subsection (h). One of the principal objects of the preliminary conference is to identify the issues and "to suppress unnecessary and burdensome discovery procedures in the course of preparing for trial of those issues."

The *Manual* suggests techniques for tailoring a discovery plan ranging from simple scheduling orders to detailed judicial analysis and demarcation of the scope, quantity, sequencing and targeting of proposed discovery to compulsory disclosure of "core information." Techniques are proposed for expedited or streamlined resolution of discovery disputes by letter, conference call, special master, etc. Special protective or "umbrella" orders to preserve privileges or confidentiality are suggested to speed discovery production. Simplified and uniform document identification protocols, document preservation orders, the use of document depositories and computerized document imaging systems are discussed. (In *In re Silicone Breast Implant Products Liability Litigation*, MDL 926, for example, a CD containing 15,000 pages of documents deposited in the central document depository in Cincinnati could be purchased for \$25). These proposed techniques are designed to facilitate prompt and efficient discovery while minimizing the need for "satellite litigation" regarding discovery issues.

The special aspects of discovery of computerized data is covered, as are non-stenographic depositions, "deferred supplemental depositions," sequencing of depositions, control of abusive conduct, saving costs through a program of informal interviews, coordination with related litigation, etc. Interrogatory practice is also discussed. While the law underlying the discussion is Federal, some techniques are transferrable to state practice: development of master interrogatories, use of interrogatories from other litigation, staged or successive responses, etc.

Trial

The special trial issues more likely to arise in complex litigation form a significant portion of the *Manual*. The *Manual* discusses the need, for example, for early attention to expensive and elaborate demonstrative evidence such as computer simulations, noting "[i]t may be advisable to obtain at least a preliminary ruling or guidance concerning the admissibility of a proposed exhibit before substantial expense is incurred in its preparation (e.g., at the storyboard stage of a computer animation)." *Manual* at 123. The preparation of depositions for use at trial, especially videotaped depositions needing editing, is similarly discussed.

Various techniques are proposed for streamlining trial or reducing trial time. The use of test cases with a view toward possible collateral estoppel, or structuring the trial by consolidation, severance or bifurcation are treated. Various scheduling options are suggested — the six-day week (expedites a lengthy

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Dealing with the Difficult Attorney Or Witness: Is There Any Other Kind?

If you have been litigating for any substantial period of time, you have probably reached the same conclusion as the court did in *Green v. GTE California, Inc.*, 29 Cal. App.4th 407, 408 (1994), that "the term 'civil procedure' is an oxymoron." And, if the O.J. Simpson trial is any indicator of trends, the oath today is at most mildly inhibiting to many witnesses. This article surveys some lesser-known countervailing tactics you can employ in this climate of hyper-aggressive litigation and wholesale evasion of the truth to level the playing field and fully protect your client's interests.

Monetary Sanctions

One obvious way to combat abusive opposing counsel is by seeking monetary sanctions under Rule 37 of the Federal Rules of Civil Procedure ("FRCP") or California Code of Civil Procedure ("CCP") §2023, which provide authority for sanctions for misuse of the discovery process. Sanctions are also available under FRCP Rule 11 and CCP §128.7 for bad faith pleadings.

It may be less obvious that you can also seek sanctions when these statutes and rules do not apply. Simply ask the court to apply its inherent powers.

Thus, in *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991), the Supreme Court upheld the Fifth Circuit's imposition of more than \$900,000 in sanctions consisting of a party's entire litigation expense including attorney fees, for litigation misconduct based on the inherent power of federal courts. The Court stated:

There is...nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not as a matter of law, resort to its inherent power to impose attorneys' fees as a sanction for bad faith conduct. This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions. But neither is a federal court forbidden to sanction bad faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the rules.

Id. at 51.

Similarly, in California, courts have been held to have inherent equity, supervisory and administrative powers as well as the inherent power to control litigation before them. *Cottle v. Superior Court*, 3 Cal. App.4th 1367 (1992). The "inherent powers of the court are derived from the state constitution and are not confined by or dependent on statute." *Id.* at 1377.

The Games Counsel Play

Also remember that you are not limited to seeking monetary sanctions. You can ask the court to issue orders governing the conduct of discovery, issue sanctions or evidentiary sanctions.

For example, you can seek the court's intervention to combat the insidious practice of witness-coaching under the guise of objections or "clarifications" or the repeated attorney-witness conferences which alter the course of a deposition. Begin by issuing a warning and making a clear record of the coaching. If



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it persists, your most satisfying recourse, besides shouting, may be to bring a motion for a protective order precluding counsel from coaching, see FRCP, Rules 30(d) and 37; CCP §§2023(a)(2) and 2025(i), and seek the appropriate sanctions. Surprisingly, there is not much case law in this area but a forceful and eminently quotable case to support such a motion is *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993).

In *Hall*, the court issued a comprehensive order governing conduct at depositions which prohibited, among other things, any objection that would not be waived if not asserted at the deposition; any private, off the record conferences between counsel and the witness during the deposition or at breaks, except for the purpose of deciding whether to assert a privilege; any suggestive objections or statements by the witness's counsel; and, any private discussions between the witness and his or her counsel concerning documents before answering questions about them. *Id.* at 531-32.

In arriving at its order, the *Hall* court observed:

The underlying purpose of a deposition is to find out what a witness saw, heard, or did—what the witness thinks. A deposition is meant to be a question and answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record.... Rather, a lawyer must accept the facts as they develop.

150 F.R.D. at 528.

The court in *Hall* also explained the rationale behind its proscription against suggestive remarks by the witness's counsel, such as counsel's "interpretation" of the question for the witness:

The Federal Rules of Evidence contain no provision allowing lawyers to interrupt the trial testimony of a witness to make a statement. Such behavior should likewise be prohibited at depositions, since it tends to obstruct the taking of the witness's testimony.

Id. at 530-31. See also Los Angeles Superior Court Rule 7.12(e)(8) ("[W]hile a question is pending, counsel should not, through objections or otherwise, coach the deponent or suggest answers.")

The In Terrorem Deposition

How do you combat the hyper-aggressive opposing attorney who insists on noticing depositions for their *in terrorem* effect — generally depositions of you as counsel on some colorably relevant basis, or a so-called "apex" deposition of your corporate client's president to gain the company's "attention." In *Spectra Physics, Inc. v. Superior Court*, 198 Cal. App.3d 1487 (1988), the court, after noting the disruption and burden caused by attorney depositions, held that opposing counsel may only be deposed "where (1) no means exist to obtain the information other than to depose opposing counsel; (2) the information sought is relevant and not privileged; and, (3) the information is crucial to the preparation of the case." *Id.* at 1496. In *Estate of Ruchti*, 12 Cal. App.4th 1593 (1993), the court upheld sanctions for counsel's failure to withdraw a subpoena of opposing counsel and to exhaust alternative discovery methods after being informed of the *Spectra Physics* requirements in a meet-and-confer letter. Thus, be sure to highlight the *Spectra Physics* decision in your meet-and-confer letter to lay the foundation for an award of sanctions if counsel insists on attempting to depose you.

Similarly, where a corporate "apex" deposition is sought, upon application for a protective order, the court must determine

whether the deposing party has shown that the official has unique or superior personal knowledge of discoverable information and, if not, the court should issue a protective order requiring the discovering party to first obtain the necessary discovery through less intrusive methods. *Liberty Mutual v. Superior Court*, 10 Cal. App.4th 1282, 1289 (1992) (collecting cases). Such alternative methods include interrogatories to a high level official exploring the state of his knowledge; depositions of lower level employees; and a corporate designee deposition (see CCP §2025(d)(6)).

Sanctions for Videotaping Opposing Counsel

On a somewhat related topic, the court in *Green v. GTE California, Inc.*, *supra*, upheld sanctions for a plaintiff's attorney's attempts to videotape defendant's counsel while she was deposing the plaintiff, purportedly in an attempt to inhibit the intimidating tactics employed by defense counsel in the past. The court noted that counsel's attempted "novel use" of a video camera violated the three-day notice requirement of CCP §2025(1), and that, irrespective of the notice problem, it was doubtful if there was statutory support for videotaping counsel in any event. *Id.* at 410.

Also be wary of the counsel who, at the outset of a deposition, seeks to ascertain all documents reviewed by your client (*i.e.*, those that you have selected for review) and to have them produced. While counsel is entitled to production of documents actually used to refresh recollection (Federal Rules of Evidence, Rule 612; Cal. Evid. Code §771), where all documents have previously been produced, "the selection of and compilation of documents by counsel...in preparation for pretrial discovery falls within the highly-protected category of opinion work product." *Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985) cited with approval in *Sedlacek v. Morgan Whitney Trading Group, Inc.*, 795 F. Supp. 329, 330 (C.D. Cal. 1992). See also *Mitchell v. Superior Court*, 37 Cal.3d 591, 600 (1994) (identification of which publicly available documents were transmitted to client by his attorney is protected by attorney-client and work product privilege as it would reveal intended strategy). Thus, only after substantive questioning and a laying of the foundation under Federal Rules of Evidence Rule 612 or California Evidence Code §771, is counsel entitled to identification and production of documents actually used to refresh recollection. Counsel is not, however, entitled to specific identification and production of all documents reviewed by a witness in preparation for a deposition. At most, counsel is entitled to a general description of the types of documents reviewed absent further foundation.

The Sandbagger

The most common subspecies of recalcitrant counsel you are likely to encounter is the "sandbagger." You know the one — the attorney who repeatedly invokes the attorney-client privilege during discovery and surprises you at trial with previously "privileged" evidence; the attorney whose experts are conveniently unprepared throughout discovery (but certainly not at trial) or the attorney who "forgets" about relevant documents until the rush of trial jogs his memory.

In state court, to uncover such surprises or at the least, to lay the groundwork for a motion *in limine*, the first step is to propound well-crafted supplemental discovery. See, *e.g.*, CCP § 2030(c)(8) (permitting supplemental interrogatories twice prior to the initial setting of the trial date and once after, in addition to the 35 special interrogatories allowed). For an example of a supplemental interrogatory see Weil & Brown, Cal. Practice Guide: Civ. Proc. Before Trial (Rutter Group 1994) p. 8-11, ¶ 8:944. In federal court, of course, the parties have a continuing duty to supplement discovery responses and initial disclosures (FRCP 26(a)) if they learn their prior responses are incomplete or incorrect and the new information has not

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When Taking the Fifth Becomes the Deep Six

The O.J. Simpson trial has brought the Fifth Amendment into sharp relief. You may wonder about its application in the context of civil business litigation.

As a defense attorney, if you ever have the good fortune to encounter a plaintiff who is forced by circumstances to invoke the Fifth Amendment, smile happily. In fact, you can smile just as happily if you run into a plaintiff who mistakenly believes that he may invoke the Fifth Amendment during discovery and waive it at trial once the real or imagined prosecutorial threat has passed, thus gaining the element of surprise.

When this occurs, the case against your client should be dismissed. It is firmly established that, where a plaintiff prevents the defendants' discovery by invoking the Fifth Amendment privilege against self incrimination as to issues tendered by the complaint, the complaint *must* be dismissed. *Fremont Indemnity Co. v. Superior Court*, 137 Cal. App.3d 554, 560 (1982); *Alvarez v. Sanchez*, 158 Cal. App.3d 709, 712 (1984). See also *Dwyer v. Crocker National Bank*, 194 Cal. App.3d 1418, 1432 (1987) (courts have never allowed a plaintiff to use the privilege against self incrimination as both a "shield and as a sword.") Bear in mind this is a rule of substantive law, not a discovery sanction and it applies during all phases of litigation. See, e.g., *Brown v. United States*, 356 U.S. 148, 154-56 (1958) (refusal to answer questions at denaturalization proceeding).

If the court fails to dismiss the case, move *in limine* to preclude the plaintiff from testifying at all or at the very least as to those matters upon which he took the Fifth. *A&M Records, Inc. v. Heilman*, 75 Cal. App.3d 554, 566 (1977). Moreover, if the plaintiff invokes the Fifth Amendment for the first time at trial but seeks to use his prior deposition or discovery responses, the court should exclude all prior discovery which relates to the subject matter upon which the plaintiff is now invoking the Fifth Amendment. See *Dwyer*, 194 Cal.3d 1418; *Alvarez*, 158 Cal.3d at 713 n.3. Finally, be aware of the apparent direct conflict between *Sheppard v. Superior Court*, 17 Cal.3d 107 (1976), in which the California Supreme Court stated that the trier of fact may draw any relevant inference from the invocation of the Fifth Amendment in a civil proceeding, and Evidence Code § 913 which prohibits counsel from commenting on the invocation of a privilege and the trier of fact from drawing any inference therefrom.

With respect to a defendant invoking the Fifth Amendment, the majority of cases hold that striking a defendant's answer is "too harsh a sanction for exercising such an important constitutional right." *Alvarez*, 158 Cal. App.3d at 713 (citing cases). However, the lesser sanctions available include: exclusion of related defenses; exclusion of defendant's testimony on the subject matter; striking of previous testimony; and, exclusion

of documents. See *id.* And, once invoked during discovery, a defendant will not be allowed to waive the Fifth Amendment at trial and thus ambush his opponent. *A&M Records*, 75 Cal. App.3d at 566. A crafty defendant may, however, request a stay until expiration of the applicable criminal statutes of limitations. See *Pacers, Inc. v. Superior Court*, 162 Cal. App.3d 686 (1984). Absent a grant of immunity from the relevant prosecutorial agencies, the best argument against such a stay order will generally be that if the court were to await the expiration of all applicable criminal statutes of limitation there is a distinct probability that the five year period in which to try the case will have expired. See *Dwyer*, 194 Cal. App.3d at 1433.

What if the party you are opposing is a corporation or partnership who is resisting discovery because of the purported Fifth Amendment rights of an officer, director, partner or other principal? The United States Supreme Court has held that corporations and "collective entities" are not protected by the Fifth Amendment, *Braswell v. United States*, 487 U.S. 99 (1988), and since "any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation... " you may move to compel the discovery along with a request for terminating sanctions (*Dwyer*, 194 Cal. App.3d at 1432), or accept the invocation irrespective of its validity and move to dismiss. *Fremont Indemnity*, 137 Cal. App.3d 554. See also *Federal Chandros, Inc. v. Silverite Construction Co., Inc.*, 562 N.Y.S. 2d 64 (1990) (held proper to dismiss corporation's complaint where deposition witness, a principal of the corporate plaintiff, invoked the Fifth Amendment and refused to answer questions).

Finally, your opponent may simply seek to hide damaging documents under the cloak of the Fifth Amendment. If, however, the documents are voluntarily created business records, they are not protected by the Fifth Amendment since it "protects a person only against being incriminated by his own compelled testimonial communication." *United States v. Doe*, 465 U.S. 605, 611 (1984). And, since the privilege is personal, *Rogers v. United States*, 340 U.S. 367, 370-71 (1951), it does not protect disclosure by third parties. *Fisher v. United States*, 425 U.S. 391, 402 (1976) (taxpayer cannot prevent production of his accountant's records held by his attorneys); *Couch v. United States*, 409 U.S. 322, 336 (1973) (taxpayer cannot prevent production of records held by her accountant). Again, the privilege does not apply to collective entities and thus corporations, partnerships and unions may not withhold documents on this basis. *Braswell*, 487 U.S. at 110. This is true even if the production of documents would personally incriminate the custodian of records since "the custodian's act of production is not deemed a personal act, but rather an act of the corporation." *Id.*

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Dealing with the Difficult Attorney

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otherwise been made known to the other parties. FRCP Rule 26(e). Under FRCP 37(c)(1) there is a self-executing sanction for the failure to make any disclosure required by FRCP 26(a) and (e)(1), consisting of evidence preclusion at trial, a hearing or on a motion.

In state court, after propounding supplemental discovery, bring a motion *in limine* to preclude any evidence responsive to prior

discovery but not previously produced on the authority of CCP § 2023(b) and *Thoren v. Johnston & Washer*, 29 Cal. App.3d 270 (1972). In *Thoren*, the plaintiff omitted from his discovery response a person who he and his counsel either knew was a percipient witness or deliberately refrained from determining whether he was and then attempted to call that witness at trial. The court held that precluding the witness from testifying was the appropriate remedy for the wilful omission during discovery. *Id.* at 274-75.

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In federal court, in addition to FRCP 37, a recent case, *Nike, Inc. v. Wolverine Worldwide, Inc.*, 43 F.3d 644 (Fed. Cir. 1994) (applying Ninth Circuit law), is forceful authority in support of a motion *in limine* or for issue preclusion sanctions if your opponent has sandbagged. In *Nike*, a patent infringement case, at the pretrial conference the court ordered both parties to provide full disclosure in response to discovery requests. Throughout discovery Nike disavowed any reliance on a theory of infringement under the doctrine of equivalents, but left the door open pending completion of an investigation by its expert. After discovery closed Nike's expert concluded his investigation and Nike decided to present a claim of infringement by equivalents at trial. The Federal Circuit upheld the district court's order precluding a claim of infringement under the doctrine of equivalents pursuant to Rule 37. In doing so, the court rejected Nike's claim that it violated no discovery order because it had produced everything in its possession at the time:

We reject Nike's suggestion that its own delay should excuse it from the court's sanction. Wolverine began manufacturing the accused shoes in 1989. Nike filed suit in February 1993; thus, Nike had over three years to investigate the merits of a possible doctrine of equivalents case. If Nike needed more time to substantiate its infringement claim, it could have delayed filing suit...or requested more time for discovery.... While failing to provide what it did not have may not seem to be a violation of an order, the sanction of precluding the pursuit of an unsupported claim was clearly appropriate here because the trial court had the right to manage its docket and require the parties to support their claims or drop them.

Id. at 648-49.

Although in *Nike* the court relied upon the district court's order directing the parties to provide full disclosure during discovery, with the 1993 amendments to FRCP Rules 26 and 37, such an obligation is now statutorily imposed and universally applicable to federal litigants. And, importantly, the Ninth Circuit has squarely rejected the proposition that belated compliance cures a discovery violation or precludes sanctions for the initial misconduct. *Henry v. Gill Industries*, 983 F.2d 943, 947 (9th Cir. 1993); *North American Watch Corporation v. Princess Ermine Jewels*, 786 F.2d 1447, 1451 (9th Cir. 1986).

With regard to fluid assertions of the attorney-client privilege, in *Xebec Development Partners, Ltd. v. National Union Fire Ins. Co.*, 12 Cal. App.4th 501 (1993), the court held that it was appropriate under the court's inherent power to control the proceedings before it, to preclude the introduction of evidence which was shielded during discovery as privileged absent a way to cure the resulting prejudice. *Id.* at 569. *Accord, In re Marriage of Hoffmeister*, 161 Cal. App.3d 1163, 1171 (1984). At the very least, the court must grant a continuance to allow counsel to review the new evidence as it would be an abuse of discretion to refuse. *Id.*

With respect to experts, the Ninth Circuit has declared, "any counsel should know that producing an unprepared expert is sanctionable." *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404 (9th Cir. 1991). See also CCP §2023(a). Such sanctions typically involve the exclusion of the expert's testimony at trial. *Id.*

Correction

The May 1995 issue of *ABTL Report* contained a typographical error on page 8 in the article by Justice Howard B. Wiener entitled "ADR on Appeal." The word "not" was omitted from a sentence that should have read, "Appellate settlement should not be limited only to those cases where the potential for reversal is great." We apologize for any inconvenience this error may have caused.

Under FRCP Rule 37 and CCP §2034(j), if a party fails to produce discoverable writings of an expert within the designated time period the court should, on a motion *in limine*, also exclude the expert's testimony at trial.

Beware the "Trojan horse" expert; this is the undisclosed expert who is purportedly there simply to impeach your expert. See CCP § 2034(m). An impeaching expert may not contradict your expert's opinion, but rather, is strictly limited to disproving a "foundational fact" which is to "be strictly construed by the trial court to prevent a party from offering a contrary opinion of his expert under the guise of impeachment." *Fish v. Guevara*, 12 Cal. App.4th 142, 146 (1993). For example, in *Fish* neither expert performed any testing to determine the permeability rate of soil and thus the undisclosed expert's testimony about the permeability rate of the soil at issue was inadmissible as nothing more than a contrary opinion. So, if you are confronted with an undisclosed expert, request an Evidence Code §402 hearing outside the presence of the jury to determine: (1) if the expert has performed testing or done anything else to give him percipient knowledge of facts, and (2) whether he has or intends to offer any opinions. Depending on the outcome of the 402 hearing, you may then move to exclude the expert testimony entirely or obtain an *in limine* order to prevent the expression of any opinions from the witness stand.

Testimonial Amnesia

Most witnesses today are savvy enough to know that outright lies are not necessary to evade pointed questioning; rather, the favored evasive maneuver is the "I don't remember" response. Of course, at trial the same witness's refreshed recollection is virtually photographic, at least concerning details favorable to the witness's version and none of the flavor of the evasion at the deposition comes through. Fortunately, there are several effective counter measures to this now common tactic.

First, establish that you are truly dealing with a lack of recollection — "I don't recall that" can mean the witness does not recall one way or the other, or that he/she recalls that the event did not occur. Next, you can exploit the lack of recall to neutralize the witness by establishing the broad range of issues on which the witness has no recollection. At trial, you can get your point across to the jury by asking slightly argumentative questions eliciting the fact that the witness is in no position to contradict the testimony of other witnesses with personal knowledge who do recall the events or statements.

To combat memory flashbacks at trial, establish at the deposition all persons, documents or things the witness is aware of that could refresh his recollection. Then find out if the witness has reviewed any such items. If not, the witness appears intentionally evasive and if he has, the failed recollection appears contrived. Of course, if the witness possesses information critical to your case, definitely attempt to refresh that recollection yourself. Even if unsuccessful, you have further laid the groundwork for an argument that the failure of memory is disingenuous.

Finally, at trial, if the witness is miraculously able to testify in vivid detail, go through select deposition exchanges with him and establish the vagueness of his memory on important issues on that occasion. Next establish what the witness has done to refresh his recollection for trial (including who was present during any such sessions) and that this could have been done at the time of his deposition. You then may, through further questioning or on argument or both, convey to the jury that the witness's current story is suspect as he formulated it in the months between his deposition and the trial.

Hopefully, the tips discussed above will help you level the playing field; however, their ultimate efficacy is heavily dependent upon a firm-willed judiciary which in the end is the ultimate equalizer.

—Richard L. Stone

trial), the four-and-a-half day week (one-half day for administration), the morning schedule (nine to noon, or eight to two, etc.)

To enhance jury recollection and comprehension in a lengthy or complex trial, various innovative techniques for sequencing evidence and arguments are suggested — presenting evidence by issue category, perhaps followed by sequential verdicts; arranging closing arguments by issue; using interim opening statements or arguments; using interim jury instructions; glossaries, indexes, time lines, exhibit books and graphics.

To control costs (but also with the practical effect of expanding the court's subpoena power) the receipt of live testimony by remote video transmission is proposed (as used in *In re San Juan Dupont Plaza Hotel Fire Litigation*, MDL 721 and in *In re Washington Public Power Supply System Litigation*, MDL 551). For a sample protocol for remote video transmission testimony from the San Juan litigation, see 129 FRD at 427-30.

Footnotes

Heavily footnoted, the *Manual* cites to useful resources such as Judge Schwarzer's study of coordination of litigation between state and Federal courts in eleven complex cases: two groups of asbestos cases, three air crashes, two fires, two building collapses, an oil spill and an investment fraud case. William W. Schwarzer, et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 Va. L. Rev. 1689, 1700-06 (1992). Other citations are provided to most of those complex Federal cases litigated over the past 25 years that have developed or tested complex case management techniques.

Case Management Orders, Etc.

In addition to numerous citations to sample orders available in the FRD or via an on-line service, the *Manual* provides 90 pages of forms of orders, notices, jury questionnaires, etc.

The Manual in the Fast Track

The *Manual* collects valuable ideas, citations and techniques that can be adapted for management of a complex case in the context of the fast track. Although complex litigation in state court is theoretically subject only to Section 19 of the Standards, the 568 pages of the *Manual* are a valuable supplement to the less than one page of the *Standards*. Nothing can substitute for ample judicial time, but proper adaptation of the techniques set forth in the *Manual* can help reduce any adverse impacts of the distractions and time constraints of fast track life.

—Hon. John J. Zebrowski

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A Rule Ripe for Change: Recovery of Attorneys' Fees

Attorneys often represent themselves in litigation, particularly when they prosecute fee-collection cases against deadbeat clients and defend themselves against the inevitable counterclaims charging legal malpractice brought by those same clients. In such cases, attorneys cannot recover attorneys' fees under present California law, as expressed in an aging state Supreme Court decision, *City of Long Beach v. Sten*, 206 Cal. 473 (1929). That is the rule, even if the attorney would be entitled to recover fees paid to another attorney to perform the same legal services.

This rule has been widely criticized and some courts have refused to follow it. Now, the Supreme Court may be on the verge of crafting a new rule to replace it.

Revisiting this issue for the first time in 66 years, the California Supreme Court recently granted review in *Trope v. Katz*, 33 Cal. App.4th 1262 (1994), the latest in a long line of California cases which have refused to award attorneys' fees incurred by attorneys in self-representation. This grant of review paves the way for the Supreme Court to overrule its much-criticized *Sten* decision.



Paul M. Miloknay

The Formalistic Rule Of *Sten*

Sten involved a condemnation proceeding in which attorney Lady represented joint property owner *Sten* and also represented himself *in propria persona*. Lady obtained a judgment in favor of *Sten* and himself and filed separate cost bills for each of them, seeking statutory attorneys' fees as an item of costs. The City moved to tax the costs claimed as Lady's attorneys' fees on the ground that Lady was an attorney who represented himself. The trial court granted the motion, fixed *Sten's* fees, and disallowed Lady's fees.

The Supreme Court affirmed. Without engaging in any independent factual or legal analysis, the Court adopted the holdings of two prior cases, *Patterson v. Donner*, 48 Cal. 369 (1874), and *City of Long Beach v. O'Donnell*, 91 Cal. App. 760 (1928). Both cases held that an attorney could not recover attorneys' fees incurred in self-representation because no obligation to pay a fee accrued and no fee was actually paid. *Patterson*, 48 Cal. at 379-380; *O'Donnell*, 91 Cal. App. at 762.

The *Sten* case has been widely criticized by appellate courts. Indeed, there is a line of cases which reject *Sten* as inequitable and illogical. These cases also recognize that, in *Sten*, the Supreme Court "expressly refused to decide whether the rule denying fees to an attorney appearing in his own behalf was a desirable one, but rather felt compelled to follow the rule under the precedent of two earlier cases." *Renfrew v. Loysen*, 175 Cal. App.3d 1105, 1108 (1985).

Sten and its progeny exalt form over substance and ignore the equitable and practical considerations which dictate that attorneys who represent themselves should be allowed to recover the

(Continued on page 8)

reasonable value of their services. Attorneys who represent themselves utilize professional time and skill which is an opportunity cost that has tangible value. The better rule would recognize the value of an attorney's services rendered in self-representation and allow recovery of fees.

The Supreme Court Inspires A Second Line Of Cases

The California Supreme Court seriously questioned the *Sten* rule in *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal. 3d 891, 915, fn. 13 (1979) ("CLAM"). In *CLAM*, the Court noted that the logic of *Sten* and its progeny is unclear, and reasoned that attorneys who represent themselves provide a valuable service for which they should be compensated:

Although such an attorney [acting *pro se*] 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.

CLAM, 25 Cal. 3d 891, 915, fn. 13 (1979).

Other cases have seized upon this language, which admittedly is dicta. Indeed, a line of cases has emerged which criticizes *Sten* and allows *pro se* attorneys to recover their fees. For example, in *Leaf v. City of San Mateo*, 150 Cal. App.3d 1184 (1984), the First District Court of Appeal reversed the trial court's order denying attorneys' fees to an attorney who appeared *in pro per* and on behalf of another individual in an inverse condemnation proceeding. The trial court, following *Sten* and its progeny, ruled that the attorney could not recover fees for representing himself because such fees are not "actually incurred."

The Court of Appeal rejected this reasoning and recognized the recent cases which have questioned the *Sten* rule. The court also noted that, in *CLAM*, the Supreme Court itself questioned the *Sten* rule as illogical. 150 Cal. App.3d at 1188. The court, applying its own reasoning and that of the Supreme Court in *CLAM*, concluded that the *pro se* attorney should be entitled to recover his legal fees:

It would be illogical and unjust to conclude that because an attorney-litigant has provided valuable professional services in his or her own behalf, no litigation cost for such services has been actually incurred.... It seems obvious that prosecution of an inverse condemnation action by an attorney acting *pro se* involves a tangible commitment of time and skills...having a substantial economic value.

150 Cal. App.3d at 1189.

The Ninth Circuit Court of Appeals took a similar approach in *Ellis v. Cassidy*, 625 F.2d 227 (9th Cir. 1980). Finding that the district court properly awarded attorneys' fees to a *pro se* attorney, the court said:

The appellees have actually suffered pecuniary loss, since they have been required to take time away from their practices to prepare and defend the suit. [Citations.] Legal services have actually been performed. [Citations.] The difficulty of placing a dollar value on the legal services performed, present in the situation where a lay defendant represents himself, is largely absent in the case of an attorney who has established fees and billing practices.

625 F.2d at 231.

In *Renfrew v. Loysen*, 175 Cal. App.3d 1105 (1985), the *pro per* plaintiff attorney sued the defendant client to collect attorneys' fees for services rendered pursuant to a written fee agreement. The agreement provided that the prevailing party in any litigation concerning fees shall be entitled to attorneys' fees and

costs incurred in connection with such litigation. The attorney prevailed, but the trial court refused to declare the attorney the prevailing party so as to entitle her to collect her fees as litigation costs.

The Court of Appeal reversed. Relying on *Leaf*, *Ellis*, and footnote 13 in *CLAM*, the court concluded that an attorney's time is valuable and:

To allow respondent to escape her obligation to pay the attorneys' fees required under the contract simply because the attorney chose to rely on her own professional skill rather than hire another attorney would create a windfall for the client at the direct and tangible expense of the prevailing party-attorney.

175 Cal. App.3d at 1109-1110.

In the cases discussed above, the courts distinguished *Sten* and reasoned that the better rule allowed the *pro se* attorney to recover his or her fees. Indeed, equity and common sense suggest that the denying a fee recovery merely because an attorney engaged in self-representation elevates form over the substantive fact that legal services were performed and an economic loss accrued to the attorney for which he should be compensated. Nonetheless, the *Sten* case enjoys continued vitality. See *City of Long Beach v. Hunt*, 8 Cal. App.2d 401 (1935); *O'Connell v. Zimmerman*, 157 Cal. App.2d 330 (1958).

Trope Challenges the Supreme Court to Revisit *Sten*

In *Trope v. Katz*, 33 Cal. App.4th 1262 (1994), the Los Angeles firm of Trope and Trope ("Trope") entered into a written agreement to perform legal services for defendant Katz in a marital dissolution proceeding. The agreement provided for the recovery of attorneys' fees and costs. Trope represented Katz from November 1985 to February 1989, when it withdrew as counsel with over \$160,000 in attorneys' fees owing. Trope sued Katz to recover the fees and Katz cross-complained against Trope for legal malpractice. The jury found Trope liable to Katz for \$118,500 in malpractice damages, and found Katz liable to Trope for \$163,000 in attorneys' fees. While Trope was the prevailing party, having won a net recovery from Katz, the trial court relied on *Sten* and refused to award Trope any of its attorneys' fees incurred in the action.

The Court of Appeal affirmed. Although the court acknowledged the equitable and pragmatic reasons for rejecting *Sten*, the court in *Trope* concluded that its hands were tied by legal precedent; it was obligated to follow the rule of *Sten*. In reaching this conclusion, the court noted that the *CLAM* footnote was dicta. *Id.* at 1267. As such, to the extent that other cases relied on footnote 13 of *CLAM*, they were not controlling. *Id.* at 1269-1270. The court thus concluded that the doctrine of *stare decisis* compelled it to follow the rule in *Sten*. 33 Cal. App.4th at 1271.

The court in *Trope* thus invited the Supreme Court to revisit *Sten*, and the Supreme Court took up the challenge. Based on the persuasive reasoning of *Leaf*, *Ellis*, *CLAM*, and *Renfrew*, and the unreasoned adherence of other courts to the *Sten* rule, it is probable that the Supreme Court will overrule *Sten* when it issues its opinion in *Trope*. The formalistic reasoning of *Sten* and its progeny — that a *pro se* attorney cannot recover his or her fees for self-representation merely because no fees are actually incurred or paid — unrealistically disregards the fact that an attorney who represents himself or herself renders a valuable service which represents a tangible and measurable loss to the attorney if he or she is not compensated.

—Paul M. Miloknay

The Impact of *Montrose*

In *Montrose Chemical Corporation of California v. Admiral Insurance Company*, 10 Cal.4th 645 (1995), the California Supreme Court considered which trigger of coverage to apply under a CGL policy where the underlying third party claims involve continuous or progressively deteriorating damage or injury. The Court adopted the "continuous trigger" rule, requiring any insurer providing coverage during the period of a continuous loss to defend its policyholders. In so holding, the Court rejected the "manifestation rule," under which all damages would be covered only under the single policy on the risk when damages first became apparent.

The decision is expected to have a severe impact on the insurance industry. No longer will CGL insurers be able to limit their exposure for continuous loss claims by isolating the insurance obligation to a single policy period — the policy in effect at the time of the discovery or manifestation of an injury or damage. Now, defense costs will be shared among all insurers on the risk over the years when damages continued to mount. Moreover, some insurers may be required to pay out multiple policy limits under different policy years.

The Court's ruling appears to decide the narrow question of whether multiple CGL insurers must share the costs of defense where pollution causes a continuous loss over multiple policy years. However, it leaves numerous other questions unanswered, such as: How will defense costs be allocated among multiple insurers? What about the costs of indemnity? When is a loss "continuous" as opposed to a series of separate losses arising from multiple occurrences? Would a different rule apply to such separate losses? What rule would apply with professional liability or directors and officers liability policies? Such thorny issues are likely to confront the courts for years to come.

The Factual Background

Admiral insured Montrose Chemical Company, a now defunct company that manufactured DDT from 1947 to 1982 at its Torrance, California plant. The Admiral liability policies covering Montrose were in effect from October 13, 1982 to March 20, 1986.

In 1983, the United States sued Montrose to remove toxic waste at a hazardous waste disposal site known as the Stringfellow Acid Pits in Riverside County. Montrose dumped chemical waste there between 1968 and 1972. The suit alleged that property damage commenced in 1956 and continued throughout the period when Admiral's CGL policies issued to Montrose were in effect.

In addition to the action by the United States, Montrose faced a consolidated private party toxic tort action, *Newman v. Stringfellow*, by numerous plaintiffs seeking damages for bodily injury and property damage alleged to have resulted from the release of contaminants at the Stringfellow site. The plaintiffs in *Newman* alleged that bodily injury and property damage occurred on a continuous basis, commencing in 1956 and extending to the present time. They alleged that 27 wrongful deaths occurred between 1982 and 1986, and that property damage was continuous throughout the same period.

Three remaining actions, known as the *Levin Metals* cases, were brought by Levin Metals against Parr-Richmond, alleging that real property sold by Parr-Richmond to Levin Metals in Contra Costa County in 1981 was contaminated by hazardous

waste. The suits allege both on-site and off-site contamination of soil, ground water, and surface water and seek damages for fraud based on Parr-Richmond's failure to disclose the contamination. Chemical processing at the Parr-Richmond terminal site ceased in 1964 or 1965. The basis of Montrose's alleged liability to the United States under CERCLA is that it shipped chemicals to the site prior to that time. The environmental contamination at the Parr-Richmond site was discovered by plaintiffs no later than August 1982. After the lawsuits were filed, Parr-Richmond cross-complained against Montrose and others for contribution and indemnity.

Montrose was an action for coverage for these claims, in which Admiral argued that the alleged contamination preceded its policy coverage, and that it was found prior to the beginning of its coverage. The trial court applied the "manifestation rule" which the California Supreme Court had previously adopted in first party property insurance cases. Thus, the court held that there was no potential for coverage under Admiral's policies and Admiral had no duty to defend.

The Court of Appeal reversed, rejecting the "manifestation rule" as inconsistent with the contractual terms of Admiral's CGL policies. The California Supreme Court agreed with the Court of Appeal, holding that standard CGL policy language provides potential coverage for continuous or progressively deteriorating bodily injury or property damage that occurs during several policy periods. CGL policies typically provide coverage for injuries and damage caused by an "occurrence" defined as an accident, including a "continuous or repeated exposure to conditions" that result in bodily injury or property damage during the policy period. According to the Court, CGL policies do not impose, as a condition of coverage, a requirement that the damage or injury be discovered at any particular point in time.

Additionally, in *Montrose* the Court held that the "loss in progress" rule codified in California Insurance Code §§22 and 250 does not limit the potential for coverage for a third party liability claim under a CGL policy as long as uncertainty remains about the amount of damage or injury that may occur during the policy period and the imposition of liability on the insured, and no legal obligation to pay third party claims has been established.

The Unanswered Questions

The continuous loss rule adopted by the Supreme Court in *Montrose* will make it easier for policyholders to obtain coverage for the costs of defending against continuous loss claims like pollution and toxic torts. However, the full impact of the case is not entirely clear. There are still difficult factual questions as to when to apply the continuous loss rule. The *Montrose* decision focuses only on "occurrence" based liabilities under CGL policies. It does not address non-occurrence-based coverage, such as personal injury or advertising injury. Nor does it address the applicable rule under professional or directors and officers liability policies.

Notably, the decision also fails to address the indemnity obligation for the costs of a settlement or judgment. To the extent that the indemnity obligation turns on policy language regarding



Glenn M. White

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"occurrence" based coverage, it would seem logical to apply the "continuous loss" rule to indemnification claims as well. But, that only raises further questions.

How would the "continuous loss" rule be applied? Would each insurer be responsible for the amount of a judgment attributable to damages that accrued during that insurer's policy period? What if damages totaled millions of dollars, and most damages occurred during a year when policy limits were \$300,000? Will there be endless litigation to ascertain when damages occurred? Or will damages simply be allocated among all insurers based on policy limits, without regard for when the damages arose? Similar questions with respect to the allocation of defense costs among insurers will likely vex the California courts for some time to come.

The Unresolved Single Versus Multiple Occurrences Issue

Additionally, the decision does not address what constitutes a continuous loss. This may invite insurers to seek to limit their exposure by arguing that a loss is not "continuous or progressively deteriorating" in nature. They may be expected to argue that, what appears to be a continuous long term loss is actually a series of individual "occurrences" of property damage or bodily injury. This approach under certain circumstances would allow insurers to shift losses from their policy period to other insurers' policy periods, reducing, if not eliminating, their exposure under the continuous loss rule of *Montrose*. The *Montrose* decision does not, however, provide clear guidance for distinguishing a continuous loss situation from a situation involving multiple occurrences.

Courts have defined "occurrence" in three competing ways. See generally, *What Constitutes a Single Accident or Occurrence Within Liability Policy Limiting Insurers' Liability to a Specified Amount Per Accident or Occurrence?*, 64 A.L.R.4th 668 (1988). A majority of courts determine the number of occurrences based on the underlying cause of the property damage. *Id.* at 673, 676-77. A minority look to the effect of the accident or the event that triggers liability. *Id.* at 673-74, 679-80.

At least two very early California cases appear to side with the causation rule. In *Hyer v. Interinsurance Exchange Auto Club*, 77 Cal. App.3d 343 (1926), where the insured's car collided with one car, deflected sideways, and collided with a second car, the California appellate court held that both collisions comprised one accident because they arose from a single proximate cause. Accord, *Perkins v. Fireman's Fund Independent Company*, 44 Cal. App.2d 427 (1941) (holding insurer liable only up to \$10,000 per accident limit even though several people were injured in an auto accident).

The causation rule has not been held applicable to contemporary continuous loss claims such as environmental or toxic claims. Recently, California courts have shown a willingness to litigate the issue of what constitutes a single versus multiple occurrence of damages. See *Chu v. Canadian Indemnity Company*, 224 Cal. App.3d 86, 97-99 (1990) (in a construction defect situation, "faulty construction" was not held to be the cause of numerous defects manifesting over time. A determination of whether there were single or multiple defects was determined to be a factual issue for litigation). Such decisions suggest the potential for numerous costly suits that may defy predictability as the courts gradually fashion guidance in this area.

—Glenn M. White

Torts

In *Freeman & Mills v. Belcher Oil Co.*, 95 Daily Journal D.A.R. 11851 (Aug. 31, 1995), the California Supreme Court abolished the tort of "bad faith denial of the existence of a contract," overruling the widely-criticized *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*, 36 Cal.3d 752 752 (1984). The Court noted that *Seaman's* has generated "uniform confusion and uncertainty" and added that it should be "overruled in favor of a general rule precluding tort recovery for nonindependent contract breach, at least in the absence of violation of 'an independent duty arising from principles of tort law.'" *Id.* at 11857-58.

Strict Liability

In *Peterson v. Superior Court*, 1995 WL 494606 (Aug. 21, 1995), the California Supreme Court overruled *Becker v. IRM Corp.*, which ruled that landlords may be held strictly liable in tort for personal injuries to tenants caused by a defect in a leased dwelling. The Court ruled that landlords may only be held liable under general tort principles if they breached the applicable standard of care.



Vivian R. Bloomberg

Insurance

The California Supreme Court rendered its long-awaited decision in *Montrose Chemical Corporation of California v. Admiral Insurance Company*, 95 Daily Journal D.A.R. 8783 (July 13, 1995), modified, 95 Daily Journal D.A.R. 11889 (Aug. 31, 1995), holding that in cases involving continuous or progressively deteriorating bodily injury or property damage, the continuous injury trigger determines which CGL policies are at risk. (See article on page 9.)

The Ninth Circuit issued a surprising decision regarding allocation of defense costs under director and officer ("D&O") liability insurance policies. *Safeway Stores, Inc. v. National Union Fire Ins. Co.*, 95 Daily Journal D.A.R. 11421 (9th Cir. Aug. 23, 1995). The court ruled that defense costs should be paid by the insurer even if they benefited an uninsured party, provided the expenditures were also "reasonably related" to the defense of insured directors and officers. The defense costs in question were incurred in defending Safeway, which was not insured under the subject D&O policy, as well as its directors and officers, who were insured. Until now, in the Ninth Circuit, defense costs have been subject to allocation in recognition of the fact that D&O policies cover only the liability of a company's directors and officers, not the company's own liability.

The court in *Safeway* also held that settlement costs should be paid entirely by the D&O insurer, notwithstanding the fact that the settlement had resolved the liability of the uninsured Safeway, in addition to the insured directors and officers. Basing its decision on the recent *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424 (9th Cir.1995), amended, No. 93-35495, slip op. 9325 (9th Cir. Aug. 1, 1995), the court adopted the "larger settlement rule" and held that:

Under the larger settlement rule, a corporation is entitled to reimbursement of all settlement costs where the corporation's liability is purely derivative of the liability of the insured directors and officers.... Allocation is appropriate only if, and only to the extent that, the defense or settlement costs of the

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Cases of Note

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litigation were, by virtue of the wrongful acts of uninsured parties, higher than they would have been had only the insured parties been defended or settled.' [Citation.]

In a related development, on Aug. 1, 1995, the Ninth Circuit denied en banc review of *Nordstrom*.

Arbitration

In *Hayes Children Leasing Co. v. NCR Corp.*, 95 Daily Journal D.A.R. 10575 (Aug. 4, 1995), the Court of Appeal held that, in the absence of an allegation that the party resisting arbitration never intended to agree to arbitrate the issues raised in the proceedings or that its assent to the agreement to arbitrate was the product of wrongful coercion, the matter should be referred to arbitration without any preliminary judicial consideration of the question of fraud in the inducement. It is not enough to allege that a contractual arbitration clause was inserted in the agreement to further a fraudulent scheme.

Insurance

In what has been proclaimed a major victory for the insurance industry, the California Supreme Court ruled that insurers are not obligated to defend against claims seeking incidental emo-

tional distress damages where the heart of the case is really for economic losses that are not covered under a standard comprehensive general liability insurance policy. *Waller v. Truck Ins. Exchange*, 95 Daily Journal D.A.R. 11663 (Aug. 28, 1995). The Court also held that an insurer does not waive coverage defenses that it fails to mention in denying a claim.

The case arose from a shareholder dispute involving allegedly intentional acts of corporate mismanagement, stock manipulation and disregarding the rights of an minority shareholder. The defendants contended that the CGL carrier should have defended because the lawsuit included incidental allegations that the plaintiff suffered emotional distress, back pain, rashes and headaches that should have been viewed as "bodily injury" within the scope of coverage. The Supreme Court disagreed, ruling that CGL policies were never intended to "cover emotional distress damages that flow from an uncovered occurrence."

In *Insurance Company of North America v. National American Ins. Co. of California*, 95 Daily Journal D.A.R. 10204 (July 28, 1995), the Court of Appeal confirmed that an insured's own negligence as a contributing cause of damage does not bar coverage under a broad form endorsement to a comprehensive general liability insurance policy where the negligence of others also created damage for which the insured is derivatively liable.

In *Pruyen v. Agricultural Insurance Company*, 95 Daily Journal D.A.R. 9041 (June 30, 1995), the Court of Appeal held that, where an insurer improperly refuses to provide its insured with a defense, and the insured then enters into a settlement with the plaintiff manifested by a stipulated judgment, a covenant not to execute and an assignment of the insured's rights against its insurer to the plaintiff, a presumption is raised that the settlement reflected the existence and amount of the insured's liability to the plaintiff. Unless the insurer proves that the settlement did not represent a reasonable resolution of the plaintiff's claim against the insured or was the product of fraud or collusion, the stipulated judgment will be binding upon the insurer and it could not avoid liability by reliance on the "no action" clause to bar plaintiff's suit.



Denise M. Parga

Express Indemnity

The Court of Appeal reviewed the legal principles pertaining to express indemnity provisions in *Maryland Casualty Company v. Bailey & Sons, Inc.*, 95 Daily Journal D.A.R. 7040 (June 1, 1995), holding that a finding that the developer was strictly liable to the plaintiff in a construction defect case is not necessarily a finding that the developer was actively negligent for purposes of determining whether the developer could seek recovery against its subcontractor on a "Type II" indemnity provision.

Good Faith Settlements

In *Gowvis Engineering v. Superior Court*, 95 Daily Journal D.A.R. 10649 (Aug. 7, 1995), the court held that the valuation of a settlement that won "good faith approval" pursuant to CCP §877.6 could have no binding or res judicata effect on nonsettling defendants in a subsequent action for indemnity against a nonsettling defendant.

—Denise Parga and Vivian R. Bloomberg

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Letter from the President

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can be difficult to obtain. Yet the ABTL is not a defense bar or large law firm based organization, and prominent plaintiffs' litigators and small firm practitioners are members of our Board, and actively participate in its programs. Second, the primary mission of the ABTL is educational. While ABTL is also active in supporting the justice system, for example, by participating in bench bar committees, judicial settlement programs and the like, the ABTL is essentially non-political, and has never been viewed as a lobbyist for any particular point of view. This narrow focus has helped the organization concentrate its resources and the talent of its members on providing educational programs which have repeatedly been characterized as the best of their kind, even in this era of mushrooming CLE providers. Third, the ABTL has always striven for and attained a high level of participation by members of the federal and state judiciary, all of whom are invited to attend each of our dinner programs, and many of whom have participated in our annual seminars. The ABTL's lack of affiliation with a particular political viewpoint undoubtedly facilitates this judicial interest. Finally, like any successful bar organization, the ABTL derives its strength from the quality of its most active members and their willingness to commit time and energy to making its activities work.

After I completed this thought process, my most important goal for this year became obvious: don't tinker with any of those building blocks which have been instrumental in ABTL's success to date. First and foremost, this means continuing to place the highest priority on providing high quality programs. We are already well on the way to meeting that goal. Our September dinner program featured a unique look at the jury system from the jurors' point of view. For this year only, we are restoring our April dinner program, which was replaced for the last two years by the Judicial College. Accordingly, you can look forward to five dinner programs under the able leadership of this year's program chair, Jeffrey Briggs, which we hope will address your needs and concerns as business litigators. This year's annual seminar, to be held on October 13-15 at the Loews Ventana Canyon Resort in Tucson, Arizona, promises to be a tremendous event thanks to the efforts of Southern California program chair, David Stern, and his counterparts in Northern California and San Diego. The seminar will focus exclusively on cross-examination, and different techniques for questioning particular types of witnesses will be demonstrated by some of the leading trial lawyers in California. Sessions will be presided over and commented upon by prominent federal and state judges representing all three ABTL chapters. The seminar will be kicked off by a presentation by Michael Tigar on cross-examination, and Chief Justice Lucas will also be joining us for a special presentation. The locale for the seminar is an easy to reach and spectacular family resort nestled in the foothills and surrounded by giant cactuses, with an abundance of recreational activities.

Notwithstanding all of its past success, I believe there are some opportunities to enhance the value of ABTL's activities to its members. Traditionally, because of its emphasis on litigation, ABTL has appealed mainly to private practitioners rather than to corporate counsel. With the increasing involvement of corporate counsel in litigation matters, both as active trial lawyers and as supervisors, the ABTL should now be able to attract more corporate counsel as members and active participants, providing obvious networking benefits for our existing members. To help us make sure that the ABTL is relevant to inside corporate litigation counsel, we have elected two new Board members this year, Anne Egerton of NBC, and T. Warren Jackson of Hughes Aircraft Company. I am sure that their input will

prove invaluable in these efforts.

Another area of potential enhancement is the development of a format for programs dealing with substantive legal issues of concern to business litigators. Because our dinner program is typically designed to attract large audiences, we tend to focus on issues not specifically related to individual practice areas of business litigation. I would like to experiment this year with one or two "mini programs," most likely lunch meetings, at which current issues in selective areas of business litigation can be explored without concern to the mass appeal of the presentation. Please call Seth Aronson, who will be chairing this effort, and let him know what areas you would most like these programs to address.

A third and critical goal this year for the ABTL is to increase our membership. Like many other bar associations, we have suffered a decline in our membership rolls, undoubtedly because of the local legal economy. Unlike those organizations, however, the ABTL membership fee is relatively modest. Those of you who are reading *ABTL Report* know the many benefits of ABTL membership, including discounts on dinner programs, eligibility for annual seminars, countless networking opportunities with the bench and bar, the *ABTL Report*, disability insurance programs and cellular phone discounts. This year, we are also offering a free dinner program for renewal by January 31, 1995, and a membership discount for new lawyers. In all probability, the "mini programs" mentioned above will be available only to ABTL members. I solicit your help in our membership effort by asking you to circulate a copy of this issue of *ABTL Report*, with a note to your colleagues suggesting that they return the coupon below.

Finally, several years ago, Mark Neubauer instituted a committee system designed to increase member participation in ABTL activities. While initially successful, some of these committees, in all candor, have not functioned effectively. For this coming year, we have pared down the number of committees, and will be making a serious attempt to revitalize those that will remain in existence. The Federal Courts Committee, headed by Alan Friedman, has already met and is planning one of this year's dinner programs. Other committees include: Superior Courts, Alternative Dispute Resolution, Insurance and Experts. I would urge any of you interested in these areas to let me know and I will put you in touch with the appropriate committee chair.

I hope to see many of you at the annual seminar in Arizona, and at our various programs this year, and look forward to the opportunity to make a contribution to the continuing success of the ABTL.

—Jeffrey I. Weinberger

JOIN US



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I would like to join renew my membership in ABTL. Enclosed is a check for \$75.00 covering my first year's dues (or \$50.00 for members admitted to the State Bar within the past three years).

Name(s) _____

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Address _____ Suite _____

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