ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

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"...and Nothing But the Truth"— Client Perjury on the Stand

You think the trial has been going pretty well. At issue is a dispute over the division of partnership assets. The two partners had operated on a fairly informal basis and had many agreements that had never been reduced to writing. But now your client's partner is dead and his widow and children are demanding a full accounting and 50 percent of the pie.

Michele Trausch

A key issue at trial is accounting for the respective interests of the partners in a valuable commercial building. Your client testifies — consistently with his deposition — that he had an oral agreement with his deceased partner to be paid fees for managing the building when they sold it and, further, that they had agreed that 10 percent of the selling price would be fair. The other side is incredulous, but can't budge your client from his story on cross-examination.

As soon as your client steps off the stand, opposing counsel, with a smirk in your direction, suddenly identifies a rebuttal witness.

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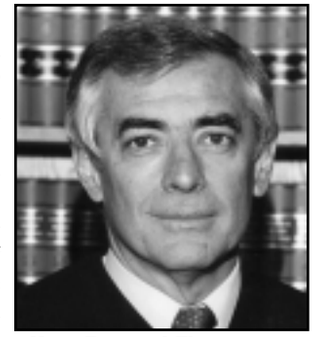
Also in this Issue

Crossing the Electronic Frontier: A Judge's Perspective

On April 2, 2001, the United States District Court for the Northern District of California took another step across the electronic frontier when it implemented electronic case filing (ECF). On that day, and purposefully not on April lst, General Order No. 45 (G045) took effect. It is the product of over a year of collaboration among the judges of this court, the Clerk of the Court and his staff, a large number of attorneys, including members of the ABTL, and other professionals who volunteered their time. In Phase 1 of ECF expected to last much of this year, ten judges (District Judges Breyer, Fogel, Walker, Ware, Whyte and Wilken, and Magistrate Judges Infante, Seeborg, Trumbull and Zimmerman) are participating. Other judges may participate if ECF cases are reassigned to them. Once the court and the bar have worked through the transitional problems and the software upgrades discussed below are completed, all judges of this district will be able to participate.



Hon. Bernard Zimmerman

This district's effort is part of a pilot program of the Administrative Office of the federal courts to implement electronic case filing nationwide. More information on the national effort can be found at: http://pacer.psc.uscourts.gov/documents/press.pdf.

We are one of the first district courts to use, or alpha test, the software that the Administrative Office has developed. Four other district courts and five bankruptcy courts have been working with prototype versions of the program for several years, reportedly with some success. In part because the Northern District includes Silicon Valley and provides a venue for a considerable high tech practice, this court concluded that it should be a national

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You've never heard the name before and look to your client, who has a rather peculiar expression on his face — something between horror and embarrassment. At the break, your client finally tells you that the surprise witness is a guy who had been paid by the partnership to "sort of" manage the building but had then, he thought, left the country so he didn't think it was necessary to mention his involvement to you. Looks like the "sort of" manager is back….

The Problem

You suspect that your client has not been truthful with you, and perhaps more importantly, has not been truthful with the Court. In short, you believe your client may have just lied under oath. Did your client commit perjury? What should you do? Should you tell the Court? What if you do nothing?

This scenario highlights the deep tensions between a lawyer's obligations to the client and to the Court. The obligations, in part, are set forth in Business & Professions Code section 6068(e): the client's confidences must be kept "inviolate" and the client's secrets preserved "at every peril." But, at the same time, the lawyer has an obligation "to maintain the respect due to the courts of justice and judicial officers" (Business & Professions Code section 6068(b)) and "to employ, for the purpose of maintaining the causes confided to him or her such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law" (section 6068(d)). These duties to the Court are echoed at California Rules of Professional Conduct 5-200(A) and (B).

What to Do and How to Do It

• At the first opportunity, confer with your client. Try to determine what actually is the truth and how the contradiction came about. Maybe the problem is simply one of communication. Perhaps there has been a misunderstanding on the part of the client as to what has been asked or what the client has recalled. The client may have a perfectly valid explanation that will allay your concerns.

However, the client's explanation may heighten your concerns. If the client had previously told you a different version of the story than the one just testified to, but now tells you that the pre-trial version was incorrect, which account do you accept as the correct one? Was he lying then or is he lying now? What if both versions are partial fabrications? Does your own independent investigation lead you to believe that your client has lied on the stand? How do you, as the lawyer, move from advocating your client's cause to adjudicating his credibility? You are taking on the role of judge in making this determination, which may be the trickiest part of the analysis. You must rely upon your own instinct or "gut feeling" and, knowing and understanding the risks, decide how to proceed.

• If you are still concerned after your talk that your client may have lied on the stand you need to determine whether your client committed perjury by turning to the Penal Code, usually foreign territory for a business trial lawyer. Penal Code section 118 states: "Every person who, having taken an oath that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person…willfully and contrary to the oath, states as true any material matter which he or she know to be false…is guilty of perjury." As to the punishment, Penal Code section 126 makes perjury a felony punishable by imprisonment in state prison for anywhere between two and four years.

Was the false testimony perjury or just a little white lie? Penal Code section 123 provides that the perjurer's knowledge as to the materiality of the fabrication is irrelevant if a trier of fact decides it is material and "might have been used to affect" the proceedings. Will the testimony cause the judge or jury to decide one way or the other? This is a very difficult judgment to make in the middle of a trial and, once again, you must make it on your own.

As you weigh these issues you need to consider not just the risk that your client may have committed perjury but also the risk that you may be considered to have suborned your client's perjury. Penal Code section127 defines subordination of perjury as "willfully procur[ing] another person to commit perjury." And it is "punishable in the same manner" as if the subordinator had actually committed the perjury himself.

If, after these considerations, you remain convinced that a statement made on the witness stand (1) was a lie and (2) is material, explain the problem to the client: He can be found guilty of perjury and you cannot suborn his perjury.

• Ask the client to recant the false testimony. When a civil trial lawyer learns, at any stage of a proceeding, that his client has perpetrated a fraud on the court, the lawyer must promptly request that the client correct the fraud.

An attorney cannot simply ignore the perjury and continue on with the case. Our ethical obligations, along with the Business & Professions Code and the Rules of Professional Conduct, will not condone silence and inaction. An attorney who attempts to benefit his or her client through the use of perjured testimony may be subject to criminal prosecution as well as severe disciplinary action. *In re Jones*, 208 Cal. 240, 242 (1929).

• If the client refuses to recant the false testimony, you must make a motion to withdraw. Ask your client whether you have his permission to disclose the basis for your motion to withdraw to the Court. If he agrees, request an *in camera* hearing with your client, out of the presence of the jury and opposing counsel, to present your motion. If the client does not agree, you must move to withdraw without specifying the exact reason to the Court.

California Rule of Professional Conduct 3-700(B)(2) requires withdrawal from representation when the attorney "knows or should know that continued employment will result in violation" of the Rules of Professional Conduct or the State Bar Act. Nevertheless, withdrawal is allowed only when the client has been given due notice,

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has had the time to find other counsel, and steps have been taken to avoid "reasonably foreseeable prejudice" to the client's rights. Rule 3-700(A)(2).

The California State Bar examined this problem in 1983, in Ethics Opinion No. 1983-74. That Opinion presents the hypothetical of a civil, non-jury trial wherein the client commits perjury on the stand. The lawyer knows that if he either discloses the perjury to the Court or moves to withdraw, the Court will rule adversely to his client. The Opinion concludes that the attorney does not have an obligation to affirmatively advise the Court of the perjured testimony, and in fact, without the client's consent, can *not* do so, because he would be violating his obligations to keep his client's confidences secret. The attorney should pursue "remedial" actions by trying to convince the client to "correct" his testimony. If that fails, a motion to withdraw should be made despite any anticipated negative consequences.

The American Bar Association Model Rules go further to require that the attorney disclose the perjured testimony to the Court, rather than simply move to withdraw without explanation. ABA Model Rule 3.3 "Candor Toward The Tribunal" states, "A lawyer shall not knowingly: … fail to disclose a material fact to the tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." Interpreting this rule, the U. S. Supreme Court stated, "Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law." *Nix v. Whiteside*, 475 U.S. 157, 177 (1986).

Thus, there is a significant difference between the ABA rules and the rules governing California lawyers. The former, as interpreted by *Nix* and other cases, implies an obligation on the part of counsel to disclose past perjury or intended perjury to the Court. In contrast, section 6068(e) of the Business & Professions Code states that the client's secrets must be preserved "at every peril," implying that an attorney may not disclose the perjured testimony to the Court. The better course of action, on the part of a California lawyer, would be to move to withdraw without disclosing a specific reason.

• In making your motion to withdraw, you will also need to move for a mistrial to allow your client the opportunity to seek other counsel. If trial has not actually commenced, move for a continuance. Unless your client wants to proceed *in pro per*, this step is essential: you cannot abandon your client or prejudice his interests by your withdrawal.

• Be prepared that the Court may not grant your motion to withdraw.

The case of *People v. Brown*, 203 Cal. App. 3d 1335 (1988), is instructive on this point. During defendant's criminal trial, defense counsel made a motion to withdraw as counsel and to continue the trial. The Court

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The Limits of Sympathy: Denial, Attribution and Blame among Jurors

Sympathy is among the most misunderstood factors in the civil jury system. The judge's instruction against it is uncommonly clear and concise. Defense attorneys are given, and typically take, every opportunity to remind jurors of their duty to disregard sympathy. And yet, many cases are filed, evaluated and settled based almost solely upon their ability to provoke sympathy.

The truth, however, is that sympathy is over-rated. Consider, for example, the following passages from Tom Wolfe's account of mortality among military test pilots in the late 50's as reported in his book, *The Right Stuff*.

Ronald Beaton

> [O]ne sunny day a member of the Group, one of the happy lads they always had dinner with and drank with and went water-skiing with, was coming in for a landing…. [H]e crashed and was burned beyond recognition…. [The other pilots] shook their heads and said it was a damned shame, but he should have known better than to wait so long before lowering the flaps.
>
> Barely a week had gone by before another member of the Group crashed and he was burned beyond recognition…[The other pilots said he] had been a good man but was inexperienced…. Every wife wanted to cry out: "Well, my God! The machine broke! What makes *any* of you think you would have come out of it any better!"
>
> Not long after that, another good friend of theirs went up in an F-4, the Navy's newest and hottest fighter plane…. He reached twenty thousand feet and then nosed over and dove straight into Chesapeake Bay. [The other pilots] were incredulous. How could anybody fail to check his hose connections? And how could anybody be in such poor condition as to pass out *that quickly* from hypoxia."
>
> The star pilot in the class behind [them] … put his ship into the test dive and was still reading out the figures, with diligence and precision and great discipline, when he augured straight into the oyster flats and was burned beyond recognition…. [The other pilots] remarked that the departed was a swell guy and a brilliant student of flying; a little too *much* of a student, in fact; he hadn't bothered to look out the window at the real world soon enough.
>
> When Bud Jennings crashed and burned…the other pilots said: *"How could he have been so stupid?"*…. All agreed that Bud Jennings was a good guy and a good pilot, but his epitaph…was: *How could he have been so stupid?*
>
> There are no *accidents* and no fatal flaws in the machines: there are only pilots with the wrong stuff.
>
> Tom Wolfe, The Right Stuff 9 –11, 27 (Bantam Books 1980)(1979).

This seemingly cold and heartless attitude toward one's peers is not unique to test pilots. Jurors are capable of it

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The Limits of Sympathy

as well. In fact, so capable of it that it led Professor Valerie P. Hans, in her recent book, *Business on Trial: The Civil Jury & Corporate Responsibility*, to observe: "Jurors' suspicions of plaintiff's claims led them in most cases to dissect the personal behavior of plaintiffs, with seemingly no limits." (Hans, *Business on Trial*, 28.) Hans's research on jury decision making in business cases provides example after example of jurors, who most closely resemble the victim, leveling the harshest blame on the victim.

Hans recounts, for example, mock jury research where jurors were presented a case where a small child was injured in a paint store and the child's mother, the store clerk and the paint store were all arguably responsible for the accident. Hans found, rather counter-intuitively, that among the mock jurors, the three strongest opponents of the mother were women. Two of these women were immersed in child-rearing themselves: one with nine children, the other with a new baby. (*Id*. at 28.) One mother's reaction to the case was "Some people let their kids do what they wanna do because they're spoiled…." (*Id*. at 26.) The other mother remarked, "I know what kids get into." (*Id*.)

In other examples drawn from post-trial interviews she conducted with jurors, Hans notes, "One juror deciding a car accident case in which the plaintiff claimed a knee injury revealed that she herself had a similar injury. Rather than leading her to sympathize, however, the injury led her to downgrade the plaintiff's situation." (*Id*. at 31.) Similarly, in a construction accident case, a juror who had done construction in the past "was one of the loudest voices blaming the [construction] worker for his own injury." (*Id*.)

From her research and experience, Hans saw enough evidence to conclude: "Under certain circumstances, jurors who are similar to a plaintiff may actually take a harsher approach than less similar jurors." (*Id*. at 40.)

In our own research, we first noted this phenomenon while researching loss of consortium claims. To our surprise, married jurors awarded far less for loss of consortium than single, divorced or widowed jurors. This was true even controlling for other factors, such as gender, age, education and income level.

An even more striking example of this phenomenon involved a disabling injury that occurred to a young girl while riding an elevator in the housing project where she and her mother lived. Despite some rather obvious liability on the part of the elevator maintenance company, a surprising number of the mock jurors in our research attributed most of the responsibility for the injury to the mother, who worked two jobs and was asleep at the time of the injury. Interestingly, we found that mothers were the most critical of the sleeping mother. In fact, we found that the willingness of other mothers to assign blame to the sleeping mother correlated strongly with their own proximity to the housing project; that is, the closer they lived to the projects, the more they blamed the sleeping mother for her daughter's injury. The mothers living in, or near, the housing project clearly felt that the sleeping mother did not have "the right stuff."

Defensive Denial

Why such pettiness among peers? One likely reason for this pettiness is a psychological defense mechanism known as defensive denial, or defensive attribution. Defensive denial is triggered when a person's sense of security is threatened by the dire circumstances of another with whom they share a similarity of background or situation. To regain a measure of security, people will denigrate the victim so that they can distance themselves from the victim. They will, for example, impute, imagine or invent a characteristic they do not share with the plaintiff, and use this characteristic to blame the victim for his or her own plight. The test pilots, for example, found after each crash that their deceased colleagues should have known better, were inexperienced, failed to check their equipment, were in poor physical condition, were too much a student of flying or were just plain stupid.

By blaming the victim, rather than identifying with their shared characteristics or circumstances, the victim's peers can continue living their life unchanged secure in the belief that they will not suffer the same fate as the victim, because they are not as stupid, careless or inattentive as the victim. In short, they have the "right stuff," and the victim does not. Defensive denial enabled the test pilots to psychologically manage the risks of flying, and enabled the housing project mothers to psychologically manage the risks of living in or near a housing project.

What is fascinating about defensive denial in the context of the courtroom is that it stands conventional jury selection wisdom on its ear. For example, conventional jury selection wisdom relies heavily upon the concept of identification — that is, you strive for jurors who will identify with your client and strike those who will not. Defensive denial suggests, quite to the contrary, that nothing could be worse than to have jurors identify too much with your client.

This phenomenon is also quite salient to the jury decision making process, for jurors, who share similarities with one of the parties or a key witness in the case, can have a profound impact on fellow jurors. Nothing is as persuasive in jury deliberations as a juror who can speak to the condition or situation of a party or a witness with a "been there and done that" authority.

While there is little doubt that defensive denial affects the juror decision making process, little is known about its triggers. What shared characteristics will trigger defensive denial? How many characteristics must be shared to trigger it? Are there some tight-knit groups that will never turn on one another? Are there claims that are simply too innocuous, or too outlandish, to ever trigger defensive denial?

Research has been able to answer some of these questions on a case by case basis, but we still know far too little about defensive denial in the jury context to offer any generally applicable answers to these questions.

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The Limits of Sympathy

The Just World Hypothesis

Defensive denial is not the only psychological limit to sympathy. Another possible limit is the so-called "just world hypothesis." Psychologist Melvin Lerner was the first to suggest that people want to believe in a world that is just, rational and reliable. When an innocent victim suffers some sort of damage or injury, he argued, it threatens belief in a just world. To restore this belief, people will denigrate the victim and minimize the severity of the damage or injury.

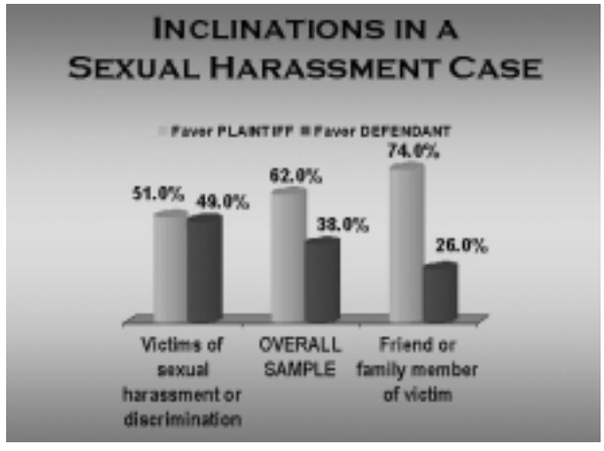
The mechanics of the just world hypothesis — reducing threat by means of denigration — are virtually identical to defensive denial. The triggers, however, are quite different. With defensive denial, one's lifestyle is threatened. With the just world hypothesis, one's belief in a just world is threatened.

The just world hypothesis is popular among jury consultants, and has inspired a broad array of voir dire questions, like: "Do you believe that the world is a just place?"

The problem with the just world hypothesis and the voir dire questions that follow from it is that they have never proven to be reliable predictors of jurors' inclinations on a case. While there is undoubtedly some truth to the hypothesis, there are simply too many people that believe in a just world for the concept to be useful at pinpointing those who are more, or less, likely to blame the victim. In our experience, defensive denial provides a better insight into the juror decision-making process.

Fellow Victims

Another possible limit to sympathy relates to an intriguing finding from a 1991 Rand Corporation study that 87 percent of people, who have suffered from an accidental injury, *never* make any effort to obtain compensation for their injury. This statistic, of course, stands in stark and stunning contradiction to the common perception that we live in a litigious society.



More importantly, this statistic suggests that there may be people in the jury pool, "fellow victims," if you will, who possess their own personal standards for what does, or does not, merit compensation. These fellow victims are more insulted, than threatened, by a plaintiff's claim. The woman in Hans' research who suffered a knee injury like the plaintiff was clearly a fellow victim imposing her own personal standard upon the case.

In our own research, we have found sexual harassment victims to be surprisingly unsympathetic to fellow sexual harassment victims. As you can see in the accompanying chart, we found in a community attitude survey of 400 Bay Area residents that only 51 percent of people who had personally experienced sexual harassment or discrimination were inclined to favor a sexual harassment plaintiff. By comparison, 62 percent of the overall sample were inclined to favor the plaintiff, and 74 percent of those who have had a close friend or family member suffer sexual harassment or discrimination were inclined to favor the plaintiff.

In more detailed focus group research, we have found that fellow victims of sexual harassment are more likely than others to read complexity into a sexual harassment case. They, for example, are more likely to speculate about the backgrounds, behavior and motives of both parties. Interestingly, the complexity that fellow victims read into these cases quite often reflects the complexity of their own experiences. On the other hand, people with no personal experience with sexual harassment, particularly those who have had someone close to them suffer sexual harassment, tend to see such cases in black and white without the complex shades of gray that victims often see in the case.

Of course, all fellow victims are not hypercritical of plaintiffs. Clearly, some may have suffered injuries that pale in comparison to those suffered by the plaintiff. Some may regret not having sought compensation, and may enjoy some vicarious satisfaction in seeing a fellow victim justly compensated. And some may simply be capable of setting aside their personal experiences.

The Tort Reform Movement

Tort reform is the most well-known of all the known limits to sympathy. It is symbolized in popular culture by the now infamous "McDonald's verdict." In fact, we have found that it is nearly impossible to talk about the number of lawsuits or the size of damage awards in voir dire without at least one, and typically many more, unsolicited references to the "McDonald's verdict" from prospective jurors.

Our research indicates, however, that the tort reform movement is not as significant a factor here in the Bay Area as it is in other parts of the country. According to a national poll, 45 percent of people nationwide believe that "most awards are excessive." By comparison, our most recent data shows that only 9.8 percent of prospective jurors in San Francisco and 26.2 percent in Santa Clara think that "most awards are excessive."

Tort reform is, nevertheless, a factor in the issue of juror sympathy. Even if local prospective jurors are less outraged by damage awards than are their peers across the country, there is no question that most prospective jurors in the Bay Area enter the courtroom predisposed to not make someone a millionaire.

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Crossing the Electronic Frontier

leader in implementing ECF and volunteered to be part of the pilot development of the program. To succeed, we need your help.

At this point, I suggest any reader not familiar with ECF visit the court's electronic filing website at http://ecf.cand.uscourts.gov. There you will learn all you need to know about ECF. Even if you have no need to file anything, you can register, take a tutorial, read through the section on frequently asked questions and otherwise familiarize yourself with the site. I urge everyone to read G045 and become familiar with its contents, and not to rely exclusively on newspaper reports and word of mouth.

To participate in ECF, you need to register online and obtain a password. That password is your electronic signature, so guard it carefully. For Rule 11 purposes, clicking "send" after you have logged on with your password is the equivalent of signing a document. G045 section X. You will also need an Internet connection, Netscape Navigator and Adobe Acrobat software (the full version), and a scanner to convert paper exhibits into electronic documents. The Administrative Office hopes to have modifications to ECF available this fall to make it fully compatible with Internet Explorer. The clerk's office has a trained staff available to assist attorneys having ECF problems. Questions can be e-mailed by clicking on the "Help Desk" button on the ECF site. There is also a toll-free telephone help line (1-866-638-7829) for more immediate problems.

During Phase 1, each case assigned to a participating judge will be subject to ECF. Presently, all complaints and removal petitions still must be filed manually. The Administrative Office is upgrading ECF to permit the collection of fees online and to generate a case number and random judicial assignment which can then be added to the complaint or removal petition before it is filed electronically. During Phase 1, ECF will not be mandatory. G045 section III.C provides that while any case assigned to a participating judge is subject to ECF, the assigned judge may, upon application, relieve the parties of the obligation. I have not yet been asked for relief. My intention is not to grant relief automatically but to require some showing of cause such as, for example, the attorney does not have the necessary equipment. When this was discussed in committee, our sense was that there are not many lawyers out there today who are not equipped for ECF. Those who are not should consider developing the capability since ECF is expected to become mandatory. Certain categories of cases currently are excluded from ECF: criminal cases, pro se filings, bankruptcy and Social Security appeals.

Why are we doing this? We believe ECF will offer major benefits to the litigants and counsel, to the public and to the courts. Counsel will no longer have to agonize over whether the messenger will make it to the clerk's office before it closes. Once e-mail lists are set up, counsel can immediately serve everyone electronically, eliminating much copying, handling and mailing. And lawyers can now tell a client that they billed time reviewing the opposition and preparing a reply on the beach at Maui and be believed.

Both litigants and the public will now be able to access everything in the court files, except sealed documents, using the Judiciary's PACER system. Benefits to the court include an anticipated substantial reduction or elimination of everything required in handling paper documents, from labor intensive manual docketing and filing to the enormous amount of space required to store files. It will improve coordination among the court's divisions since every judge and court employee will have to access to a file regardless of the division in which the case resides. It should improve the accuracy and efficiency of the court process. If you file a document electronically, no longer will your opponent, or the judge for that matter, be able to say, "I didn't get it; it must have gotten lost in the mail (or the clerk's office)."

How can you help? Become familiar with ECF and be prepared to use it. On April 2, 2001, when I announced in open court that the first case designated for ECF had been assigned to me, the predominant look in the courtroom was bewilderment. As I write this, one persistent problem the court is facing is that attorneys are not re-filing their complaints, removal petitions and related documents in PDF format within ten days as required by G045 section V. This can disrupt ECF. For example, it is difficult for a judge to electronically post an order addressing a motion or application if those documents have not been electronically filed.

Be patient. Everyone expects problems and glitches to surface. Recently, when the court's Internet connection was interrupted, an order was issued promptly continuing all filing deadlines to the following day. See G045 section VI.E. If you become aware of a problem, please report it so that it can be addressed.

Crossing this electronic frontier should not be as difficult as crossing earlier physical frontiers. We expect that it will not be too long before everyone is glad we did.

Judge Zimmerman is a United States Magistrate Judge for the Northern District of California.

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The Limits of Sympathy

Conclusion

Obviously, I do not mean to suggest that sympathy plays no role in jury decision making. However, the recent research of psychologists and jury consultants shows that the issue of juror sympathy is more nuanced than most trial attorneys recognize. The research indicates that there are psychological boundaries, or limits, to compassion that often serve to balance out the natural sympathies that exist on a jury. The next time you have a juror who is "just like" your opponent's client, think twice before you make that knee-jerk peremptory strike.

Ronald Beaton is President of The Consilium Research Group. rbeaton@consiliumresearch.com

MARY MCCUTCHEON

On INSURANCE

I try to find the silver lining in every pro-insurer court decision. But it's hard to find one in *Certain Underwriters at Lloyd's, London, et al. v. Superior Court* ("Powerine"), 24 Cal.4th 945 (2001) (rehearing denied). In *Powerine*, the Supreme Court ruled that an insurer has no duty to indemnify its insured for expenses incurred pursuant to environmental cleanup and other remediation orders issued by administrative agencies if those orders are not issued as part of a judicial proceedings. This decision threatens to eliminate insurance coverage for the cost of any environmental cleanups and other remediation efforts which are incurred by insureds as a result of agency orders, at least with respect to policies containing the standard duty to indemnify language found in the typical commercial or comprehensive general liability ("CGL") policies. *Powerine* will defeat the reasonable expectations of many insureds, who for years have routinely looked to such policies for coverage for remediation measures ordered by environmental agencies.

The Court based the ruling on the interpretation of the specific policy language describing the insurer's duty to indemnify. It held that the insurer's duty to indemnify the insured for "all sums that the insured becomes legally obligated to pay *as damages*" (the language found in the insuring agreement of the standard CGL policy), does not provide coverage for expenses incurred solely pursuant to agency orders. The Court held that the phrase "as damages" limits insurance coverage to "money ordered by a court." Apparently, there must literally be a court (not an agency) order holding an insured liable for money damages, presumably due to its failure to undertake remediation or comply with an agency order, before coverage is triggered.

The Court linked its ruling to its earlier decision in *Foster-Gardner, Inc. v. National Union Fire Ins. Co.*, 18 Cal.4th 857 (1998), which held that an insurer's duty to defend the insured in a "suit seeking damages" is "limited to a civil action prosecuted in a court." Consequently, according to *Foster-Gardiner*, the defense obligation does not extend to administrative agency proceedings. In *Powerine*, the Court reasoned that because the duty to defend is broader than the duty to indemnify, the duty to indemnify cannot be interpreted to cover expenses arising from claims that do not give rise to a duty to defend. Therefore, if expenses incurred by an insured in administrative agency proceedings are not included in the duty to defend, the expenses incurred in complying with an agency order arising out of such proceedings cannot be covered under the duty to indemnify.

Despite the draconian reach of the *Powerine* decision, there may yet be a silver lining, albeit a thin one, allowing coverage in certain circumstances. The Court's focus on the "as damages" language suggests the possibility that a duty to indemnify could exist with respect to policies that do not contain the "as damages" qualifier. For example, some policies require the insurer to indemnify the insured for "all sums that the insured becomes legally obligated to pay" or "all sums imposed by law". In fact, the Court states:

> We recognize that the provision imposing the duty to indemnify could have done so without any limitation to money ordered by a court [*i.e.*,"damages"]. In that event, it would have created a broad financial-subsidy arrangement under which the insurer would "pay any sum that the insured becomes legally obligated to pay." 24 Cal.4th at 965.

Because environmental claims can trigger policies going back for a number of years, older policies in particular may contain nonstandard language which leaves this option available. However, it can be assumed that insurers will not interpret the Court's ruling in this fashion without substantial prodding.

Mary McCutcheon

The practical ramifications of *Powerine* are significant. As discussed in Justice Kennard's dissenting opinion, an insured faced with an environmental cleanup obligation is left with essentially two options as a result of the majority's decision: 1) seek coverage under the insurer's duty to settle claims and, if denied, fund the cleanup itself (assuming it has the means to do so) and then sue the insurer for breach of the duty to settle; or 2) decline to comply with the agency order, forcing the agency to initiate judicial proceedings to invoke the insurer's duty to defend and indemnify. Either way, additional expenses, delays, and uncertainty, not to mention further environmental harm, will most likely result.

Powerine potentially has wide-ranging ramifications for claims outside of the environmental arena. There may be many instances where early intervention by attorneys or the insurer prior to the filing of a lawsuit, as well as early settlement efforts, will minimize the claimant's damages and the ultimate costs of resolution, benefiting the insurer as well as the insured. The Court's majority opinion may well be relied upon by insurers to insist that unless and until a lawsuit is filed against the insured, the insurer has no obligation to defend, settle or indemnify any claim, environmental or otherwise, which would otherwise be covered by the policy. Hopefully, insurers will recognize the value of responding to and seeking to resolve claims at an early stage, on a practical basis, without hiding behind *Powerine* as an excuse to avoid obligations until a lawsuit raises the ante.

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...and Nothing But the Truth

ordered an *in camera* hearing outside of the prosecutor's presence, where defense counsel informed the Court that "substantial differences" had arisen between himself and his client such that there would be "an irreconcilable conflict" in his continued representation. Defense counsel went on to say that he thought his client, who insisted on testifying, would give perjured testimony and that he had advised the client that if he did so, the lawyer would be suborning perjury. The trial court denied both the motion to withdraw and the motion to continue trial, and the defendant was convicted. The Court of Appeal for the Third District found that there was no error by the trial court in denying either motion. Citing Business & Professions Code section 6068, as well as the earlier version of Rule 3-700 of the Rules of Professional Conduct, the Court found that "while defense counsel acted according to the moral and ethical obligations required of him as a member of the legal profession, the trial court did not abuse its discretion in denying his motion to withdraw." *Id.* at 1338-39. Whether the attorney was allowed to withdraw during the trial was "within the sound discretion of the trial court." *Id.* at 1339.

• If the Court refuses to grant your motions, you must continue with the representation, but you cannot argue or make reference to the perjured testimony to the Court or the jury. State Bar Ethics Opinion 1983-74 instructs that after perjured testimony has been proffered, the lawyer must conduct the balance of the trial as if such testimony had been stricken from the record.

Obviously, this option is not desirable, but if you as an attorney are caught in this dilemma, you may have little choice. The Courts have refused — at least in the context of a criminal trial — to criticize attorneys for proceeding when a motion to withdraw has been denied. As the Court noted in *People v. Brown*, "Requiring defense counsel to generally continue representing defendant did not expose counsel to disciplinary or criminal action. He fulfilled his ethical obligation by bringing the motion to withdraw." *Id.* at 1341, n. 3.

Conclusion

If you follow these steps, although you may or may not be satisfied with either your client's decisions or the Court's, you will have done your best professionally to negotiate your way through a legal and ethical minefield.

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PETER BENVENUTTI

On CREDITORS' RIGHTS

When Pacific Gas & Electric Company filed its Chapter 11 petition in San Francisco on April 6, 2001, it initiated one of the largest bankruptcy cases in U.S. history and dramatically highlighted the resurgence of bankruptcy activity in Northern California and throughout the West. Chapter 11 cases — corporate reorganizations — are the bread and butter for business bankruptcy lawyers. What significance does this have for business litigators? Plenty in my view.

During the last several years a booming economy, driven locally by the explosive growth of Silicon Valley technology companies, left many business insolvency professionals underemployed. In each successive year during the '90's, the volume of Chapter 11 cases filed in the Northern District declined, from an all-time annual high of 1002 in 1992 to a meager 129 last year. This decline of local business insolvency work was exacerbated by increased Chapter 11 filings in Delaware bankruptcy courts, which have successfully cultivated a reputation as user friendly to large corporate debtors and their lawyers. With few exceptions, bankruptcy practice groups at local firms shrank as many seasoned bankruptcy lawyers developed other areas of practice and few junior lawyers replaced them.

To use a term common in insolvency circles, there has been a major turnaround. Fueled initially by the dot-bomb phenomenon, insolvency work began to pick up locally late last year. As the local and national economy softened, business bankruptcy practices in local firms started experiencing rapidly escalating levels of demand. Much of this new insolvency work is out of court. For example, the liquidation of dying dot-coms, typically low on assets once their venture funding runs out and their employees are laid off, often occupies too short a time frame for a Chapter 11 filing to provide any particular advantages. However, there has simultaneously been a significant upturn in formal business bankruptcy filings: during the first four months of 2001, 104 original Chapter 11 cases were filed in the Northern District, nearly as many as in all of 2000.

Into this environment came the PG&E filing. With assets of over $24 billion and $18 billion in liabilities, PG&E has been reported as either the third or fourth largest Chapter 11 case ever. Some prescient creditors had arranged for representation during the preceding months. Many others apparently did not, so during the hours and days after the April 6 filing local lawyers' phones rang off their hooks as major creditors, some asserting claims of many tens of millions of dollars, scrambled to find and retain counsel to represent them in the PG&E case. Local bankruptcy lawyers have become overtaxed and are struggling to find experienced help. The courtroom of San Francisco Bankruptcy Judge Dennis Montali, usually empty and almost tomblike only a few months ago, is now packed to the rafters and buzzing with activity several days a week for PG&E-related proceedings. The "Special Notice" List — names and addresses of creditors and other interested parties requesting notice of all proceedings in the case — now has over 300 entries. The demand for bankruptcy lawyers is back with a vengeance.

Why should you be interested?

High Drama. The case presents a study in conflict among powerful forces on multiple levels — regulators and those they regulate, energy suppliers and purchasers, the state and the feds, the utility and its ratepayers, politicians and voters, and the debtor entity and its creditors. It is a drama featuring greed and power, the struggle between order and chaos, and the efforts of government to tame, overcome or ignore the laws of economics. All Northern Californians will be affected to some extent, yet no one knows the outcome.

Peter Benvenutti

Fascinating Legal Issues and New Case Law. Many thorny issues of first impression are presented by the interplay of Chapter 11 and state and federal energy regulatory law, and between the powers of the federal bankruptcy courts and California's state sovereign immunity. Look for trial court and appellate decisions in these and other area.

Litigation Work. The object of Chapter 11 is a negotiated reorganization plan, but the law of averages predicts that not all of the potential disputes presented by the case will be settled. Some will probably have to be litigated, in Judge Montali's bankruptcy court and in other venues as well. The stakes are staggeringly large. Already bankruptcy lawyers are not the only professionals whose services are in high demand. The legal team of PG&E's primary bankruptcy counsel includes business litigators as well as bankruptcy specialists. My firm is also special litigation counsel to PG&E, and it would not be surprising to see a number of other litigators actively involved in one way or another.

* * *

The Northern District Bankruptcy Court maintains a user-friendly website — http://www.canb.uscourts.gov — through which one can readily access the PG&E docket, most pleadings, and other information about the case.

* * *

A disclaimer: The views expressed in this column are my own, and do not necessarily represent the views of my firm, our client, or anyone else.

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Significant Intellectual Property Decisions

Three recent Ninth Circuit decisions in the field of intellectual property law have answered several important open questions and, at the same time, created traps for the unwary.

In *Chance v. Pac-Tec Teletrac Inc*. (9th Cir. Mar. 20, 2001), the Court addressed the issue of what constitutes "first use" priority of a service mark under the Lanham Act. The mark "Tele Trak" was claimed by plaintiff for a lost and found tag service and by defendant for tracking lost or stolen vehicles. In October 1989, plaintiff sent out 35,000 postcards announcing the Tele Trak service. They received 128 responses but made no sales at that time. There was some evidence of a February 1990 sale to "a longtime friend" and a summer 1990 gift to a friend, but these sales were found not to be *bona fide*. Actual, arm's length sales began after February 1991. Defendant started using the mark in June 1989, introduced its new service using the mark in July 1989, provided the service for free in April 1990 and launched the service publicly in December 1990, when defendant made its first sale.

Michael Grace

The Court held that trademark priority is not simply choosing the earliest sale date but rather should be determined based on the "totality of the circumstances test." Because defendant conducted a public relations campaign, was interviewed by major newspapers nationwide about the branded service, and developed a slide show months before the free service began, the court found that the totality of the circumstances required the conclusion that defendant's first use date "was significantly earlier" than April 1990, the date of first use found by the court below. In short, "trademark rights can vest even before any goods or services are actually sold if 'the totality of [one's] prior actions, taken together, [can] establish a right to use the trademark' [citations and internal quotes omitted]."

In *Click Billiards Inc. v. SixShooters Inc.*, (9th Cir. June 4, 2001), the court reversed an order granting summary judgment in a trade dress infringement case involving competing pool halls and eased the burden of presenting a trade dress infringement case. Plaintiff complained that defendant had copied plaintiff's style of doing business, including the use of large floral print carpet pattern and style, dark mahogany wood finishes, ceiling and wall covers, similar woodwork, layout and arrangement of pool tables, drink rails, and even the color, shape and location of the ceiling fans. Defendant argued that each of these items was functional and hence unprotectable under trademark law.

The court confirmed the rule developed in *Fuddruckers* and confirmed by the Supreme Court in *Two Pesos Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992), that "restaurants and similar establishments may have a total visual appearance that constitutes protectable trade dress." Plaintiff must prove that the trade dress is "nonfunctional," serves a "source-identifying role," and that defendant creates a likelihood of consumer confusion. To the court, the focus is not on the individual elements but on the "overall visual impression that the combination and arrangement of those elements create."

The court reviewed a trade dress survey that indicated that 80 percent of a group of pool hall patrons linked the defendant's trade dress to the plaintiff. Without addressing the merits of the survey, the court found that the survey raised questions of material fact regarding the source identifying qualities of the trade dress.

Especially significant to the appellate court was evidence that one of plaintiff's employees admitted defendant into one of plaintiff's pool halls before opening time in order to take measurements and compare materials used on countertops, tables, walls and bar stools. The court viewed the evidence as precluding summary judgment. The court warned, "[T]rial courts disfavor deciding trademark cases in summary judgment because the ultimate issue is so inherently factual."

In *Breed v. Hughes Aircraft Co.*, (9th Cir. June 14, 2001), the court dismissed an appeal for lack of jurisdiction, even though neither party raised the issue. Plaintiffs alleged 14 separate claims for breach of an alleged oral agreement regarding rights to magnetics technology, including one solitary claim for an order directing that plaintiff's name be added as a co-inventor to defendant's patent. The case began in Texas state court, was removed to U.S. District Court for the Western District of Texas and then transferred to the Central District of California, where a motion for summary judgment was granted. Plaintiff appealed to the 9th Circuit.

In reviewing jurisdiction, the court determined that the appeal was within the exclusive jurisdiction of the Federal Circuit. The test is whether any claim arose under the patent laws at the time of filing the complaint. If so, then the Federal Circuit has exclusive appellate jurisdiction, even if the patent claims are not the subject of the appeal. There are exceptions to this general rule where the plaintiff dismisses the patent claim without opposition "early in the litigation," or where the parties ask the district court to enter a final decision pursuant to FRCP Rule 54 (b) as to the nonpatent claims only. According to the court, "The pleading pitfall occasioned by the Federal Circuit's jurisdiction statute is surely a trap for the unwary and one which calls for particular care and a conscious decision with respect to patent claims while drafting a complaint."

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WALTER STELLA

On EMPLOYMENT

A client recently asked me an unexpected question: "Am I really better off in arbitration with this case?" As a management-side employment attorney, I could not recall the last time I had been asked this question. For years, representing companies in employment litigation involved a routine analysis of whether an enforceable arbitration agreement governed the dispute. If an arbitration agreement arguably covered some or all of the claims asserted, we moved to compel arbitration. Sometimes we won. Sometimes we lost. But employers rarely questioned the merits of arbitration over litigation. That has changed.

Years ago, management-side and employee-side California employment lawyers developed opposing views on the merits of arbitration. Among other things, management-side lawyers applauded the cost savings associated with arbitration, while employee-side lawyers decried employees' waiver of their jury-trial rights. It was no surprise that each side fought hard when the issue of the enforceability of pre-dispute mandatory arbitration agreements came before the California Supreme Court in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000).

In *Armendariz,* the Court held that mandatory pre-dispute arbitration agreements of claims brought under the California Fair Employment and Housing Act ("FEHA"), (Cal. Gov't Code section 12900 *et seq*.) are enforceable — but only on certain conditions. The Court held that, at a minimum, mandatory pre-dispute arbitration agreements must: (1) allow for all relief available under FEHA; (2) ensure adequate judicial review by requiring a written award; (3) allow adequate discovery; and (4) not require the employee to pay unreasonable costs and arbitration fees.

The last two requirements, by increasing the cost of arbitration, have prompted employers to question their prior preference for arbitration when statutory discrimintation claims are asserted. Although arbitration generally costs less than court litigation through trial, many lawyers (and their clients) can recount experiences in which arbitration cost just as much. After *Armendariz*, the savings have become even less certain. First, the employer must now bear the entire cost of the arbitration. According to the California Supreme Court. "[A] mandatory employment arbitration agreement that contains within its scope the arbitration of FEHA claims impliedly obliges the employer to pay all types of costs that are unique to arbitration." *Id.* at 113.

Second, and more significantly, the expected cost savings from conducting more limited discovery in the arbitration setting have evaporated after *Armendariz*, at least when FEHA claims are asserted. The Court held that adequate discovery is indispensable for the vindication of FEHA claims. *Id.* at 104. By agreeing to arbitrate the FEHA claims, the employer has impliedly consented to such discovery, the precise parameters of which are not defined. *Id.* at 106. Thus, although the relative cost advantage of arbitration may continue to hold true in most cases, those involving statutory discrimination claims may be just as costly to arbitrate as to litigate.

Arbitration also has its inherent disadvantages for employers. As a practical matter, it is difficult to obtain summary disposition of claims by law and motion practice prior to an arbitration hearing. Many employment claims are susceptible to legal defenses that can be asserted on summary judgment and other pretrial motions. Without a vehicle for eliminating suspect claims, the employer often bears the cost of a full arbitration hearing, even when a viable legal defense is available. This problem is especially acute in those instances in which an employee uses arbitration as a low cost method of airing petty slights and grievances.

Walter Stella

Furthermore, the grounds for challenging an arbitrator's award are very narrow. Under the California Arbitration Act, an arbitrator's award may only be vacated in the event of fraud, corruption, and other forms of misconduct by the arbitrator. *See, e.g.*, Cal. Code Civ. Proc. section 1286.2. An arbitration award cannot be reviewed for errors of law. S*ee, e.g., Moncharsh v. Heily & Blasé*, 3 Cal. 4th 1 (1992). This is a double-edged sword for employers. On the one hand, it ensures the finality of the result. On the other hand, the brightest and most skilled of arbitrators can misconstrue California's ever-changing employment laws. Moreover, there is at least a perceived tendency by some arbitrators to "split the baby" and deny an employer a complete victory at arbitration even in strong cases. Despite *Armendariz's* limitations and its inherent disadvantages, arbitration should still be a preferred alternative to litigation in some employment cases. For example, the confidential nature of arbitration proceedings may be preferred by employers facing press-worthy claims of discrimination or harassment. Confidentiality is also important to employers who fear spurious copycat lawsuits in the event of a significant loss in open court. Moreover, given the inflammatory nature of employment claims, arbitration allows employers to avoid the risk of inflated awards by "runaway juries." This alone may tip the scale toward arbitration in many cases. Nonetheless, arbitration is no longer the panacea for employers that it once was thought to be.

"So," my client pressed, "if our case is as strong as you say it is and our chances of summary judgment are as good as you say they are, am I really better off in arbitration in this case?" Hmmmm. Good question.

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Letter from the Editor: Our Thanks to Chip Rice!

After ten years, the old boy is finally "retiring!" Charles "Chip" Rice published the first ABTL Northern California Report in November 1991, and since that time has published three outstanding issues per year. This makes his 30th issue! During his spare time over the last ten years, Chip maintained a sophisticated trial practice at Shartsis, Friese & Ginsburg. As noted by our *ABTL Report* Publisher, Stan Bachrack (who Chip hired in August 1991 and is still with us!), Chip has "earned a rest, having met every deadline and every editing challenge over the last ten years with consummate skill, grace, good humor and dedication." On behalf of the Board of the Northern California Chapter of ABTL and all of its members, our great thanks to Chip for a job very well done! Although we will sorely miss Chip's expert hand at editing, he will continue to enlighten us with his annual column on Securities.

Chip Rice (Circa 1991)

With much trepidation, Tim Nardell and I take up the Editor's mantle from Chip. Since we believe the *Report* is in great shape, we do not plan on making any drastic changes. ABTL provides sophisticated trial practice programs with insight from and to experienced business trial lawyers. We emphasize "trial" rather than just "litigation." Our tri-annual *Report* offers articles from judges and senior practitioners on trying high stakes cases, and dealing with the difficult pleading and discovery issues that arise from them. Our columnists keep us updated on developments and strategies in some of the most active and important areas of law in which we litigate. Tim and I hope to maintain the high standard set by Chip for timely, insightful, and practical articles from the Bay Area's judges and top business trial lawyers offering advice that we can apply in our daily practice.

Chip Rice (Circa 2001)

I am pleased to report that a strong new slate of Columnists have joined us on the Editorial Board. First, our thanks to our outgoing columnists Zela Claiborne and Barry Goode who for the past 10 years have written tremendous columns on Mediation and Environmental law. Zela will continue her full time practice as a mediator while Barry now works with Governor Davis to solve the current energy crisis. Joining existing columnists Peter Benvenutti, Dave Dolkas, Mary McCutcheon, and Chip Rice, are Bill Hirsch from Lieff Cabraser on Class Actions, Trent Norris from McCutchen on Environmental law, Walter Stella from Morrison & Foerster on Employment (debuting in this issue), Howard Ullman from Orrick on Trade Regulation, and Jim Yoon from Wilson Sonsini on Patent law. Welcome to all our new Columnists!

Finally, we are looking for you to become involved in the *ABTL Report*! We would welcome your help in continuing our tradition of publishing insightful and interesting new articles. Consider whether in your own practice or that of one of your colleagues there's an important article waiting to be written. To our judicial colleagues, we offer an accessible forum in which to publish an article on that overlooked issue you've been noodling! In the months to come, Tim and I will be in contact with many of you to ask that you share your secrets and insights with your fellow Bay Area business trial lawyers. Please give me a call any time to discuss ideas or leads for an article by you, one of your associates or partners, a judge, or a key consultant. (Ben Riley: (415) 693-2092; or briley@cooley.com.) We welcome and look forward to your input. With your help, we will adhere to Chip Rice's fine tradition of keeping the presses rolling for your *ABTL Report*.

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