

# abt REPORT

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## *The Psychology of Litigation*

**T**his fall I am offering a seminar at Stanford Law School entitled, “*The Psychology of Litigation: Practical and Ethical Implications for Lawyers.*” Using constructs from cognitive and developmental psychology and case studies drawn from my own experience as a trial judge, I hope to explore the conscious and unconscious reasons why people litigate and how lawyers and a litigation culture enable both rational and irrational uses of litigation.

The topic is one that has interested me since the beginning of my legal career. Before I became a judge, I was the directing attorney of a legal services program serving people with mental and emotional impairments. Although many of them had meritorious legal claims involving benefits, treatment and discrimination, most of my clients suffered from fairly obvious distortions in their cognitive processes. Establishing and maintaining a trusting, respectful attorney-client relationship

under these circumstances was a daunting task. An even greater challenge was reconciling a lawyer’s duty to advocate for a client’s expressed interests with the reality that such advocacy might be directly contrary to the client’s

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**Hon. Jeremy Fogel**

## *The Role of California’s Prosecutors in Unfair Competition Actions*

**T**he Unfair Competition Law (“UCL”), Business and Professions Code section 17200, *et seq.*, is California’s most important consumer protection statute. The UCL is the principal law enforcement tool used by California’s prosecutors to protect consumers as well as competitors from unfair and unlawful business practices. This article addresses the importance of the UCL as a law enforcement tool, the unique attributes of public prosecution of the UCL, and the goals of the California law enforcement community in using the UCL to protect the public.

In addition to public enforcement authority, California’s Unfair Competition Law provides a private right of action, unlike its federal counterpart, Section 5 of the FTC Act. Under section 17204, any individual or organization can bring an action “on its own behalf or on behalf of the general public” regardless of whether he/she has been injured personally by the practices at issue. Because of this broad private standing provision, the UCL has drawn increased interest and a measure of controversy as a vehicle for private lawsuits.

The California Legislature has recently conducted hearings regarding the activities of the Trevor Law Group (a Southern California law firm comprised of three recent bar admittees) and several other small private law firms for improper and abusive UCL lawsuits that targeted small businesses. These lawsuits improperly used the UCL to coerce small businesses to pay money to the attorneys under the guise of a consumer protection action to benefit the general public. In reality, only the attorneys’ bank accounts benefited.

California’s prosecutors have responded vigorously to

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**Tricia Pummill**

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## *Prosecutors' Role in UCL Actions*

stop these abuses of the UCL. California Attorney General Bill Lockyer has filed a civil UCL law enforcement action on behalf of the People of the State of California against the Trevor Law Group and another such law firm to halt the abusive practices, obtain restitution for victims, and seek civil penalties for the defendants' violations of law. Additionally, the Los Angeles County District Attorney's Office filed an *amicus* brief successfully urging dismissal of the two largest cases the Trevor Law Group had filed in the Los Angeles County Superior Court. The Attorney General has opened investigations regarding the other private law firms who may have engaged in similar abuses. And, the State Bar of California, after conducting its largest-ever misconduct investigation, filed disciplinary charges against the three Trevor Law Group attorneys and ultimately obtained their disbarment via resignations while the disciplinary charges were pending.

The California District Attorney's Association ("CDA") and public prosecutors fully support these measures and are committed to assisting in the efforts to stop the improper use of the UCL.

### Prosecutors' Unique Role in UCL Enforcement

Elected public prosecutors play a role in UCL enforcement which is markedly different from the function of private litigants in these actions. Public prosecutors have been given a unique role to represent the People of the State of California in protecting consumers, law-abiding businesses and the marketplace. Law enforcement actions under the UCL are brought by the State of California in its sovereign capacity. These actions serve many of the same functions (including deterrence, punishment and restitution) as criminal prosecutions under the Penal Code. As in criminal cases, prosecutors in UCL cases are advocating for justice — not for the interests of a particular individual or group. For all these reasons, the statutory scheme of the UCL confers a leading role on public enforcement agencies including exclusive authority to recover UCL civil penalties (section 17206) and a unique monitoring function for UCL appeals (section 17209).

The Attorney General and each of the 58 district attorneys are Constitutional public officers, elected and periodically evaluated by all the citizenry, and forbidden by law and ethics from personal pecuniary gain from their prosecutions. Prosecutors are subject to public scrutiny, oversight, and civil grand jury review, which do not apply to private attorneys. Their salaries, which are set by the Legislature or county boards of supervisors, are entirely unaffected by the collection of fines or penalties in cases they pursue.

In contrast, private attorneys litigating under the UCL have no such system of checks and balances, and have a direct personal financial stake in the outcome of the litigation. In addition, private attorneys often settle UCL cases for the payment of a specified monetary amount in exchange for dismissal of a filed lawsuit or an agreement not to file a threatened lawsuit.

Public prosecutors require injunctions, civil penalties and restitution in the resolution of law enforcement cases. The ethical standards of public prosecutors prohibit the accepting of fines, penalties, or reimbursement of costs for disposition of consumer protection cases without judicial authorization. And, unlike many of the settlements reached by private attorneys, settlements reached by public prosecutors result in stipulated judgments which are approved by the court and are matters of public record.

Government prosecutors do not engage in the practices and tactics that have given rise to calls for amendments to the Unfair Competition Law. The non-partisan California Law Revision Commission conducted an exhaustive three-year study of these issues and found no evidence of prosecutorial abuse of authority under the UCL. (See *Unfair Competition Litigation*, California Law Revision Commission, 26 Cal. L. Revision Comm'n Reports 191 (1996).) In fact, to the contrary, the State Legislature has assigned a special watchdog role to the Attorney General and local district attorneys in the development of the UCL. Section 17209 requires that appellants seeking appellate review of UCL matters must provide notice and briefs to the Attorney General and the relevant district attorney so that those public officials may monitor the case and, where appropriate, participate as *amici curiae* to ensure proper development of the law.

### UCL Actions by Public Prosecutors

Government prosecutors bring UCL cases in the public interest. Such actions are often the result of citizen complaints to their local district attorney or city attorney. Administrative, licensing and law enforcement agencies also bring consumer protection matters to the attention of the local prosecutor. Businesses seeking to maintain a fair and honest business environment frequently report the unfair or unlawful tactics of their competitors. While many disputes between two businesses are not matters for a governmental prosecution action, uniform enforcement of consumer protection laws plays an important role in maintaining a fair and level playing field benefiting business and consumers alike.

The Attorney General, district attorneys, and city attorneys may bring UCL actions to prosecute violations occurring in their jurisdictions, and may extend those actions to statewide violations. (Business and Professions Code section 17204.) Unlike private plaintiffs, consumer protection prosecutors are authorized to seek penalties of up to \$2,500 per violation. (Business and Professions Code section 17206.) When the injured consumer is a disabled person or a senior citizen, an additional penalty of \$2,500 per violation may be assessed. Prosecutors may also obtain restitution for victims and injunctive relief, and may recover costs incurred by consumer agencies. (Business and Professions Code sections 17203, 17206 and 17206.1.)

Prosecutors use the UCL to address a wide variety of unlawful or unfair business activities. Often, the business activity involves violations of California's false advertising

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law, Business and Professions Code section 17500, which prohibits the making of any untrue or misleading statement to a member of the public with the intent to sell goods or services, when the maker of the statement knew or should have known the statement was untrue or misleading. Section 17500 also prohibits "bait and switch" advertising. Business and Professions Code section 17500 provides for a civil penalty of up to \$2,500 per violation, restitution to victims, injunctive relief, and recovery of costs of consumer agencies. (Business and Professions Code sections 17535, 17535.5, 17536.) The remedies under sections 17200 and 17500 are cumulative. (Business and Professions Code section 17534.5; *People v. Bestline Products, Inc.*, 61 Cal.App.3d 879 (1976).)

Public prosecutors seeking to accurately ascertain the facts surrounding suspected unlawful business activity are authorized to compel the production of books, records and even oral testimony prior to filing a legal action. (Government Code section 11180 *et seq.*) Prosecutors may also require businesses to substantiate their advertising claims pursuant to Business and Professions Code section 17508.

#### Law Enforcement Goals in UCL Actions

The prosecutor's job is to seek justice, and consumer protection prosecutors are charged with advocating for appropriate civil remedies for UCL violations. To fulfill these obligations, California prosecutors pursue the following goals in law enforcement actions under the UCL:

**Injunctive relief to end unlawful practices.** Prosecutors in UCL matters insist that unlawful activity cease. In this regard, prosecutors are protecting both consumers and honest businesses, both of whom may suffer injury from the illegal conduct. If the unlawful conduct does not cease, prosecutors may take immediate action, by asking a court to issue a temporary restraining order or preliminary injunction. When government prosecutors seek a temporary restraining order or a preliminary injunction in UCL cases, they are not required to show irreparable injury. Instead, where a statute provides for injunctive relief, the public agency need only establish that it is reasonably probable that it will prevail on the merits. A rebuttable presumption then arises that the potential harm to the public outweighs the potential harm to the defendant. (*IT Corp. v. County of Imperial*, 35 Cal. 3d 63, 73 (1983).)

In contrast to some private actions, public prosecutors require permanent injunctions as a condition of settling any consumer action. These injunctions not only require cessation of the unfair or unlawful practice but may establish affirmative requirements or obligations to prevent accidental or negligent violations. As long as a company remains in business, it will be bound by the injunction.

**Victim restitution.** Prosecutors seek restitution for individuals who have been injured by the illegal activity. In

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## Keys to Successful Mediation

**B**usiness people and their attorneys recognize that mediation is low-risk, cost-effective, and confidential, and that it enjoys a 90 to 95 percent success rate when conducted by an experienced mediator. The mediation process is far less expensive than litigation, both in terms of attorneys' fees and costs and of downtime for company employees involved in discovery and trial preparation.

Through mediation, it is possible to preserve business relationships. Perhaps even more important, mediation makes it possible to maintain some control over the risk of a stunning loss resulting from relinquishing the determination of the case to an arbitrator, judge, or jury. Especially when a dispute could give rise to dire consequences for a business, officers of a company often prefer to retain control of the outcome and opt for the certainty of a mediated resolution.

Nevertheless, even experienced counsel may fail to take the steps that will increase the chances of settlement and provide a positive benefit to their clients. Here are some suggestions for a successful mediation:



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#### Exchange Briefs

When attorneys submit confidential briefs to the mediator without exchanging them, the opposing side will often come to the mediation table without a clear idea of the opposition's view of the case and what it hopes to achieve at mediation. Even worse, the mediator may have to spend the first half of the day clarifying basic information. Although one purpose of writing a brief is to educate the mediator, an equally important goal is to educate the opposing party and impress them with the strength of your client's position.

Particularly in a complex commercial or construction case where the issues may be numerous and the damages substantial, the best practice is to exchange comprehensive briefs. Outline your client's view of the facts and the law relating to the main issues and list the damages along with the rationale for the calculation. Opposing counsel will need to review your key documents in order to accurately evaluate the case, so attach those. There is no point in concealing documents that can be obtained in routine discovery. Remember that the decision-maker on the other side, perhaps the company president who has flown in from another state, may not be up to speed on the details of your claim or defense. Exchanging briefs helps the parties come prepared to move promptly into meaningful negotiations.

If there is specific, confidential information that you

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need to raise only with the mediator, it is best to address it in a separate letter for the mediator's eyes only, as a supplement to your mediation brief. Or, since *ex parte* communication with a mediator is allowed, you may call the mediator in advance to discuss sensitive issues.

### Consider a Range of Options

Before the mediation, you will no doubt discuss a range of settlement possibilities with your client. Sometimes, parties decide in advance on a specific dollar range, including the very highest amount to be offered or the lowest to be accepted. That approach is a mistake. Pre-mediation meetings are better spent thinking about how the case looks to the other side and analyzing what their needs may be. Keep an open mind and consider many options.

At mediation, your client will have an opportunity to hear about the weaknesses of your case from the point of view of the opposition. And the mediator's job is to create doubt in your client's mind. Stay flexible and be willing to take a fresh look at the case. Be prepared to learn something new that will cause your client to re-evaluate his or her settlement position. Then, you may want to reconsider your bottom-line and even explore options that include something other than money, such as an agreement to do business with the other party in the future or to accept

services in trade. Such arrangements may be far more valuable to your client than a monetary settlement and may be the only way to bridge the gap between the parties.

### Make an Opening Statement

At the beginning of the joint session, counsel are invited to, and frequently do, make an opening statement. Some attorneys, anxious to cut to the chase, feel that an opening is not necessary because opposing counsel is familiar with their position and/or because they have outlined the key points in the mediation brief. Do not miss this valuable opportunity.

It is an unfortunate fact of life that the mediator, opposing counsel, and the decision-maker for the opposing party do not always appreciate the strength and rectitude of your client's position. Making an opening allows you to use (and your client to see you use) your best advocacy skills to force the other side to take a hard look at the case from your client's point of view and to give them a taste of how the case might look at trial. So take the time to outline your client's view of the case orally. This is your chance to look the President or CEO of the opposing company in the eye and use your persuasive powers to point out the strengths of your case and the vulnerabilities of theirs.

If your client is articulate and familiar with the details of the dispute, you may want him or her speak to some points. That way, you can demonstrate your client's strength as a witness if the case must proceed to trial. On another level, too, your client is in the best position to send the message that the company is interested in a reasonable resolution and open to discussing a variety of possibilities.

### Stifle the Impulse to Insult

A cautionary word about "advocacy skills:" there is a world of difference between litigation advocacy and mediation advocacy. Litigation advocacy can be successful even if it is aggressive and non-conciliatory. By contrast, mediation advocacy is most likely to be successful when all participants openly discuss the factors contributing to the dispute, the merits of each party's legal and factual position, and potential solutions. Show respect for the opposition and work toward a deal that makes business sense.

That is not to say that there will not be strong expressions of negative opinions and emotions. And this "venting" is not necessarily bad. A good mediator understands the transformative potential of acknowledging and validating negative feelings, and is expert in the art of handling outbursts.

But participants should stifle the impulse to announce that the people on the other side of the table are crooks or bigots or have "cooked the books." Insults are likely to harden the other side's resolve, thereby preventing your client from obtaining a successful resolution; they may even cause the other side to walk out of the mediation. Keep your eye on the ultimate goal: helping the parties put their differences behind them.

### Bring the Right Participants

Mediation is a dynamic, multi-sensory process the nuances of which cannot be accurately conveyed, much less summarized, to an absent decision-maker. The ideal mediation process involves the dismantling of mistrust and enables the participants to hear, not just listen to, each other with more empathy and less skepticism. This process enables participants eventually to soften their positions and find a resolution that puts an end to uncertainty and is far superior, business-wise, to a litigated result. The absence of a decision-maker undermines the process.

A "decision-maker" is a person without whose participation the dispute cannot be resolved. Though that definition sounds straightforward enough, in actuality it can be tricky for counsel to identify the true decision-makers. In a sexual harassment case, for example, the employee's husband may have a significant investment — emotional, financial, and perhaps even religious — in the way the matter is resolved. If the couple has agreed in advance on conditions, such as a dollar amount, the immediate termination of the alleged harasser, and an apology from the HR Director, the wife will find it difficult to deviate from those terms. Therefore, consider whether spouses, ad-

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**Deborah Rothman**

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justers, CFO's, HR Directors, and/or department heads from whose budgets the settlement will be deducted, should be part of the mediation team.

Sometimes, counsel invite too many people to participate. It is difficult to negotiate with a group of eight or ten or more. The representatives tend to adopt a group mentality regarding the case and to reinforce each other in that view, thereby preventing the decision-makers from re-evaluating the case in the light of new information. Also, some of the participants may have been involved in the disputed transaction and may be more concerned with defending their actions than with finding a business resolution. The Project Manager in a construction case may focus on trying to explain why it is not her fault that there were cost overruns and delays rather than finding a way to save the company from the risk and cost of trial.

In many complex commercial cases, such as partnership dissolutions, the testimony of an accountant or other expert will be central. Consider inviting your expert to the mediation. Be sure to contact opposing counsel in advance and agree that both sides will bring experts. If only one side presents its expert, the other side may be reluctant to negotiate in a belief that it has been put at a disadvantage. If both experts are present, they may be able exchange views and then assist in outlining a workable settlement.

#### Prepare Your Client

In an effort to maintain control, some attorneys may tell their clients to remain silent at mediation. Silencing an informed and articulate client can be a big mistake. Your client actually may be the best person to outline the facts, since he or she may know the details and chronology, and may be more credible than counsel. Also, your client's sincere expression of a desire to find a resolution, especially if coupled with an acknowledgment of his or her own distress and an expression of empathy with the opposing party's distress, can soften the other side's settlement posture. Finally, after a long negotiation, it often is in a private meeting of both sides' decision-makers with the mediator that the party representatives are able to outline a resolution that can be firmed up after consulting with counsel.

Since your client should be an active participant, you must do some advance preparation. Prepare him or her for a dynamic process where participants will express many opposing points of view and where expressions of outrage, and even some yelling, are likely. There may be boredom while the mediator caucuses with other parties and there may be no real breakthrough until late in the day. The mediator will ask some challenging questions, offering little comfort to your client, and undoubtedly will spend some time focusing on the weak points of your case. The first demand may be very high or the first offer far too low. When the parties are prepared in advance for these events and understand that they should do some thinking about a persuasive rationale for each demand or offer, they will be in a good position to get the most from

the process.

Finally, having your client actively participate in the mediation may allow him or her emotionally to move free of the dispute, towards resolution and closure. Constructive interaction with the mediator and the other parties often provides clients with an important sense of having their "day in court," allowing them to better weigh and become comfortable with the various settlement options.

#### Be Candid With the Mediator

Be frank in your discussions with the mediator in the privacy of a caucus. That is not to say that you should necessarily reveal your bottom line to the mediator, but you enhance your credibility and get the best assistance the mediator has to offer if you speak honestly. Be candid about the facts and the law, about the players and their personalities, and about the psychological, organizational, and emotional dynamics of the case. By all means, tell the mediator what you want to accomplish and outline your ideas for persuading the opposing side to move in that direction. As the negotiations progress, ask the mediator for some evaluation. You may be pleased to find that the mediator will reinforce what you have already told your client and that your client will be able to hear it better from an objective third party. If the mediator's evaluation is different from yours, you will at least gain an opportunity to see the case from a neutral perspective. And your client may appreciate hearing the bad news from an outsider rather than from you.

Assume that the mediator will use some of what you say to push the other side to soften their position. If there are points that you want kept confidential, mention those specifically. Also, early on, you should advise the mediator of any special settlement requirements, such as a confidentiality provision or making the deal contingent upon Board approval. After you give your offer or demand to the mediator, be sure to review what is going to be presented. That way, there will be no embarrassing miscommunications.

#### Draft the Final Agreement Later

Before leaving the mediation, be sure to draft a comprehensive memorandum of understanding outlining the key points of the agreement, including every issue that could foreseeably result in a dispute that might undo the settlement, and have the parties sign off on it. A handwritten agreement is fine. The document should state that it is meant to be enforceable under California Code of Civil Procedure, section 664.6 or its equivalent, and that counsel will draft a final agreement within a week or ten days. Be aware that, although counsel and clients are likely to be battle-weary after an exhausting day of negotiations, the parties and the mediator should focus their remaining energy on preparing a thorough confirmation of their settlement before departing.

Consider also whether to bring an agreement drafted in advance with blanks to fill in. That is fairly standard in personal injury suits or in straightforward employment

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best interests (for example, vindicating the right of a client suffering from paranoid schizophrenia to refuse anti-psychotic medication might result in the client's reversion to delusional behavior, leading to the client's arrest or involuntary commitment).

### The View From The Bench

I revisited this subject early in my judicial career as a family court judge. I think that it is fair to say that while most people who appear in family court are relatively "normal" in their everyday lives, there is a period in virtually every litigated family law case in which one or both parties completely lose perspective. The grief, anger, depression and other emotions that typically surround the breakup of a marriage interact synergistically with the dynamics of the adversary system to produce an extremely toxic situation.

In presiding over hundreds of such cases during the four years I served in family court, I observed a wide variety of relationships between lawyers and clients. Some lawyers viewed their role as that of a counselor first and an advocate second; these lawyers perceived an ethical obligation to put brakes on their clients' more destructive (or self-destructive) impulses and to help their clients identify the clients' best interests in the long term. Other lawyers operated with the more traditional view that as long as compliance with a client's directive was not illegal or clearly precluded by the Rules of Professional Conduct, their obligation was to advocate zealously for the client's position.

Both of these approaches led to certain difficulties. The "best interests" approach, while it tended to result in settlement, sometimes was heavy-handed, leaving the parties with the feeling that they had not been heard, that a resolution had been imposed on them, and that their perspective and personal suffering were irrelevant. The "expressed interests" approach, on the other hand, led to contested hearings involving trivial matters and, in its worst manifestation, child custody wars that permanently traumatized the children in question.

When I began my long term relationship with civil litigation in the early 1990's, I thought at first that civil cases would be different. After all, I told myself, civil cases usually are mostly about money — no children, family heirlooms or intimate relationships are involved — and the civil litigators I knew tended to believe that their cases were far more substantive and intellectually serious than those heard in family court. However, while I can say in hindsight that no judicial assignment quite equals that of a family court judge for emotional intensity, many of the same psychological dynamics I observed in family court are alive and well in civil litigation. Moreover, because their presence rarely is acknowledged or more than superficially explored by civil litigators, these dynamics can have particularly profound effects in civil cases.

In one intellectual property case over which I presided, two major high-tech companies spent millions on litiga-

tion over several years, yet it was only shortly before trial that I learned almost by accident that a primary motivation for the dispute was an unresolved personal grudge between the companies' respective CEOs — the result of the younger of the two having become the commercial competitor of his former mentor. I have seen many other cases in which factors irrelevant to the merits or economic realities of a case, such as a party's intense need to "win" or deeply rooted sense of entitlement or victimization, prevented any meaningful consideration of other points of view. In each of these cases, teams of talented and hardworking lawyers advocated fiercely and effectively for their client's expressed interests, generating cartloads of pleadings and impassioned oral arguments, and opposing counsel typically responded in kind.

When I see a civil case that appears to be unusually conflicted — chronic discovery disputes, disparaging letters between counsel copied to my chambers' fax machine at all hours of the night, refusal to engage meaningfully in an ADR process — my first question is "why?" I suspect that in most cases if I were to ask counsel that question I would hear a vigorous exposition of their client's position as well as a detailed chronicle of the misdeeds of the other side. To be sure, business or policy considerations or the conduct of the opposing party may provide a complete or at least a partial explanation. What I am seeking by my question, however, is something entirely different: it is an understanding of the circumstances, the relationships, and the life experiences that have led the parties to litigate so aggressively. I am also interested in the personal and psychological factors that might be motivating the lawyers.

### Facilitative Mediation

One of the greatest benefits of my family court experience was an exposure to facilitative mediation. Unlike the mediation with which most civil practitioners are familiar, which tends to be evaluative and focused on compromise, facilitative mediation is intended to enable parties to reflect upon why they feel the way they do and to understand the motivations and interests that underlie their positions. A parent's insistence on a particular child custody arrangement, which might be framed in the context of litigation as the product of a selfless desire to act in the children's best interests, in fact may be driven by unconscious feelings of guilt, anger at the other parent, a need to assert control, or ambivalence about the breakup of the marriage. A facilitative mediator, typically a mental health professional rather than a lawyer, attempts to bring such feelings into the open so that the parties can begin to think about what actually *is* in the children's best interests.

Although the goal of the process ultimately is resolution of the dispute, the ideal resolution is not a compromise but rather an expression of the parties' best thinking. Facilitative mediation can provide a resolution that addresses the interests of all parties using the insights gained through the mediation process, thereby either preserving the parties' relationship or, if there is no relation-

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HOWARD ULLMAN

## On ANTITRUST

California's unfair competition law, Business and Professions Code section 17200, *et seq.* ("UCL"), is notoriously broad, especially with respect to "unfair" claims. As a result, in the past it has been abused. The question remains, however, whether a UCL claim or counterclaim ever makes real sense in antitrust business litigation.

Two observations define the outer bounds of the debate. On the one hand, courts — especially federal courts — are wary of UCL claims. Indeed, the lack of any UCL standing requirement has led some federal courts to rule that they do not have Article III "case or controversy" jurisdiction over suits brought in the public interest by plaintiffs who were not themselves affected, injured or harmed in any way. *See, e.g., O'Connor v. Boeing North American, Inc.*, 197 F.R.D. 404, 420 (C.D. Cal. 2000). Moreover, federal courts will often decline to exercise supplemental jurisdiction over remaining UCL claims after dismissing federal antitrust claims (*see, e.g., Vangala v. Corwin Medical Group, Inc.*, 2002-1 Trade Cas. (CCH) ¶ 73,673 (C.D. Cal. 2001)), or will perfunctorily conclude that UCL claims fail for the same reasons that federal antitrust claims fail. *See, e.g., Stein v. Pacific Bell Telephone Co.*, 173 F.Supp. 2d 975 (N.D. Cal. 2001).

On the other hand, California courts have sought to narrow the amorphous definition of unfairness, while preserving the statute's flexibility. In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163 (1999), the California Supreme Court ruled that UCL unfairness has a specific meaning in the context of competitor suits. Under *Cel-Tech*, a firm that accuses a competitor of unfair business acts or practices under the UCL must establish that the competitor's conduct threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition. *See id.* at 187. This definition, while imprecise, provides sufficient guidance to infuse a competitor's UCL claim with meaning but is still obscure enough to give a plaintiff or counterclaimant ample legal room to maneuver.

Taking account of these points, there remain at least three reasons to consider a UCL claim in addition to or instead of a federal antitrust claim:

*Bringing a UCL claim allows you to file in state court.* The federal antitrust laws are enforceable only in federal court. A UCL claim, however, can obviously be brought in California court. (Of course, if there is diversity jurisdiction, the claim may be removed to federal court anyway.)

*Bringing a UCL claim allows you to "import" federal antitrust law into a state court action.* Under *Cel-Tech*, courts will look to, among other things, whether there is

an incipient violation of an antitrust law, or a violation of the policy or spirit of the antitrust laws. Under this analysis, plaintiffs can rely upon the federal antitrust laws as predicates. Although courts also often interpret California's own antitrust law, the Cartwright Act, in accordance with federal antitrust precedents (*see Morrison v. Viacom, Inc.*, 66 Cal.App. 4th 534, 541 (1998)), the scope of the Cartwright Act is narrower than federal antitrust laws in several respects. For example, a single merger does not violate the Cartwright Act. *See State of California ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147, 1163 (1988). Similarly, California has no direct counterpart to Section 2 of the Robinson-Patman Act, although the Unfair Practices Act does address certain types of price discrimination. *See* Business and Professions Code section 17001. It also remains unclear whether the Cartwright Act reaches monopolistic practices by individual firms. *Compare Lowell v. Mother's Cake & Cookie Co.*, 79 Cal. App. 3d 13, 23 (1978) with *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1478 (9th Cir. 1986), *modified on other grounds*, 810 F.2d 1517 (9th Cir. 1987). In sum, there are enough differences between the Cartwright Act and the federal antitrust laws to justify looking for an alternate vehicle to import federal antitrust precedents into a California state court case where that is your goal.

*Bringing a UCL claim may enable you to establish a lower burden of proof.* In a UCL claim, you need establish only an "incipient" violation of the antitrust laws, or a violation of their policy or spirit. Some recent cases have recognized that as a result plaintiffs may escape federal antitrust law's stricter pleading standards. *See, e.g., Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 269 F.Supp. 2d 1213, 1227 (C.D. Cal. 2003) (dismissing Sherman Act claim, but not UCL claim; "[e]ven if [plaintiff's] pleading is deficient with respect to some of the substantive elements of federal or state antitrust law, [the UCL's] prohibition on 'unfair' business practices arguably brings within its radius conduct that might otherwise fall outside the strict confines of antitrust law.").

Antitrust lawyers often dismiss the UCL. However, sometimes there are valid reasons to consider bringing a UCL claim in addition to or instead of a federal antitrust claim. Keep in mind, however, that the available remedies differ considerably; most notably, while treble damages are recoverable under the Clayton Act, the only monetary recovery permitted under the UCL is restitution. *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134 (2003).

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ship to preserve, providing a true sense of finality. A client satisfaction survey conducted by California's Administrative Office of the Courts some years ago found that more than sixty percent of the parties referred to facilitative mediation by the state's family courts expressed satisfaction with the outcome, an astounding statistic given the extreme polarization of most child custody disputes at the time of referral.

While lawyers are not irrelevant in a facilitative process, they play a significantly different role than they do in an evaluative one. Lawyers can provide critical assistance to a client — particularly one who is unsophisticated or in a less powerful position — in understanding the legal landscape and knowing what is and is not possible from a legal standpoint. They also can encourage the client to express his or her concerns without fear and offer assurance that the client will have a strong advocate in the event that a resolution satisfactory to the client cannot be achieved. What they do not do is control the process; posturing, strategic bargaining and gratuitous disparagement of the other party or counsel are fundamentally inconsistent with the facilitative model.

### The Costs Of Litigation

Litigation and the adversary system are embedded so thoroughly in our legal culture that the value of other paradigms of conflict resolution may not always be apparent to us. While most successful litigators care enough about their professional reputation not to engage in uncivil behavior even if asked to do so by a client, I doubt that many litigators inquire very deeply into their clients' motivations, and I suspect that many clients would be offended by such an inquiry unless it were done very carefully. Beyond that, most litigators like to litigate, and it usually is in their economic interest to do so, particularly when law firms typically require a large number of billable hours and lawyers are under intense pressure to meet their quotas. How, then, should our legal system respond to a situation in which costly and often destructive litigation frequently is driven, and some of our best legal talent occupied, by unacknowledged psychological agendas? Do lawyers have an ethical obligation to ask "why?," both of their clients and of themselves?

My questions are not merely rhetorical. There is an entirely respectable argument that, except in clear cases of illegal or unethical conduct, lawyers should not be expected to question their clients' motives, that doing so improperly and paternalistically shifts responsibility from the client to the lawyer, and that lawyers are not trained and should not try to be psychologists. According to this argument, the proper role of lawyers is to present the client's position skillfully and effectively, letting the adversary process and the trier of fact produce a just result.

I have three responses to this argument. First, a thorough exploration of a client's reasons for wanting to litigate is not the same thing as second-guessing the client. By asking open-ended questions and listening non-judg-

mentally to a client's answers, much as a facilitative mediator would do, a lawyer can learn a great deal about the acknowledged and unacknowledged interests that underlie the client's positions while at the same time helping the client become more aware of those same interests. The lawyer does not *tell* the client what is in the client's best interests; instead, the lawyer facilitates a dialogue in which the client is able to think more broadly and more objectively. Rather than simply doing the bidding of an angry client who wants the lawyer to take no prisoners, a lawyer can encourage the client to talk in detail about the history of client's relationship with the other party, whether the client is ready to burn any bridges that might still exist between them, and whether there are means other than litigation (or homicide) that might address the client's concerns more completely.

Second, whatever the benefits of protracted litigation, the economic costs of intensely litigated cases have become enormous. While not every litigated case is the product of irrational motivations and while some disputes only can be resolved appropriately by trial, huge amounts of money, energy and legal talent are expended on motions, discovery and trials that might be avoided by a serious effort to understand the roots of conflicts at their outset. In an environment in which ninety-five to ninety-eight percent of civil cases eventually settle before trial anyway, a greater focus on resolving cases earlier through a more facilitative process could result in great economic benefits to the parties.

Third, the human costs of prolonged litigation to clients, society and litigators themselves are well documented. More than eighty years ago, Judge Learned Hand made his famous remark that, "...as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death." While clients who have prevailed at trial or obtained a particularly beneficial settlement through litigation may have a more favorable view of the process, in my experience the vast majority of civil litigants find the experience traumatic and unsatisfying. Serially and sometimes simultaneously they hate the other party, the other party's lawyer, the judge and, if the result is less satisfying than they imagined, their own lawyer. They feel abused in discovery and treated like a piece of meat by the legal system. They cannot believe the amount of time and worry the case has required and they certainly cannot believe the amount of money they have spent. Our society as a whole has a consistently unfavorable view of lawyers — a view that in my mind is quite unfair but that I think has something to do with the popular concept of lawyers as amoral warriors ready to do whatever a client asks. And I doubt that I need to tell any litigator reading this article how the demands of a heavily litigated case can affect one's personal life and physical and emotional health.

### Conclusion

My point in this article, and my reason for offering my seminar at Stanford, is not to argue that litigation has no value. To the contrary, given that some people will act badly no matter how much someone asks them not to

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BILL HIRSCH

## On CLASS ACTIONS

**R**ecent efforts to amend California's Unfair Competition Law, Business and Professions Code section 17200, *et seq.* ("UCL"), have ended, and the controversial attempt to add disgorgement of ill-gotten gains or profits as a remedy was abandoned in the face of strong resistance from the business community. Nonetheless, in a UCL class action, restitutionary disgorgement is alive and well, and provides a powerful tool that is not available in individual or representative actions.

The recent round of legislative activity was actually launched by a trio of Supreme Court decisions issued over the last three years. First, in *Kraus v. Trinity Management Services*, 23 Cal. 4th 116 (2000), the Supreme Court held that disgorgement of ill-gotten gains into a fluid recovery fund is not a permissible remedy in a representative UCL action.

This ruling turned on the Court's distinction between restitution and disgorgement. On one hand, the Court held that restitution, the only type of monetary relief permitted in a UCL action, is limited to the return of money or property to those persons "who had an ownership interest" in it. On the other hand, the Court recognized that disgorgement is a broader remedy that may include either: (1) money unfairly taken from the victims, even if all such money is not returned to those who have an ownership interest in it ("restitutionary disgorgement"); or (2) profits earned as a result of the unfair business practices, even if those profits do not represent money taken directly from the victims ("non-restitutionary disgorgement").

Based on this distinction, the Court held that disgorgement into a fluid recovery fund is not a permissible remedy in a representative UCL action because it is not restitutionary in nature. Neither type of disgorgement is permitted — the recovery is limited to victims who step forward to claim their share.

Not so in a UCL class action. There, under Code of Civil Procedure section 384, restitutionary disgorgement into a fluid recovery fund is permitted, even if the actual victims do not step forward to collect their share. This has great practical importance. In *Kraus*, restitutionary damages were limited to \$2,225; had the case been a class action, the recovery would have been \$445,745, plus interest.

Then, in *Cortez v. Purolator Airfiltration Products Company*, 23 Cal. 4th 163 (2000), the Supreme Court extended the scope of restitution in a UCL action, holding that restitution could not be limited to the restoration of money or property once in the possession of the victim. Instead, recovery of unpaid wages — which were never in the plaintiffs' possession — was permitted as restitution because the employees had an ownership interest in their unpaid wages.

Finally, in its most recent decision, *Korea Supply*

*Company v. Lockheed Martin Corp.*, 29 Cal. 4th 1134 (2003), the Supreme Court held that a plaintiff was not entitled to recover lost profits or a lost business opportunity under the UCL. The Court first reiterated that non-restitutionary disgorgement is never permitted in an individual UCL action, thus extending *Kraus* to cover individual as well as representative actions. Next, it expanded and restated its ruling in *Cortez*, explaining that restitution is permitted not only when a plaintiff seeks to recover money or property that was once in its possession, but also when the plaintiff has a "vested interest" in the money or property.

The Court then applied these principles to plaintiff's claim for restitution of a commission it lost as a result of unfair business practices, and held that restitution was not a proper remedy because the plaintiff only had a "contingent" or "expectancy interest" in the commission, not a vested interest. Further, while a vested interest might include any legal right to money or property that has not been turned over to the plaintiff, restitution is permitted only if the defendant is in possession of identifiable funds or property belonging to the plaintiff.

*Korea Supply* will not be the last word on disgorgement. Enterprising plaintiffs may, for example, seek to broaden the scope of restitution, relying on cases such as *Nickel v. Bank of America Nat'l Trust & Savings Assoc.*, 290 F.3d 1134 (9th Cir. 2002). There, the Ninth Circuit held that "the elementary rule" of restitution is "that if you take my money and make money with it, your profit belongs to me." Under this theory, restitutionary disgorgement may include any profits that defendants make by using money that belongs to plaintiffs. While this could be confused with non-restitutionary disgorgement, it is different because plaintiffs must establish that the funds or property in a defendant's possession belong to them. If the money does belong to plaintiffs, there is nothing in *Korea Supply* that would prevent plaintiffs from recovering the profits made on their money.

**F**or now, this much is clear: plaintiffs may not recover non-restitutionary disgorgement. In a representative action, this has severe consequences, and ultimately limits the effectiveness of actions brought on behalf of the public. But in a class action, restitutionary disgorgement survives, and still provides a powerful enforcement mechanism for the victims of unfair business practices. With the broadening of the concept of restitution itself, there is still room to seek disgorgement whenever money or property belonging to plaintiffs is unfairly taken or withheld.

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Bill Hirsch

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### *Prosecutors' Role in UCL Actions*

the criminal justice system, our state Constitution requires that prosecutors obtain restitution for illegal acts that harm our citizens. Consumer protection prosecutors seek to do the same in civil UCL actions. Consumers who have suffered financial losses should have their losses reimbursed. For example, the consumer who is lured to a business by a deceptive advertisement should receive the advertised product or service at the reasonably understood price.

**Punishment and deterrence.** Prosecutors seek to punish the defendant business and to deter it from committing future violations. This is accomplished by seeking a judgment imposing penalties. Once a California prosecutor has proven acts of unfair competition under the UCL, the imposition of civil penalties is mandatory. (*People v. National Association of Realtors*, 155 Cal. App. 3d 578 (1984).)

Prosecutors strive to obtain penalties that are appropriate in light of the violation. In determining the appropriate penalty, prosecutors and the court are guided by six nonexclusive factors set out by statute: (1) the nature and seriousness of the misconduct; (2) the number of violations; (3) the persistence of the misconduct; (4) the length of time over which the misconduct occurred; (5) the willfulness of defendant's misconduct; and (6) defendant's assets, liabilities, and net worth. (Business and Professions Code sections 17206 and 17536.)

Not only must monetary sanctions reflect the seriousness, duration and willfulness of the violation, they must also be meaningful and proportional to the size of the business. A penalty which might be onerous to a small business could be trivial to its larger corporate competitor. The penalty must punish the defendant — not merely be incorporated as an added cost of doing business. Similarly, the penalty must deter both the defendant and the business community generally from similar violations.

#### Conclusion

The statutory scheme of the UCL confers a leading role on public enforcement agencies including exclusive penalty authority and a unique monitoring function for the development of UCL appellate law. However, significant rights are also delegated to private litigants under the UCL. It is important to California's consumers and honest businesses that the UCL be protected from abusive or misguided lawsuits under the statute's private right of action, and California's prosecutors are dedicated to that objective. But the UCL must also be protected from ill-conceived efforts to undermine its effectiveness as California's principal consumer protection statute. Only through this important public policy balance can we properly serve the UCL's universally accepted goal of fair and honest competition in the California marketplace.

*This article was a collaborative effort of Tricia Pummill from the San Diego County District Attorney's Office, Robert Nichols from the Marin County District Attorney's Office, and Thomas Papageorge from the Los Angeles County District Attorney's Office.*



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### *The Psychology of Litigation*

and that even reasonable people may be unable to reconcile some basic differences, the ability to litigate and present a case to an impartial trier of fact is an essential option within any system of justice. Business in the modern world cannot function effectively without consistent and reliable application of the rule of law, and litigators and litigation have made and continue to make fundamentally important contributions to our society in areas such as civil rights and consumer and environmental protection.

What I am suggesting is that we lawyers and judges not *assume* that litigation is an appropriate option simply because no law or ethical rule prohibits it, that we explore with great care and to the greatest extent possible the interests and concerns that bring parties to the point of considering litigation, and that we look to facilitative processes earlier and more often. I suggest that we become better listeners and counselors: that we seek to understand as well as to advocate.

Acquiring these skills takes time. To effect a lasting change in our legal culture, our legal education will need to explore more fully the expectations of clients and train lawyers in non-traditional areas, such as conflict psychology and facilitative mediation. However, by identifying cases that are driven by factors other than their merits and doing our best to encourage the resolution of such cases at an early stage, we can redirect our economic and human resources toward more positive ends. And, along the way, we just may improve the image of our profession and the quality of our professional lives.

*Jeremy Fogel is a United States District Judge for the Northern District of California, sitting in San Jose.*



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### *Keys to Successful Mediation*

matters. But in a complex, one-of-a-kind commercial matter, such an agreement is likely to be perceived as one-sided. Draft the final settlement agreement later, submit it to opposing counsel, and negotiate over the final version so that both sides make contributions. This "buy-in" will help ensure compliance by both parties.

#### Conclusion

Mediation is an opportunity to maintain control of the dispute and reach a resolution that makes more business sense than a litigated outcome. Use your best professional skills to help your client make the most of the mediation process.

*Zela G. Claiborne and Deborah Rothman are on the Mediation and Arbitration Rosters of the American Arbitration Association. [www.zclaiborne.com](http://www.zclaiborne.com). [www.deborabrothman.com](http://www.deborabrothman.com).*



JAMES YOON

## On PATENTS

*“A jury consists of 12 persons chosen to decide who has the better lawyer.”*

Robert Frost (1874-1963)

**P**atent cases require juries to make difficult decisions regarding complex (and often esoteric) technologies. During trial, the patent jury wades through a swamp of conflicting technical experts, witnesses and documents before it can begin its deliberations. Unfortunately, once these deliberations begin, the jury finds that it lacks the technical background necessary to perform an independent assessment of the facts relating to issues such as patent infringement and patent validity. To compensate, the patent jury relies on the presentation of trial counsel to define the issues, explain how the issues should be decided, and provide the conceptual tools that are necessary to analyze the case. To meet these jury demands, patent litigators frequently use mock trials to improve trial advocacy.

The primary function of mock trials is to enhance the performance of counsel. When used properly, a mock trial increases the clarity of presentation and improves advocacy. A mock trial helps eliminate confusion and reduces the possibility that the jury will focus on different issues than those desired by the attorney.

In contrast, when used improperly, the use and reliance on mock trials can lead to errors and miscalculations. A mock trial is not a clone of the actual trial. The attorney conducting the mock trial will present her case in a different manner at trial. Similarly, opposing counsel (also armed with a mock trial) will present her case in a manner that is distinct from the one presented to the mock jurors. As a result, over reliance on the mock trials should be avoided.

### Mock Trials Help You Understand the Jury

The greatest benefit of a mock trial is that it can improve trial counsel's understanding of the potential jury, the problems in understanding the case, and, therefore, the clarity of presentation. Litigation takes time. Often, trial counsel lives with a case for months, if not years, before trial. This familiarity with the record, coupled with knowledge of patent law, can create “blind spots” regarding how the key issues in the case will be perceived by the jury. The act of preparing presentations for both sides of a case (e.g., plaintiff and defendant) combined with analysis of how the mock jurors deliberated on the issues presented may be the best way of identifying and eliminating problems with juror understanding of your case.

Each time I conduct a mock trial, I have three clear goals: (1) the elimination of juror confusion; (2) the identi-

fication of the facts and arguments that resonate with jurors; and (3) the development of a story that provides juries with an easy to use, favorable framework for analyzing the case. If these goals are achieved, the mock trial is successful.

### Mock Trial Data Is Not a Substitute For Judgment

The greatest danger of a mock trial is that counsel may use the data generated by the mock trial (and presented by jury consultants) as a substitute for judgment regarding trial strategy. For example, if 65% of the mock jurors liked argument #1 (even though it is weak on the law and facts) and if only 35% of the mock jurors liked argument #2 (even though it is strong on the law and facts), there is a strong temptation to emphasize argument #1 at trial and de-emphasize argument #2. Resist this temptation. Remember, a primary purpose of the mock trials is to identify points of confusion. Mock jurors do not favor arguments they cannot understand.

Once confusion is eliminated, the jurors at trial might find argument #2 is far more compelling than argument #1. Further, the actual jurors may reject argument #1 because opposing counsel (armed with her own mock trial) exploited its weaknesses at trial. Trial practice is an art, not an actuarial table.

### Mock Trials Do Not Predict Victory Or Defeat

Mock trials are artificial events that do not predict victory or defeat at trial.

Mock trials are typically one-day events that focus on a limited set of issues and frequently do not involve the testimony of live witnesses. Trials are quite different. Over a two week or longer trial, the jurors will receive substantially more information on and explanation of the key issues. This additional information and explanation may eliminate confusion that existed at the mock trial or, alternatively, create confusion where previously none existed. Further, trial is theater. Over the course of trial, jurors will form strong opinions regarding the credibility of the witnesses and trial counsel. These opinions regarding credibility will shape their deliberations in a manner that was not — and could not be — addressed at the mock trial. Accordingly, counsel should not use the results of mock trials to predict victory or defeat. Counsel should limit “predictive” conclusions from mock trials to those which help identify arguments or theories that may be compelling to the actual jury at trial.

**M**ock trials can be an important part of the preparation for trial. They focus trial counsel on the key issues of the case and provide valuable feedback regarding points of jury confusion and concerns. Armed with the feedback from a successful mock trial, the litigator will be a more effective and successful advocate for his or her client.

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James Yoon

## Letter from the President

The Northern California Chapter continues to raise the bar for the ABTL. Program Chair Marla Miller, of Morrison & Foerster LLP, launched a rich, provocative series of programs. Keynote speaker Chief Justice Ronald M. George provided inspiration and specifics on the value of *pro bono* efforts by both bench and Bar, and December 9th's program will feature Attorney General Bill Lockyer's take on the uses and abuses of Business and Professions Code section 17200.

As the final edition of this year's *ABTL Report* goes to press, Claude Stern, of Quinn Emanuel Urquhart Oliver & Hedges LLP, is putting together the finishing touches on an ambitious statewide Annual Seminar on punitive damages to be held in New Mexico. The program materials will be vital equipment for anyone prosecuting or defending a punitive damages case. Attendance is already superb for the program. As we've learned, exceptional programs are the ABTL's largest source of new member interest.



John Bartko

The *ABTL Report* continues to shine; it has become a must-read for busy trial lawyers. Editors Ben Riley (Cooley Godward) and Tim Nardell (Coblentz, Patch, Duffy & Bass) kept their sharp eyes on quality and punctuality all year — from Judge Elizabeth LaPorte's Summer 2003 article "*Managing the Runaway Patent Case*," to Boris Feldman's timely advice "*Protecting the Quarterback: Preparing the CEO for Trial*," to Judge Jeremy Fogel's first-rate "*The Psychology of Litigation*" in the current issue.

The ABTL was built on its ability to foster two precious but scarce sources of professional vitality: collegiality, and the informal interchange of ideas between bench and Bar. The Board continues to provide dedicated service to the organization while implementing new programs designed to: increase participation of newly-admitted members; diversify the perspective of the Board to include a broader cross-section of the Bar; and set clear priorities and goals for the ABTL.

Our chapter continues to be the most successful and the largest at more than 1525 members. We warmly welcome and sincerely appreciate the participation of new 2003 Board members: Hon. Beth Freeman (San Mateo Superior Court); Hon. Marie Weiner (San Mateo Superior Court); Alexander Brainerd (Heller, Ehrman, White & McAuliffe); Charles ("Ben") Burch (United States Attorney's Office, Northern District of CA); Marla Miller (Morrison & Foerster LLP); and Richard Seabolt (Hancock

Rothert & Bunshoft LLP).

I am pleased to pass the baton to my successor Rob Goodin, of Goodin, MacBride, Squeri, Ritchie & Day, LLP, who has been an invaluable source of wisdom throughout the year. Rob is very active in the legal community and chairs many boards, including the Bay Area Legal Aid and the American College of Trial Lawyers (Northern California).

I owe many thanks to all members for the reward and honor of serving as your President. Keeping faith with our tradition of punctual endings, I'll do a quick fade and join my distinguished predecessors. Thank you for the opportunity.

*Mr. Bartko is a partner with the law firm of Bartko, Zankel, Tarrant & Miller in San Francisco, and is currently the President of the Northern California Chapter of ABTL.*

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