ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

NORTHERN CALIFORNIA

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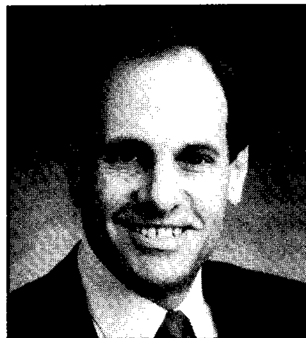
Letter from the President

WELCOME to the first edition of *ABTL Report*, the publication of the Association of Business Trial Lawyers of Northern California. Through this publication and our regular *ABTL* programs, we hope to provide current, useful and practical information to practitioners of business trial law.



Arthur J. Shartsis

Because we all receive many more scholarly publications than we can hope to read, we have tried to make *ABTL Report* short, readable and practical. Since we publish to serve your professionals needs, we welcome any comments you might have. Send them to our Editor, Charles Rice, Suite 1800, One Maritime Plaza, San Francisco, CA 94111.

The response to the creation of the *ABTL* in Northern California has demonstrated the need for an organization that addresses the professional interests of the business trial Bar. Over 1200 members have already joined since we announced the organization's creation in September, which underscores the legal community's enthusiasm for the concept. At our first MCLE Dinner Program on October 8 we had 450 lawyers and 50 federal and state court judges. Our membership and Board of Governors includes lawyers and judges from throughout the region.

The *ABTL* of Northern California is patterned after and associated with the very successful *ABTL* in Los Angeles, which has provided programs of interest to business trial lawyers for eighteen years. We are very much indebted to the *ABTL* lawyers and judges in Los Angeles who made the effort to stimulate the creation

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San Francisco Superior Court Local Rules Changes

EFFECTIVE July 25, 1991, the San Francisco Superior Court, with the assistance of the San Francisco Bar Association, significantly revised its Local Rules for Civil Cases to comply with the Trial Court Delay Reduction Act (Government Code Sec. 68600 *et. seq.*). The most significant changes involve implementing three case management plans to insure compliance with the Act, replacing the At-Issue Memorandum with a Status Conference Statement filed approximately 150 days after the complaint is filed, and requiring all complaints to be served within 60 days unless a court order extends this time.

Hon. William Cahill

In addition, appropriate cases can be assigned to one judge for all purposes. Unfortunately, budgetary restrictions which prevent hiring additional research attorneys and court clerks make it impossible to have single assignments for more than a limited number of cases.

General Civil Cases

All general civil cases will eventually be assigned to one of three case management plans:

Plan 1: Intended to dispose of the case within 12 months of filing of the complaint.

Plan 2: Intended to dispose of the case within 18-24 months.

Plan 3: Intended to dispose of the case within 24 months or a longer period if necessary. These cases will be assigned to a single judge for all purposes.

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Local Rules Changes

Upon filing of the complaint, *all cases* will be assigned to Plan 1 and will remain in Plan 1 unless good cause is shown to the Presiding Judge or his or her designee. When the complaint is filed, the County Clerk will designate on the face of the complaint a Status Conference date approximately 150 days from the date of filing. Plaintiff must notify all defendants of this Status Conference date. The Conference will only be continued on order of the Presiding Judge.

Reassignment Procedures

If a party wishes its case reassigned to either Plan 2 or Plan 3, that party must, within 30 days of its first appearance, lodge with the Presiding Judge and file in the Clerk's office a written request that the action be reassigned. All such requests are to be accompanied by a proposed order and proof of service of the request on all parties (including those not yet served with the complaint). Any other party in the action can file an opposition to the reassignment request within five days.

We anticipate that most requests for reassignment will be decided without hearing. Attorneys requesting assignment to Plans 2 or 3 should write their requests to convince the Presiding Judge of the necessity for the change. Rule 2.3.3.A outlines the information needed in the request. At a minimum, every request must designate the requested Plan, the reasons why the case should be removed from Plan 1, the substance of the parties' claims, anticipated Law and Motion matters and special procedures and settlement prospects.

Plans 1 and 2

Cases assigned to Plans 1 and 2 will be handled much like cases have been handled in the past. Law and Motion matters will be heard in the Law and Motion Department and cases will be assigned to trial by the Presiding Judge using the Master Calendar system. Now, however, cases will be assigned a trial date more quickly than in the past and every effort will be made to meet the statutory goals for early disposition.

When the complaint is filed, a Status Conference date will be set for 120-150 days thereafter. This Conference must be attended by the attorney with primary responsibility for the case. Not less than 30 calendar days before the Conference, all counsel are required to meet and confer regarding a Joint Status Conference statement.

Not later than twenty court days before the Status Conference, all parties are to serve and file a Joint Status Conference Statement, or individual statements of not more than five pages in length, which contain all of the items listed in Rule 2.4.4.C. *This Status Conference Statement will replace the At Issue Memorandum required by California Rule of Court 209.* The Status Conference Statement *must contain* the parties' Jury Demand, request for legal preference, arbitration information, prospects for settlement, and any other information the Court will need to conduct a meaningful status conference.

At the Status Conference, the Court will assign a trial date within one year of filing of the complaint for Plan 1 cases and 18-24 months for Plan 2 cases. The Court will also refer appropriate cases to arbitration and other cases to the Early Settlement program and will also assign a settlement conference date.

On the trial date, the Plan 1 and Plan 2 cases will be assigned to a court room for trial in the same way as in the past: the Presiding Judge will assign the cases out on the Monday set for trial. We intend that cases will be sent to trial on the trial dates scheduled.

Plan 3 Cases

The experience of our Fast Track Courts over the last few years has shown that many cases benefit from single assignment to one judge for all purposes. To take advantage of this, a limited number of cases will be assigned to one judge for all purposes.

Upon an approved application for Plan 3, the Presiding Judge will assign a case to one judge for all purposes. The parties will have 15 days from assignment to seek to disqualify the assigned judge under Code of Civil Procedure Sec. 170.6.

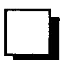
The judge to whom the case is assigned will immediately schedule a Special Status Conference. The conference date assigned by the County Clerk's office at the time of filing the complaint will be vacated, and a Status Conference Statement will be filed with the judge assigned to the case. At the Status Conference, discovery, law and motion and other issues will be discussed. Either at that conference or a later one, a trial date will be set and we intend that the case will be tried on that date.

We anticipate that these Plan 3 cases will proceed as single assignment cases did in the Fast Track Program (and as cases do in Federal Court). Such cases can include cases with significant law and motion matters and/or complex issues or related cases that arise out of the same transaction or have related facts. (See Rule 2.6 on Related Cases.) In some cases the Court will singly assign a case on its own motion. However, in most cases, it will be the attorneys' responsibility to bring such cases to the attention of the Court.

Conclusion

The purpose of these changes is to comply with recently passed legislation regarding early judicial intervention in and prompt disposition of cases. The lessons regarding the advantages of single assignment learned from the Fast Track experience have been learned and implemented as much as is possible under the current budgetary restrictions. We hope that these changes will help attorneys in conducting their cases and any suggestions for improving this system are welcome.

The Hon. William Cahill is a Judge of the San Francisco Superior Court.



ZELA G. CLAIBORNE

On CONSTRUCTION

YOU are handling a large construction case involving the development of an entire city block in downtown San Francisco. You represent the general contractor on the residential/commercial project. The cost of construction exceeded the contractor's Guaranteed Maximum Price contract by at least ten million dollars. Your client claims that the project could not be built at the agreed-upon price because the developer failed to meet its obligation to provide complete and coordinated construction drawings. Also, the contractor claims that the developer breached the construction contract by failing to pay for the cost overruns. After investing substantial sums of its own money to keep construction moving, the contractor was forced to leave the job before completion. The developer, in turn, believes that the cost overruns were due to contractor mismanagement, claiming those costs as well as the cost of retaining a new contractor to complete the job.

Zela G. Claiborne

The case is in the final stages before trial, and you have just exchanged motions in limine and trial briefs with opposing counsel. The litigation has been hard fought. There has been lengthy and expensive law and motion activity, including many bitter discovery disputes. Finally, the presiding judge informs counsel that it is unlikely that there will be a courtroom available for trial, which is anticipated to take three months. What can you do next?

Alternative dispute resolution is an obvious answer. However, this case present special problems. The parties have tried the usual methods of ADR, including a "mini-trial" and a mediation, without success. This complex lawsuit had been assigned to an experienced superior court judge for both law and motion and settlement. After several attempts to settle the case, that judge finally had thrown up his hands and sent the parties home.

To avoid the cost of repeatedly preparing the case for trial, the parties eventually agreed to binding arbitration. However, the attorneys on both sides had arbitrated complex cases in the past and had been dissatisfied because arbitration is not necessarily more economical than trial. The following ground rules allowed counsel to maintain some control over the arbitration process and save money for their clients:

The first thing the parties agreed upon was a time limit. The arbitration was limited to six four-day weeks. Each day included six hours of testimony. Each side had ten days in which to present its case and two days for rebuttal. Counsel had to decide how to allot that time between direct and cross-examination. These time constraints forced each side to sharply limit the number of witnesses and documents to be presented. The lawyers were precluded from conducting long cross-examinations.

Arbitrator Selection

Next, the parties reached agreement about arbitrator selection. Because each side claimed several millions of dollars, the parties easily decided that a panel of three arbitrators was appropriate. They also agreed that one arbitrator should be a retired judge with experience in the construction area. That judge was chosen after counsel from each side investigated the reputations of a number of judges and selected one.

The parties then chose two neutral arbitrators from the construction industry, including a contractor and a developer. Rather than the common practice of each side selecting one arbitrator, they were mutually selected through a joint interview process conducted by one attorney for each side. Counsel selected these arbitrators both for their experience with similar construction projects and for their reputations for impartiality. After 25 interviews and extensive negotiations, the parties had a panel.

Numerous issues remained. For instance, which rules of evidence, if any, would apply to these proceedings? In the interest of efficiency, the parties agreed that only the hearsay rule should apply. Further, the arbitration contract included a briefing schedule with page limits, a time by which the arbitrators were requested to reach a decision (three weeks after submission of closing briefs), and a deadline for payment of any award (four weeks after the decision). Judgment was to be entered in the superior court pursuant to C.C.P. Section 1287.4.

Result

The conventional wisdom is that arbitrators tend to "split the baby" so that, by arbitrating, a claimant gives up the chance for a big win before a jury. In this case, the contractor won most of the damages claimed—several million dollars—but was not awarded prejudgment interest on the money invested in the project.

Therefore, the award appears to be a compromise. Nonetheless, the contractor was awarded an amount well in excess of that recommended by the mediator and was paid promptly. Further, the dispute was resolved within months of the execution of the arbitration contract. Finally, the time limits helped to keep costs down.

Each side was sure that its position was right and wanted its day in court. Only after that goal became impossibly expensive could they agree to an alternative.

Perhaps attorneys would do clients a service by considering a carefully managed arbitration proceeding early in the case, or even when the client enters into a construction contract. It would be possible for the contract not only to call for the arbitration of disputes arising out of the construction contract but also to provide for some time limits on the proceeding.

Ms. Claiborne is a partner in the firm of Bronson, Bronson & McKinnon.

Proposed New Federal Procedures for Disclosure

CRITICISMS of existing discovery procedures have finally produced significant and controversial proposals for reform. Two such proposals would, if adopted, dramatically alter discovery by shifting the fact-finding process from "responding" to requests of an adversary to voluntary, mutual "disclosure" of information: (1) proposed amendments to the Federal Rules of Civil Procedure distributed for public comment in August 1991 by the Judicial Conference Advisory Committee on Civil Rules; and (2) a draft pilot program for the Northern District of California developed by the Civil Justice Reform Act Advisory Group for Northern California.

Nicole A. Crittenden

Commentary Sought

This article is intended to alert readers to the pendency of these proposals in order to encourage commentary. Public hearings on the proposed amendments to the Federal Rules of Civil Procedure will take place on November 21, 1991, in Los Angeles, California. Written public comment is invited but must be submitted by February 15, 1992, to the Administrative Office of the United States Courts. Public hearings regarding the draft pilot program of the Advisory Group are anticipated shortly. Pilot implementation for a two-year period is recommended to commence January 1, 1992. The following is a summary of the proposed amendments to the Federal Rules of Civil Procedure:

Disclosure Replaces Discovery

Documents. A party must disclose a copy (or a description by category and location) of all documents "likely to bear significantly on any claim or defense" within 30 days of service of the answer. Alternatively, any party may trigger disclosure upon 30 days notice accompanied by their own disclosure. The Committee Notes provide that documents be described "sufficiently to enable opposing parties (1) to make an informed decision concerning which documents should be examined, at least initially and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests." Proposed Rule 26 (a) (1) (B) and Notes thereto.

Witnesses. Parties must disclose individuals "likely to have information that bears significantly on any claim or defense" within 30 days of service of the answer or demand for disclosure. The Committee Notes provide that "counsel are expected to disclose the identity of those persons who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the parties." Proposed Rule 26 (a) (1) (A) and Notes thereto.

Damage Computations. Parties must disclose the computation of damages claimed, making the relevant evidentiary material available for inspection and copying, within 30 days of the answer or a demand. Proposed Rule 26 (a) (1) (C).

Discovery Permitted Only After Disclosure. Except with leave of court or upon agreement of counsel, no discovery from any source will be permitted before the required disclosures are made. Proposed Rule 26 (d).

Ten Depositions Per Side

Limited Depositions. Except with leave of court or agreement of counsel, depositions will be limited to 10 for each side and to six hours per deponent. Proposed Rule 30 (a) (2) (A) and (d) (1). The number and length of depositions may be altered for particular classes of cases by local rule. Proposed Rule 26 (b) (2).

Expert Reports. Ninety days prior to trial, parties must disclose any expert testimony to be offered in the form of a written report. The disclosure is to include a complete statement of the expert's opinions and the basis therefor. Proposed Rule 26 (a) (2). An expert deposition may be conducted only after the required disclosure. Proposed Rule 26 (b) (4). An expert will not be allowed to testify on direct examination as to any undisclosed matters. Proposed Evidence Code Rule 702.

Duty To Supplement. Counsel will have a continuing duty to supplement and correct all required disclosures. Proposed Rule 26 (e). The continuing duty to disclose witnesses and documents is "the functional equivalent of standing interrogatories." The duty to disclose damage computations includes "the functional equivalent of a Standing Request for Production under Rule 34." Committee Notes to Proposed Rule 26 (a) (1).

Sanctions. Sanctions for inadequate disclosure may include orders to pay reasonable expenses, including attorneys fees, preclusion from discovery and preclusion from presentation of undisclosed evidence at trial. Proposed Rule 37 (c) (1).

Duties to Investigate

These new provisions raise questions regarding the duties a lawyer has to investigate the existence of relevant documents and witnesses. The Committee Notes strongly caution against over inclusion of witnesses or documents. At the same time, the proposed rules require a certification that a "reasonable inquiry" has been made. Proposed Rule 26 (g) (1).

Judge Schwarzer, now Director of the Federal Judicial Center, suggests that a disclosure obligation should not require an investigation beyond that now required by Rule 11. *Slaying The Monsters of Cost And Delay: Would Disclosure be More Effective Than Discovery?*, 74 Judicature 178 (1991). That is, parties would be obligated to search for documents and information only in places where they would ordinarily expect to be found and

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MARY E. MCCUTCHEON

On INSURANCE

YOUR client will be in a better frame of mind to appreciate the quality of your legal services in a complex case if you can persuade an insurance company to pay for those services as well as contribute to any settlement or judgment in the case. The following are suggestions for maximizing the likelihood of insurance carrier participation in defense and indemnity.

Analyzing Coverage Sources

Mary E. McCutcheon

Be Creative. Insurance policies generally insure types of conduct or damages rather than specific causes of action. Look beyond the labels on the causes of action in the complaint. Does the harassment claim constitute invasion of privacy? If so, it may fall under the personal injury coverage in a general liability policy. Does the delay damages claim include charges for idle equipment? Such damages may constitute "loss of use of tangible property," also covered by a general liability policy. Could additional facts concerning the dispute which are not alleged in the complaint trigger coverage?

But Be Pragmatic. Your zeal to obtain a defense in a case of questionable coverage may impair your client's future insurability. In a situation of dubious coverage, consult your client's risk manager or broker as to the impact of the tender.

Notify Excess Carriers. You do not want to be in the position on the eve of the trial of seeking settlement authority from an excess insurer, only to have it claim that it has never heard of the case.

Have You Looked at All Policies? Does the lawsuit allege conduct or damages which could involve several policy years? Have you analyzed coverage in light of the following policies: errors and omissions; directors and officers liability; limited partner liability; workers compensation and employers' liability; advertising injury; fidelity; and fiduciary liability? Have you investigated whether your client is an additional insured under another entity's policy?

The Tender of Defense

Explain Your Coverage Theories in the Tender of Defense. If you realize that your coverage theory is not obvious, spell it out in the tender letter. Claim representatives are human, too; they do not like to acknowledge that they made a mistake when they denied the tender. Spare them the embarrassment and walk them through the argument *before* they deny coverage.

Don't Get Trapped in the Carrier's View of Coverage. Claims representatives often issue stock denials on grounds which are not supported by the current state of the law. For example, carriers often rely on a "manifestation" theory to deny coverage for progressive damage which occurred, but was not discovered, during their policy period. This theory, however, has not (as of yet) been adopted in the liability context in California. See ***Prudential-LMI Commercial Ins. V. Superior Court*** (1990) 51 Cal. 3d 674. A carrier may also assert that "equitable" relief is not covered, but this position has been rejected by the Supreme Court in *AIU Ins. Co. v. Superior Court* (1990) 51 Cal. 3d 807.

Carrier Relations

Kill the Insurer with Kindness. Don't scream bad faith at the first denial of coverage. Keep corresponding as to why you think the refusal to accept the defense ins incorrect. Provide all the information the claims representative asks for – and more – including pleadings and status reports. Offer to meet with the representative to discuss the case.

Explain Case Staffing to the Carrier. When appropriate, explain to the carrier why multiple attorneys or extraordinary expenses are necessary – before you send the first bill. If you cannot reach agreement with the carrier, make sure that your client understands that portions of the bills may be rejected. (We'll talk more about payment of independent or "Cumis" counsel and Civil Code §2860 in a subsequent issue.)

Keep the Carrier Informed of the Status of the Litigation. It is difficult to convince claims representatives to extend significant settlement authority when they have not seen a single deposition summary, status letter or set of interrogatory answers. Keep them informed of your client's potential exposure. Don't be too optimistic about the case. It is much easier for a claims representative to authorize a settlement within the reserve (the projected exposure documented in the file) than to explain to his or her supervisor why a case reserved at $50,000 must be settled for $ 400,000. At the same time, don't be so pessimistic in your evaluation that the carrier loses confidence in your judgment or is tempted to second-guess you.

Final Warning

Know Your Client's Policy Limits. Don't assume your client's insurance is infinite. Your client could be a defendant in four separate lawsuits with a total settlement value of two million dollars, yet have only one million in insurance coverage. Or you may vigorously defend a case, only to find that your reasonable but substantial defense costs have "wasted" the limits available for settlement. Your litigation and settlement strategy should take into account the amount of policy money available for indemnity.

Ms. McCutcheon is a partner in the firm of Farella, Braun & Martel.

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New Discovery Procedures

from persons under their control. However, such a limitation is not set forth in the proposed new rules or the accompanying comments.

Given present Rule 56 practice, plaintiffs' attorneys may well be concerned that the new disclosure rules will be used to make motions for summary adjudication without adequate opportunity to conduct discovery. Although the proposed amendments do not enlarge a court's power to dismiss a pleading, this may be the practical effect.

Dramatic Departure

Most significantly, the proposed revisions to the federal rules suggest a dramatic departure from traditional adversarial discovery. Lawyers will be expected to anticipate which documents an adversary "should examine" and which witnesses an adversary might "reasonably be expected to depose." Supporters of the measure tout it as the only way to restore professionalism and curb runaway discovery costs. Those who doubt whether attorneys can rely on their adversaries to make complete disclosures should remember that even the current adversarial model depends largely on the integrity of attorneys in conducting and responding fully to discovery requests.

Indeed, one can ask whether the proposed rules actually go far enough. The answer is unclear because the proposed rules contain an inherent contradiction. Once disclosure has been completed, the tables are turned; the parties are then free to resume discovery under the broader standard "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." This discovery would apparently go forward hand in hand with the ongoing duty to supplement and correct "disclosures."

In light of this discovery "safety net," the proposed amended rules may not accomplish true discovery reform. Several commentators, including Judge Schwarzer, have suggested that no discovery at all should be allowed under the disclosure system without a court order and a showing of particularized need. Since the current proposed rules do not go this far, they may simply create another vehicle for dispute and delay, thus increasing rather than decreasing the costs of discovery.

Northern District Pilot Program

The following is a brief summary of the proposed pilot Program for the Northern District of California:

Even if the proposed amendments to the Federal Rules of Civil Procedure are not adopted, litigators in the Northern District of California will likely be confronted with new disclosure obligations as part of a pilot program proposed by the Civil Justice Reform Act Advisory Group.

The proposed two-year pilot program, which may be commenced as early as January 1, 1992, incorporates the proposed amended Rule 26 (a) (1) with respect to the disclosure of witnesses, documents and damage calculations. The pilot program limits depositions to five per party with each deposition a maximum of 12 hours. All limits could be modified by the trial judge for good cause. The pilot program also contemplates case-specific discovery plans and intensive court-supervised discovery conferences.

The proposed two-year pilot program would allow an evaluation of the disclosure process before it is adopted on a broad, permanent basis. The Advisory Group will study the process and compare pilot program discovery to discovery in non-pilot cases to determine whether the proposed reforms achieve their goals. There is much to be said for this precaution.

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CHARLES R. RICE

On SECURITIES

LAST May a federal jury found two Apple Computer officers liable for more than $100 million in securities fraud damages but returned a defense verdict for Apple itself. Faced with this apparent inconsistency, U. S. District Judge James Ware entered judgments notwithstanding the verdict for the two officers and ordered a new trial against Apple alone. After seven years of litigation, several published decisions and a five-week trial, the plaintiffs will get at least one more bite of the Apple.

Charles R. Rice

The Apple Case

November 1982 – An Apple press release announces that the "Twiggy," a new disk drive intended in part for the new Lisa computer, "has undergone extensive testing and design verification" and "ensures greater integrity of data."

September 1983 – Apple announces sharply lower quarterly earnings and termination of Twiggy. Its stock plunges 25% the next day.

1984 – A class action for all Apple stock purchasers between November 1982 and September 1983 charges Apple and several officers and directors with "fraud-on-the-market" for statements promoting Twiggy and Lisa.

1987 – The *Apple* defendants are granted summary judgment. The district court finds the sixteen alleged misrepresentations are not actionable, primarily because they were not misleading or material in light of other negative publicity about Lisa.

September 1989 – The Ninth Circuit Court of Appeals affirms most of the summary judgment for defendants but allows plaintiffs to go to trial only on claims relating to the November 1982 Twiggy press release. The U. S. Supreme Court later denies plaintiffs' appeal of defendants' partial summary judgment.

May 1991 – After a lengthy trial, the jury finds for Apple and several individuals but against two Apple officers, the VP responsible for the division developing Twiggy and the CEO during the relevant period. The jury awards damages of $2.90 for each of the approximately 33,000 shares traded during the class period.

September 1991 – Faced with cross-motions to resolve the jury's inconsistency, Judge Ware enters a judgment *n.o.v.* for the two Apple officers and orders a new trial against Apple only.

The Lessons So Far

Although any conclusions should obviously be drawn with caution, the case illustrates a few nuggets of conventional wisdom as well as a few trends:

Officers Face Personal Exposure

The jury's verdict for Apple but against its officers has been reversed, as it probably had to be. Officers should be reassured that this particular result is unlikely, but *Apple* will probably encourage securities plaintiffs to cast their nets more broadly by naming more individual defendants. Corporate officers and counsel should review indemnification policies and insurance coverage. Separate representation of defendant officers should also be considered carefully, both to reassure the individual defendants themselves and to guard against a maverick verdict.

Adverse Publicity As A Defense

In a fraud-on-the-market case, defendants' non-disclosures "may be excused where that information has been made credibly available to the market by other sources," such as the press. The Ninth Circuit distinguished between "the press' intense, sustained focus on Lisa and her risks" and "brief mention in a few poorly-circulated or lightly-regarded publications," which would not be a defense.

Press Releases As Securities Fraud

Press releases touting new products may be intended primarily for the consumer (rather than the securities) market, but they may still create "fraud-on-the-market" or other securities claims. Since press releases are written by different people for different purposes and with less care than the typical SEC filing, clients and counsel should adopt appropriate safeguards.

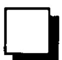
Internal Memos As Evidence

Internal memos and private notes or letters don't talk, they scream. "Smoking gun" documents often have a disproportionate effect on the jury. Witnesses come and go but exhibits are taken into the jury room. The *Apple* plaintiffs emphasized negative internal memos about Twiggy, particularly one that said "we suspect most of them will fail during the warranty period." Ironically, the dangers of notes and internal memos are often not understood by business executives or even corporate lawyers, who may "put it in writing" to protect themselves. Written criticisms or reservations should be made cautiously and, even more important, should be met with a careful, constructive and written response.

Make Your Motions

The *Apple* jury's verdict was a sobering reminder of the unpredictability of juries. The risk of jury confusion and/or hostility in complex securities cases puts a premium on motion practice. Defenses such as reliance and loss causation or the distinction between recklessness and negligence may have little jury appeal, but they may be dispositive. The "press defense" based on bad publicity, for example, might backfire in front of a jury by emphasizing the allegedly unjustified optimism of defendants' statements. The *Apple* verdict underscores again that defense counsel must seize every opportunity to have a judge, rather than the jury, resolve their case.

Mr. Rice is a partner in the firm of Shartsis, Friese & Ginsburg.



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President's Letter

of our organization in Northern California and who have provided their valuable experience to help us get started.

With the advent of MCLE, the *ABTL* is all the more timely. We have an opportunity to develop and present programs that are specifically tailored to the needs and interests of business trial lawyers. We have access to the finest lawyers in the United States to provide top quality programming. That programming will include five MCLE dinner programs each year, as well as an Annual Seminar held at a resort location.

The first joint Annual Seminar was held last month at Pebble Beach with the *ABTL* of Los Angeles. A group of top trial lawyers from both Los Angeles and San Francisco presented a savings and loan securities fraud trial, complete with jury deliberation. Prominent federal and state court judges from both Los Angeles and San Francisco analyzed and commented on trial techniques and courtroom practices. The Seminar also included an interview with California Chief Justice Malcolm Lucas.

When we first began to form the Northern California chapter of the *ABTL* earlier this year, I made a point of attending programs in Los Angeles to get a sense of why the organization has been so successful. Their sustained level of interest is built on three elements. First, the programs are all topical, high quality and well presented. Second, they have established a strong tradition of judicial participation, both in the programs and at the social hour that precedes each dinner. Third, the bi-monthly dinners provide an opportunity for business trial practitioners to see each other and reinforce professional relationships in a more relaxed setting. Our evening program format should provide the same benefits.

The Board of Governors is committed to developing top quality programs. If there are any subjects that you feel we should address, I encourage you to contact me or any member of the Board to share your ideas. We have started this organization to enhance our common professional interest in improving our practice and profession and strengthening our personal relationships with fellow practitioners. Your participation and input will certainly contribute to our objectives.

I look forward to seeing you at our next MCLE program at the Sheraton Palace Hotel on Wednesday, December 11, starting with cocktails at 6:00 p.m. Our program will feature Law & Motion judges from San Francisco, Alameda, and Santa Clara Counties, and the new Writs & Receivers judge from San Francisco. Our moderator will be Mel Goldman of Morrison & Foerster. I attended the Los Angeles *ABTL* Law & Motion program earlier this year, which presented a very revealing picture of the variety of individual practices of the Law & Motion judges. Our program should prove to be a very practical and useful presentation. I hope you will join us.

Mr. Shartsis is a partner in the firm of Shartsis, Friese & Ginsburg.

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Stephen Oroza

COMING EVENTS

December 11, 1991	MCLE Dinner: State Court Law & Motion Practice
February 12, 1992	MCLE Dinner: Jury Persuasion

Cocktails at 6:00 p.m. Dinner at 7:00 p.m.

Sheraton Palace Hotel.

Call Bridget Mullins (415) 421-6500 for tickets.