ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

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ADR in Contra Costa County Superior Court

CONTRA Costa County, according to a recent survey by the *California Lawyer*, is the seventh busiest court in the state. Our Superior Court tries more jury trials than any other court in Northern California, and the number of civil jury trials has steadily increased during the past three years. Because of the finite number of both judges and hours in the week, we have had to search for alternative ways to resolve our quagmire of civil cases.

Hon. James Marchiano

Alternative dispute resolution (ADR) is not some will-o'-the-wisp: it is a concept whose time has arrived. The Judicial Council is currently seeking comment on ADR and has proposed Judicial Administration Standards 32 and 33 for implementing and coordinating ADR programs for all courts. A proposed bill for mandatory ADR, which was considered by the state legislature last year and may be reintroduced, would have added provisions to the Code of Civil Procedure requiring mediation, mini-trials, mandatory reference and other forms of ADR.

Recent articles in *Business Week, Forbes*, and *U.S. News and World Report* have expressed the desire of business clients for an early, comprehensive evaluation of expected legal expenses, the risks of litigation, the probability of success, and alternatives for early resolution. Prediction of jury verdicts is, at best, an imprecise art. ADR offers the parties a win-win situation—the parties can avoid the uncertainty of when their case will come to trial, the outcome at trial, and what may become of their case during post-trial motions and appeal.

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We Stonecutters

IN medieval times, a farmer visited a city and saw three stonecutters engaged in their work. Never having seen that activity before, the farmer asked them what they were doing. The first replied, "earning my living." The second said, "cutting stones." But the third looked up and answered proudly, "I am building a cathedral."

Hon. Charles A. Legge

What work are you and I, attorney and judge, doing each day—earning our living, cutting our stones, or building a cathedral?

Our days are dominated by pressure and by detail. Your life's work has become measured by billable hours and income. My life's work has become measured by pending cases and statistics on delay. You become a champion who must win each cause, and then get more. I become an administrator who must conclude each matter quickly, and then move to the next.

But let us look beyond our stonecutting and our earning of our living. Let us view our work in a higher

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ADR in Contra Costa County Superior Court

If necessity is the mother of invention, the Contra Costa County Superior Court's ADR programs evolved out of the necessity of doing business differently. In 1988 Contra Costa County adopted a Fast Track program which required all cases filed after January 1, 1988, to be assigned for all purposes to four (now five) judges. These five judges handle approximately 3,700 civil filings and have resolved 80 percent of the Fast Track cases within 12 months. The remaining 20 percent, however, still pose a "sword in the stone" challenge to the civil department. Moreover, there were several thousand pre-Fast Track civil cases that are still assigned from the master calendar as trial departments became available. Gridlock soon ensued because of the number of criminal trials, and these pre-Fast Track cases stalled on the spur line of a "slow track."

In light of the Bench's obligation to be responsive to all litigants, Contra Costa County Superior Court started an ADR program with a simple mediation component supervised by a judge, working with voluntary attorneys, who reviewed cases for settlement on the morning of trial. We also began a Trials on Time (TOT) program that provided pro tem judges to try civil cases with time estimates of seven days or less. Eventually, a comprehensive approach evolved to handle civil cases from conception to resolution.

The judges, court administrator's staff and trial bar in Contra Costa County have developed a comprehensive system of ADR programs that offer a constructive opportunity to resolve cases at critical times. Our ADR programs are an eclectic amalgamation of successful programs tried elsewhere. For example, our early intervention program known as EASE is modeled after a successful program developed by U.S. Magistrate Wayne Brazil of the Northern District of California.

The Contra Costa County Bench does not want to put the many private ADR groups out of business. However, like AVIS, we try harder. The chart at the bottom of this page outlines what is offered.

At the first status conference, the parties may seek (or the judge may order) the case referred to our Extra Assistance to Settle Early (EASE) program. Specially appointed EASE referees will review the case in detail with all sides during a two-hour conference. The purpose of the program is to analyze issues, investigate weaknesses and provide an early intervention mechanism for an economical, accelerated resolution of the case. The EASE referee will make recommendations to the parties, explore the possibility of binding arbitration and prepare a written report for the court. Business litigation is particularly appropriate for this program.

The Extraordinary Settlement Program (ESP) provides complex Fast Track cases with an opportunity for an in-depth, voluntary settlement conference with non-Fast Track judges who have the interest and ability to settle complex litigation. All parties must stipulate that there is a reasonable possibility (not probability) of settlement and that discovery has progressed sufficiently to allow meaningful settlement discussions. The attorneys may contact the court directly for a voluntary settlement conference, which is usually scheduled between 4:30 p.m. and 6:00 p.m. Mondays through Thursdays. With the permission of the assigned Fast Track judge, ESP is available at the option of the parties between the status conference and issue conference. ESP has had a 90% success rate.

After the issue conference, the trial judge may suggest that the case be referred to the Special Mediators Actively Resolving Trials program (SMART) on the morning of trial. This program has been in effect for the past three years to mediate pre-Fast Track cases. The SMART program is also now mediating Fast Track cases on a selective basis. A mediator with expertise in the issues involved in the assigned case will spend from one and a half to three hours reviewing the issues and making settlement recommendations. SMART mediators have resolved approximately 60% of the cases that have come before them.

If the case does not settle, the SMART mediators can recommend the case for the Trials on Time (TOT) program if the trial estimate is four to seven days and the issues are controlled by BAJI. The parties select a pro tem judge from a list of experienced trial attorneys recommended by the court. The TOT program guarantees a date certain and a trial from 9:00 a.m. to 5:00 p.m. each day. The parties obtain a jury panel from the regular jury pool and preserve their right of appeal. The parties provide their own court reporter for the trial. The TOT program has successfully resolved approximately 30 cases during the past two years.

The SMART mediators may also recommend binding arbitration to the parties if the case does not settle. The attorneys for the parties work with a judge to select a single, neutral arbitrator, and the case then proceeds as

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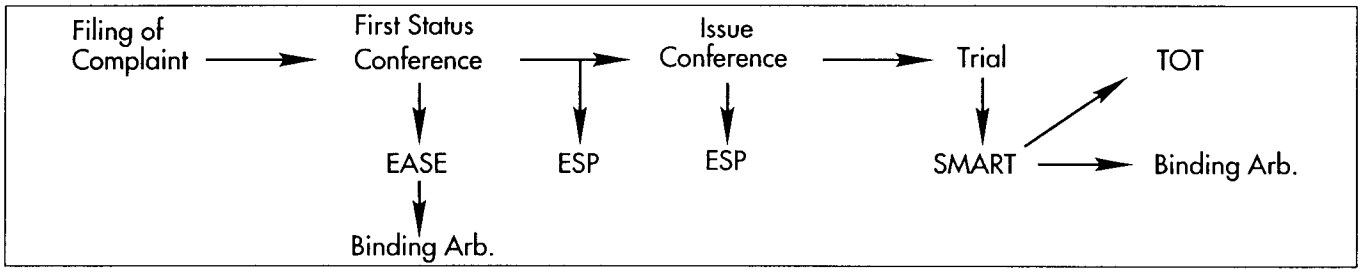


CHARLES R. RICE

On SECURITIES

LAMPF, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S.Ct. 2773 (1991), held that all private claims under § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 must be brought within one year of discovery of the facts constituting the violation *and* within three years of the violation itself. Securities defense lawyers have used this new "Aladdin's *Lampf*" to dismiss cases that were timely when filed under prior law. Congress tried to put the genie partially back into the bottle, but its compromise satisfied almost no one and has been ruled unconstitutional by several federal courts, including one in the Northern District of California.

10b-5 claims have been "implied" by the federal courts for almost 50 years even though never expressly provided by Congress. Prior to *Lampf*, most Circuits decided the timeliness of such claims by "borrowing" the "most analogous" limitations period under the forum state's law. Critics called for a federal statute of limitations to foster uniformity and predictability and deter forum shopping, but Congress failed to act.

The Supreme Court, as Justice Blackmun noted, was "faced with the awkward task of discerning the limitations period that Congress intended courts to apply to a cause of action it never really knew existed." The Court adopted the two-tier limitations period set by Congress for certain private claims that were expressly provided by the Securities Exchange Act. The Court also held that "equitable tolling" of the limitations period while the victim is ignorant of the fraud was "fundamentally inconsistent" with the three-year "statute of repose," which bars even claims that were not discovered in time.

Reaction to Lampf

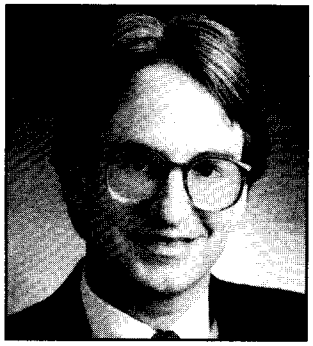
The Supreme Court applied this "new" statute of limitations retroactively to the *Lampf* parties. Under such circumstances, according to *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439 (1991), the new rule must also be applied to all other pending litigation. According to one Congressional study last year, more than $650 million of claims that were timely when filed had been dismissed under *Lampf* and an additional $4 billion of claims, including highly publicized cases against Michael Milken and Charles Keating, might be dismissed.

Last year, Congress considered bills changing the statute of limitations for 10b-5 claims to two or three years after discovery and five years after the violation. Faced with a log-jam of interest groups, however, Congress postponed a decision on the appropriate limitations period and only barred retroactive application of *Lampf*. The new Section 27A of the Securities Exchange Act provides that the limitations period for pre-*Lampf* 10b-5 claims shall be governed "by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed" before *Lampf*. Plaintiffs were also given 60 days to seek reinstatement of any 10b-5 claims dismissed under *Lampf*.

Some lower federal courts have applied Section 27A to uphold or revive claims otherwise barred by *Lampf*. Other federal judges have found the new legislation unconstitutional. Judge Legge of the Northern District recently held, in *In re Brichard Securities Litigation*, that Section 27A violated the constitutional separation of powers because it "improperly directs a result in pending cases" without changing the substantive law and because it "reverses final judgments of the federal courts." The retroactivity of *Lampf* and the constitutionality of Section 27A will apparently not be finally decided until the issue reaches the Supreme Court.

Where Do We Go From Here?

Congress should make up its mind about the limitations period for 10b-5 claims. Defenders of *Lampf* argue that abusive securities litigation imposes a "litigation tax" on capital formation and that lengthening the limitations period would be a tax increase.



Charles R. Rice

Proponents of a longer limitations period argue that *Lampf* will bar too many meritorious fraud claims. Justice Kennedy argued in dissent that the three-year statute of repose "simply tips the scale too far in favor of wrongdoers." Ponzi or pyramid schemes can evade detection for years. Most states do not have "statutes of repose" for common law fraud, and those that do usually allow claims to be brought at least five years after the tort. Moreover, shorter statutes of limitations are unlikely to deter "strike suits," which are often filed within days or even hours of a stock price decline. Abusive securities litigation could be targeted more directly by limiting discovery, curtailing RICO, facilitating summary judgments or awarding attorneys' fees to prevailing parties.

Several compromises are possible. Congress could retain the "one-year from discovery" limit but lengthen the statute of repose to five years. Alternatively, Congress could lengthen the statute of repose only for investors in non-publicly traded securities, such as real estate limited partnerships, that are typically subject to less market and regulatory scrutiny.

In the meantime, defense counsel will continue to assert that *Lampf* governs their cases and that Section 27A is unconstitutional. Plaintiffs' counsel may consider filing their claims in state courts with longer statutes of limitations. Plaintiffs may also try claiming that defendants are "equitably estopped" from raising a limitations defense because they affirmatively concealed their fraud. "Equitable estoppel" was not discussed in *Lampf*, but it has been applied to claims under Section 12(1) of the Securities Act, even though "equitable tolling" is not. This exception, however, could swallow the rule in light of the self-concealing nature of fraud. In any event, the long-term impact of *Lampf* will apparently not be resolved soon.

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

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We Stonecutters

perspective: We *are* building a cathedral.

In our calling–yes, calling–there is something more than your winning, and something more than my closing cases. And there is something more than passing money around, which cynics say is the real objective of our work. That something more is Justice, with a capital J. That is the cathedral we are building.

We are both engaged in building Justice. We may not see that in each task we do. And when we do see it, it is more often accompanied by a sigh than by a fanfare. But it is nevertheless there and worth building. We should feel responsible for our cathedral, and take pride in our role in building it.

Are we building Justice with the facts; that is, the foundation stone of *truth*? You struggle daily with your documents, your interrogatories and your depositions. I struggle daily with my witnesses, my records and my rules of evidence. We both labor in details, distinctions and technicalities. But that labor is not itself the objective; it is the blueprint for finding the facts, and hence the truth. Let us remember that the truth, and not the technicalities, is the objective and is a building block for our cathedral.

Are we building Justice with *law*? You labor at finding precedent and then using it in service of your cause. I labor at applying what precedent tells me is the "law," however uncertain and however subject to change. As precedent is applied to each case, our recognition of real "law" becomes illusory. But it is there. That is, the concept is there. The "law" is not just a set of rules. It is an attempt to apply the wisdom and experience of humankind to present problems. Our use of law is part of the building of our cathedral.

Are we building Justice with our personal conduct? Is your objective to win at all cost, regardless of the consequences to one another and to the process? Is my objective to demonstrate the weight of my position, regardless of the consequences to you and to your clients? The building of Justice should be with light, not heat. The building should be an intellectual process. We should work with our heads first, our hearts second, and our emotions and our egos not at all. The cathedral will stand long after we are both gone.

How do we treat your clients when they seek Justice? Do your objectives somehow become more important than theirs? Do I somehow decide cases mechanically, rather than resolving living rights and duties? Let us remember that we are building Justice on behalf of people and institutions. The cathedral we build is for their use.

How do we measure Justice as it is being built? Is it your win-loss record? Is it my case count or reversal rating? Neither. Justice is not measured in such objective terms. Does that mean that Justice does not really exist? Certainly not. Many of the vital ingredients of life–love, friendship, beauty, character–are not measured objectively, but they are nevertheless real. As long as Justice is there, somewhere, the process of building it is more important than the result in any one case. The true measure of Justice is in the diligence with which we build it.

Justice does extract a terrible price from our lives. Its demands are constant and its burdens are sometimes overwhelming. But the price is worth it. We are blessed that we do more than just earn our living or cut our stones. We have interesting work to do; we have meaningful work to do. Our work is to construct Justice, with its two building blocks of truth and law. In doing so, we serve others and not just ourselves. And while we are daily earning our living and cutting our stones, we are at the same time building our cathedral.

The Hon. Charles A. Legge is a United States District Court Judge, Northern District of California.

ABTL Annual Seminar on Maui To Highlight ADR Mini-Trial

THE Northern and Southern California chapters of ABTL will present their second jointly-sponsored Annual Seminar this year from October 23 to 27 at the Four Seasons Resort on the Island of Maui.

The MCLE-approved program will highlight a demonstration of the alternative dispute resolution process, including a mini-trial of a multi-party dispute resulting from a failed leveraged buyout.

Featuring a faculty of more than 50 distinguished federal and state judges and private ADR experts from throughout the state, the program will focus on practical and tactical techniques to use in ADR procedures in a complex commercial case.

At the mini-trial, three teams of trial lawyers will represent unsecured creditors, sellers and secured lenders. Before the mini-trial, the teams will reveal their strategies in client meetings and examine fact and expert witnesses. A settlement conference will follow the mini-trial.

Chief Justice Malcolm M. Lucas of the California Supreme Court, making his fourth consecutive ABTL Annual Seminar appearance, will be among the faculty that includes a dozen federal and state court judges.

The State Bar of California has approved 12 hours of MCLE credit for the Seminar activity.

The deadline for Seminar enrollment, which is limited to ABTL members who have paid their 1992 dues, is July 31. For more information, please contact Robert E. Gooding, Jr., Program Chair for ABTL, Northern California, at Howard, Rice, Nemerovski, Canady, Robertson & Falk, at (415) 434-1600.

MARY E. McCUTCHEON

On INSURANCE

THE complaint against your client alleges an array of claims, some of which are covered under your client's general liability policy. The insurance company agrees to defend under a reservation of rights but informs you that it will pay only a percentage of the defense fees because it has the right to "allocate" defense costs between covered and noncovered claims. Whatever happened to the insurer's "broad defense obligation" that you once heard about?

As it happens, a lot less than the insurer would like you to believe. A review of the cases cited by insurers in support of their purported right to allocate demonstrates that the "right" is more theoretical than real.

The Law: The Insurer's Overreach Exceeds Its Grasp

A carrier cannot escape its defense obligation if only some of the claims in a lawsuit are covered by its policy. The breadth of this obligation is demonstrated by *CNA Casualty of California v. Seaboard Surety Co.*, 176 Cal. App. 3d 598 (1986), where the Court of Appeal adopted the holding of a New York appellate case finding a duty to defend where the only potentially covered claims were "two solitary, unsubstantiated words" that were part of a "shotgun allegation" in the middle of an otherwise noncovered cause of action.

Nonetheless, insurers argue that California cases give them the right to "allocate" fees between covered and noncovered claims, effectively limiting their broad defense obligations. Ironically, however, the very cases which insurers cite have held that allocation is permissible only in rare circumstances.

For example, in *Hogan v. Midland National Ins. Co.*, 3 Cal.3d 553 (1970), an insurer who had breached its duty to defend argued that its liability for defense fees should be prorated based upon the ratio that the amount of covered damages bore to the total damages. While allowing for the *possibility* that an insurer could "allocate" fees between covered and noncovered damages, the Supreme Court rejected the insurer's "pro rata" formula. The Court found that an insurer must produce "undeniable evidence of the allocability of specific expenses," and that it must sustain a "heavy burden of proof" in establishing an allocation.

California Union Ins. Co. v. Club Acquarius, 113 Cal.App.3d 243 (1980), extended the daunting proof requirements articulated in *Hogan* to instances where an insurer has not breached any duty to defend. And although the court characterized its decision as permitting the insurer to "allocate" defense fees, it merely allowed the insurer to withdraw from the defense after the outcome of the liability phase of a bifurcated trial made clear that any damages proved in the damages phase could not be based on covered claims.

Under the standards developed in *Hogan* and *California Union*, most cases would not be subject to the insurer's "right" to allocate. In a recent unpublished opinion, the Ninth Circuit made several important observations about the impracticability of allocating defense costs. *United Coastal Ins. Co. v. Strategic Organization Systems International, Inc.*, No. 9016340, May 13, 1992 (United States Court of Appeals for the Ninth Circuit). The insurer contended that allocation was appropriate because the covered and noncovered claims arose from separate fact settings. The Ninth Circuit disagreed, noting that the insurer's "effort to segregate artificially [claimant's] claims into mini-lawsuits ignores the practical realities of modern-day commercial litigation..." The Ninth Circuit also relied on standard policy language by which the insurer promised to defend "suits" rather than specific "claims."

The Ninth Circuit further ruled that the insured had no obligation to allocate fees between covered and noncovered claims; the insured has no obligation to assist the insurer in meeting its burden of proof. Moreover, while acknowledging that an insurer need not pay for defense costs "exclusively attributable" to noncovered claims, the court found that an insurer must pay the cost of defense measures appropriate to the defense of covered claims even if those same efforts benefit the prosecution of separate litigation for which there is no defense obligation. In courts which follow this reasoning, insurers will have difficulty arguing that they have no duty to pay defense costs which may also benefit, for example, the pursuit of the insured's cross-complaint.

Mary E. McCutcheon

Finally, *Stalberg v. Western Title Ins. Co.*, 230 Cal.App.3d 1223 (1991), contains a cautionary lesson for insurers. At the outset of the litigation, the insurer offered to pay only half of the defense fees. The court found that because the insurer could not demonstrate that it had adequately investigated the claims before it made its offer, or that "50-50" in fact was the appropriate allocation, it was liable not only for breach of its duty to defend but also for breach of the covenant of good faith and fair dealing.

The Conclusion: Allocating Defense Costs Is A Risky Business For Insurers

Independent counsel faced with an insurer's demand for allocation can take comfort from the language of the very cases which insurers cite in support of their demand. These authorities establish that the presence of noncovered claims does not justify a "pro rata" allocation of defense costs. And, while an insurer need not pay for specific expenses which benefit *only* a noncovered claim, it bears the burden of proving that the fees are "exclusively attributable" to those claims.

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

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ADR in Contra Costa County Superior Court

a court trial without the possibility of appeal.

Because of the limited number of trial judges for civil jury trials, the Bar is encouraged to take advantage of any or all of the programs outlined above. Attorneys with pending cases in Contra Costa County should work with opposing counsel to identify which of the programs would efficiently resolve their cases. Not every case is appropriate for every program. The EASE program and binding arbitration are available in the earliest stages of litigation. The ESP program is available for long settlement conferences during discovery. The SMART program is available on the morning of trial, and the TOT program is available for shorter cases that do not settle during the SMART program. Within this range of alternatives, however, attorneys have an opportunity to counsel clients toward an efficient, fair resolution of their litigation.

Counsel can request assignment to the EASE program by checking the space on the Contra Costa County Status Conference form. If your assigned Fast Track judge does not have sufficient time to devote to complex settlement conferences, counsel should request assignment to the ESP (Extraordinary Settlement Program), where a judge will devote an early evening or evenings to an in-depth settlement conference.

If opposing counsel is not interested in ADR, you can enlist the assistance of the Fast Track judge. Each of the Contra Costa County Fast Track judges is familiar with our ADR procedures, has a written summary of the programs to hand out to counsel and will either encourage or order the parties to appropriate ADR.

Whether you are assigned to a special referee or are working directly with a judge in one of the programs, the court requires short, succinct statements of issues. The emphasis is on "short" to force the attorneys to distill and clarify the divisive legal and factual disputes that are preventing settlement. Careful preparation and rigorous editing of the required statements will enable the referee or judge to get to the heart of the matter.

In Contra Costa County, over 150 attorney-volunteers selected by the court are participating as referees, mediators and pro tem judges and are providing an extraordinary service to the civil justice system. Participating lawyers have indicated that their skills in issue analysis, evaluation of cases, and settlement techniques have been enhanced by their work as referees.

We are sounding the clarion call for volunteers from the Association of Business Trial Lawyers of Northern California. The EASE program, in particular, needs volunteer attorneys with business litigation background to serve as special referees. You can make a difference in your court system. To volunteer, call (510) 646-4005 and ask to serve.

The Hon. James Marchiano is a Judge of the Contra Costa Superior Court.

ASSOCIATION OF BUSINESS TRIAL LAWYERS
abtl
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COMING EVENTS

September 9, 1992 MCLE Dinner:
Settlement Techniques

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

Sheraton Palace Hotel.

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

PAULINE O. FOX

On FEDERAL PRACTICE

THE Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 ("the Act"), was enacted in December 1990 partially as a result of the dissatisfaction expressed by client groups over the high cost and interminable delays associated with litigating civil cases in federal courts across the country. In response to the Act, Advisory Groups appointed by each of 34 federal district courts submitted reports containing recommendations on how best to reduce cost and delay in civil litigation. Ten of these districts were designated as "Pilot Districts" under the Act. As such, they were required to implement cost and delay reduction plans no later than December 31, 1991, that addressed six specific "principles of litigation management" enumerated in the Act.

The other courts, including the Northern District of California, voluntarily completed their reports by December 31, 1991, in order to be considered "Early Implementation Districts" under the Act. In the case of the Northern District of California, an early implementation plan was adopted in order to establish now those measures that a consensus believes are needed and to adopt on an experimental basis those measures that research demonstrates are likely to reduce unnecessary expense and delay in litigating civil cases to a just conclusion.

The Case Management Pilot Program ("the Pilot Program"), which will apply to the majority of all civil cases filed in the Northern District on or after July 1, 1992, was designed with the latter of these twin objectives in mind. The overall purpose of the Pilot Program is to enable parties to civil litigation who are proceeding in good faith to resolve their disputes sooner and less expensively than presently is the case.

The terms of the Pilot Program are set forth in Proposed General Order 34 which currently contains several procedural changes about which counsel should be aware. The most controversial change, although not necessarily the most significant, is the new obligation to disclose, not later than the 100th day of the case, five types of information: (1) the identity of persons known to have discoverable information about the case; (2) documents that "tend to support" the disclosing party's position in the case; (3) apparently pertinent insurance policies; (4) evidentiary material that relates to compensatory damages claimed by another party; and (5) a computation of damages and evidentiary materials in support thereof.

Obviously, the purpose of this disclosure obligation is not to replace all discovery. Rather, it is to move away, at least to a limited extent, from completing basic discovery (*e.g.*, the production of insurance policies) with formalistic and time-consuming measures and to facilitate a better and earlier review of the merits of the adverse party's case. Moreover, such disclosure can be used to set the stage for what I believe is the most significant part of the Pilot Program, the Meet and Confer process.

The Meet and Confer process requires counsel, no later than the 110th day of the case, to meet and confer on a number of items relative to the future course of the litigation. The item which I believe can most effectively lead to a reduction of unnecessary cost and delay is set forth in Section VI.D.2. of the Proposed Order. That Section requires counsel to "...meet and confer to [p]lan at least the first phase of discovery, specifically identifying areas of agreement and disagreement about how discovery should proceed."

Plaintiffs' counsel should use this provision to make specific discovery requests, including, for example, document requests, of the defendant. Defense counsel can then discuss with their clients whether the requested documents are legally required to be produced and whether production is feasible and practical at the initial stage of the litigation. Defense counsel can then counter in a variety of ways by, for example, agreeing to produce the requested documents, suggesting a phased approach to discovery, or specifying those requests for which there is a legitimate objection. If counsel cannot resolve their disputes, those disputes can then be identified in the Case Management Proposal for resolution by the judge at the Case Management Conference. No more form objections, motions to compel, or costly discovery games. Since both the document requests and the objections to those requests are to be reviewed by the judge assigned to the case, counsel would be well-served to temper both those requests and the objections to them.

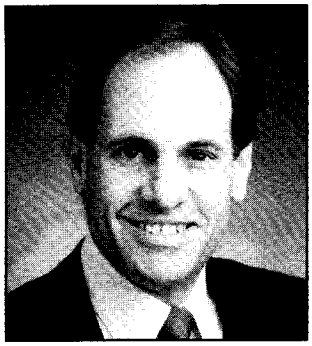
Pauline O. Fox

Another item on which counsel must meet and confer is the "...utilization of alternative dispute resolution procedures." As of now, cases are assigned to the Court's Early Neutral Evaluation ("ENE") program according to case number; even-numbered cases are assigned to ENE, odd-numbered cases are not. Common sense suggests that it cannot be true that only even-numbered cases would benefit from ENE or that all even-numbered cases are well-suited to ENE. The meet and confer process gives counsel the opportunity to assess whether ENE (or another ADR procedure) would be valuable, and, if so, should be tried for their case. On the other hand, if counsel decide that the ADR procedure to which they have been assigned would not be helpful, the Case Management Conference provides counsel with a vehicle to obtain an exemption from the judge.

The terms of the Pilot Program were discussed, debated, and ultimately designed by a broad range of interested parties, including lawyers, client representatives and judicial officers. The Pilot Program will work to reduce cost and delay only if counsel proceed in good faith, and if the Court is able to provide the early judicial supervision that the program contemplates.

Ms. Fox is a partner in the firm of Pillsbury, Madison & Sutro.

Letter from the President



Arthur J. Shartsis

WE have gotten off to an outstanding beginning for the ABTL of Northern California. In our first year in the Bay Area, we have signed up more than 1600 members, presented five top-quality dinner programs, and co-sponsored the Annual Seminar at Pebble Beach with the Los Angeles chapter of the ABTL. In October we will co-sponsor the Second Annual Seminar, to be held in Maui. The support of law firms throughout the Bay Area has been critical to our success, and we look forward to the same high level of participation. Toward the end of this summer we will commence our drive to renew memberships, and we hope to receive continued support from all of you.

In addition to our commitment to top quality Continuing Legal Education programs for local business trial lawyers, I hope to see the ABTL's activities expand into other areas to contribute to and improve our profession. As discussed in Judge Marchiano's article in this issue of the ABTL Report about the various programs adopted in Contra Costa County Superior Court, alternative dispute resolution (ADR) is an idea whose time has come. There is no question that the trend in our profession is toward more creative, efficient and effective ways to resolve disputes. For lawyers to remain competitive, we must continue to improve our skills in bringing about earlier resolution of litigation.

The Board of Governors has been actively discussing ways in which the ABTL can contribute to the legal profession by enhancing both the Bench's and the Bar's general understanding and use of early settlement and ADR techniques. By this fall, I hope to be able to report on our progress in that regard and perhaps introduce some new programming activity for the participation of members of the ABTL.

Our September dinner program will be devoted to effective lawyering techniques for settlement conferences and ADR procedures. Rather than merely examining the mechanics of the various dispute resolution programs, we plan to present an experienced panel that will counsel civil practitioners on the most effective ways to advance their clients' interests in the settlement process. As is our tradition, the panel will provide lawyers with insights as to what judges expect from lawyers in these situations, as well as what approaches are successful or unsuccessful in resolving matters.

Our October Seminar in Maui will present a full mini-trial of a complex business dispute, conducted for the purpose of reaching early dispute resolution before an experienced ADR judge.

While our September program will focus on the needs of lawyers, I hope that the ABTL can provide resources to aid in training judges on effective use of settlement techniques. From my discussions with both state and federal judges, it is clear that judicial education on settlement techniques has been a hit-or-miss proposition. A review of judicial training and education demonstrates that significant time is not devoted to preparing judges to settle cases. It is clearly in the interests of our clients that both lawyers and judges be as sophisticated as possible in dispute resolution techniques, so that we can work toward streamlining what virtually everyone agrees has become a cumbersome and overly expensive process. The Board is looking specifically at possible contributions the ABTL can make in this regard.

As ever, I welcome your comments as to what you believe the ABTL should be doing to improve this aspect of our professional lives.

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