ASSOCIATION OF BUSINESS TRIAL LAWYERS

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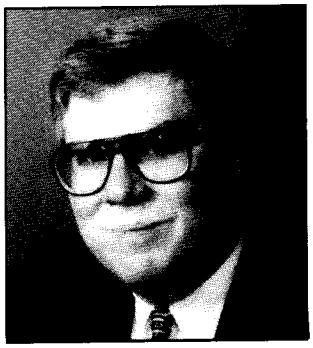
Letter from the President

LAWYERS and lawsuits are much at the center of things these days – though not all is civil, in several senses of that word. The Simpson trial threatens to create a nation of armchair McCormicks and Wigmores, not to mention Darrows, Nizers and Kekers. Despite my best efforts at disinterest, I find myself irresistibly drawn to the goings-on of Clark and Darden and Johnnie Cochran, eager to measure my own (imagined) performance against theirs. It is a tough translation for someone whose typical bill-of-fare is the Sherman Act. Whatever the "life or death" character of much civil litigation, "killing" a competitor is well-removed from the real thing. Nonetheless, both the milieu and the skills are essentially the same and, I suspect, it is hard for many trial lawyers to resist at least an occasional glimpse into the surreal world of this American obsession. As a byproduct for many nonlawyers, the Simpson trial is also providing a valuable "civics" course in the



Stephen V. Bomse

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Also in this Issue

Obtaining Maximum Benefit From ADR Phone Conferences

IN the fall of 1993, the U.S. District Court for the Northern District of California instituted ADR Phone Conferences, on a pilot basis, as part of its continuing exploration of the use of Alternative Dispute Resolution techniques. We have now conducted over 300 of these conferences, spanning a wide range of subject matters.

This article describes the procedures of the ADR Phone Conference, common misconceptions about its use and ways to maximize its potential benefits. Although this article focuses on experiences in the Northern District, many of the issues discussed are broadly applicable to the effective use of ADR in civil litigation.

Stephanie Smith

ADR Phone Conference Procedure

The ADR Phone Conference is part of the ADR Multi-Option Pilot program established by the court's General Order 36, implemented on July 1, 1993. Chief Judge Thelton Henderson, Judge Marilyn Hall Patel, Judge Fern Smith and Judge Vaughn Walker are participating in this pilot phase. (Judge Barbara Caulfield was also an original participant.)

Civil cases covered by General Order 34, the Case Management Pilot Program, that are assigned to the four participating judges are automatically assigned to the ADR Pilot. As described in General Order 36, counsel and parties in these ADR Multi-Option Pilot cases are encouraged to learn about the court's major ADR options (Early Neutral Evaluation, magistrate judge settlement conferences, mediation and arbitration) as well as private ADR procedures, discuss these options as part of their required "meet and confer" under General Order

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Obtaining Maximum Benefit From ADR Phone Conferences

34 and, if possible, stipulate to an ADR option.

At the time of filing, the plaintiff (or removing defendant) receives an Order re Court Procedures, containing court-ordered deadlines for the case. This Order includes a date and time for an ADR Phone Conference, set between 95 and 105 days after filing. These conferences are set on Tuesdays and Thursdays, at 45-minute intervals, from 9:00 a.m. until 2:15 p.m. If the parties notify my office that they have stipulated to an ADR option or that the case has settled or otherwise terminated, the Conference is taken off calendar. Otherwise, plaintiff's counsel coordinates and places the call to the court's Phone Conference line at the appointed hour.

The Conference is conducted by me or Mimi Arfin, the Deputy Director of the program. As former litigators experienced in ADR techniques, we answer questions about the court's ADR options and try to help the parties select the best ADR option for that case. The time spent in the ADR Phone Conferences is split about evenly between discussions of process choice and timing issues. The process discussion addresses which ADR process, if any, would be most likely to benefit the case and whether a non-ADR activity, such as an early dispositive motion, should occur prior to any ADR process.

General Order 36 presumes that an ADR session, if it can be useful, will occur within 90 days of the Case Management Conference (CMC). If the CMC occurs around 120 days after filing, as is often the case, the presumptive deadline for an ADR session would be around 210 days after filing. Often the parties spend time in the ADR Phone Conference exploring how much discovery they really need to understand the core of the case and how long that discovery is likely to take. The parties incorporate these timing issues into the case management plan that they propose to the judge at the Case Management Conference.

After each ADR Phone Conference, we prepare a confidential memo to the judge summarizing the Conference. If counsel have not agreed on an option, the memo includes our recommendation, if any, as to the best ADR option for the case. (These memos only discuss issues related to ADR process choice and do not make recommendations on the merits of the case.) Counsel then discuss ADR with the judge at the Case Management Conference and the judge decides whether to refer the case to an ADR program. The court presumes that most cases will benefit from some type of ADR within seven months after filing, but the judge will exempt a case from the requirement if counsel persuade him or her that no ADR would be appropriate at that stage.

Initial Impressions, Including Some Surprises

Mimi and I have been surprised by the high degree of cooperation among counsel in these conferences. Although a few conferences have been highly combative, the vast majority have been cooperative and constructive, even when counsel had strongly differing viewpoints. Most counsel seem genuinely curious about what the court is offering and how it can benefit their clients.

The level of knowledge about the different ADR options varies enormously among the different counsel with whom we speak. Some are tremendously sophisticated about the differences between ENE and mediation, for instance, and about the significant differences in the processes being offered by other ADR providers under the title "mediation." Other counsel know virtually nothing about these processes and have not had significant first-hand experience with any of them, except private or state court-sponsored arbitration programs, which differ significantly from all of our court's ADR programs, including our arbitration program.

General Order 36 encourages, but does not require, that clients be present at the ADR Phone Conference. The rule also permits one or both sides to attend the Conference in person at the courthouse. Although both of these occurrences are relatively rare, our limited experience is that both of these factors increase the quality of the ADR discussion and the productivity of the Conference.

Common Misconceptions

Several of the most common misconceptions are contained within the following statement: **"We can't do ADR now because it's too early to talk settlement."**

First misconception: ADR is only useful if the case is ready to settle today. In fact, a good ADR process produces numerous benefits short of settlement. ENE, for instance, was designed initially as a way to help parties focus their case, communicate early about key evidence, identify the key issues in dispute and thereby streamline discovery and motion work and reduce cost and time for the parties. Settlement was seen only as a possible secondary benefit.

ENE, magistrate judge settlement conferences and mediation can produce significant benefits even if the case fails to settle at the first session. Parties' positions and priorities can be clarified, so all sides can focus their litigation resources on the key issues. It is quite common, for instance, for parties to realize through an ADR process that the case turns on one or two factual issues and that only limited discovery is necessary to assess and resolve the case. Or the ADR process can identify the primary legal issue in dispute and point to a dispositive motion as the most efficient way to resolve the case.

If the chosen ADR process allows the clients themselves to participate actively, those clients will often benefit from personally expressing their concerns and feelings about the dispute and hearing their opponent's viewpoint directly, perhaps for the first time. Often this communication and, sometimes, venting of emotion can be critical to resolution of the case. Moreover, in client-centered ADR processes, the clients' motivations, needs and priorities (what mediators would call "underlying interests") can be discussed, expanding the array of possible settlement options.

Second misconception: I know when my case is ready to settle. Trial lawyers rightfully pride themselves on their litigation instincts in a variety of areas, including settlement timing. However, we have seen numerous cases settle or make significant progress toward

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settlement even when one or both counsel thought it highly unlikely, if not impossible. In the adversary process, counsel usually see only the litigation posturing of the other side. They often do not know what the opposing lawyer, or more importantly the opposing party, is really thinking about the dispute and what it would take to resolve it. A third-party neutral, whether a judicial officer, mediator or evaluator, can meet with each side confidentially and learn of possibilities not yet revealed to the opposing side. Furthermore, an effective neutral can create a spirit of cooperation that is much harder, if not impossible, to achieve in direct negotiations between adversaries.

Third misconception: I can't talk settlement until discovery is completed. Even if the parties want to talk settlement, lawyers often think that discovery must be completed before any settlement effort can be productive. In most cases core information about the case must be known in order for each side to assess its risks – but obtaining this information often requires far less than full-blown discovery. In simpler cases, parties often know such core information before the case is filed. Even in more complex cases, the disclosures required by the court's rules and informal exchanges of information, prior to or at the ADR session, may be sufficient to enable the parties to have productive settlement talks.

Fourth misconception: The court is going to make us do ADR even if it is clearly a waste of time. There are two presumptions in the ADR Multi-Option Pilot: first, that some form of ADR can be helpful in the vast majority of cases; and second, that most cases are ready to benefit from ADR well before the case is ready for trial. However, the goal of the program is to reduce cost and delay and contribute to improving the results in cases. If your case is not going to benefit from ADR or cannot benefit until much later in the pre-trial period, explain these concerns in the ADR Phone Conference and in the Case Management Statement, then be prepared to discuss the bases for these concerns with the judge at the initial Case Management Conference. The district judge will listen to the views of all parties and the ADR staff before deciding whether to refer the case to some ADR process and, if so, which one. But bear in mind that you need to have a reasoned basis for a request that the case not be assigned to an ADR process.

Getting the Most Out of the ADR Phone Conference

Use the Conference to get your opponent and your client to try a settlement process. One of the greatest barriers to initiating settlement discussions, whether early or late in the case, is the unwillingness to be the first to raise the topic for fear of being perceived as weak. This barrier can impede communication between you and your opponent and between you and your client. In the adversary setting, there is a risk that anything you suggest will be rejected immediately by your opponent on the theory that if it is good for your client it must be bad for their client. You may be reluctant to encourage your client to consider ADR options out of concern that the client will perceive you as uncommitted to the case or afraid to take the case to trial.

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Summary of Major Bankruptcy Amendments

LONG-awaited bankruptcy reform legislation was sped through Congress last fall. Absent from the Bankruptcy Amendments of 1994 (the "Act") are highly controversial provisions concerning a major overhaul to the Chapter 11 reorganization process and extraordinary preferential treatment to pension fund claimants. Congress chose to defer radical revisions to the bankruptcy laws until it receives the findings and conclusions of a blue ribbon commission created under the Act. The new commission will be charged with studying the Bankruptcy Code ("Code") and the bankruptcy system, and will report back to Congress within two years. The commission will be closely watched. A similar commission, the Burdock Commission, formed in the 1970's, recommended that the nation's bankruptcy system be radically changed. Its recommendations resulted in enactment of the Code.

Maureen McQuaid

Although the Act did not overhaul the Code as thoroughly as some interested parties had hoped, the Act did make significant changes to the bankruptcy laws. The following highlights provisions of the Act which may be of interest to business trial lawyers.

Expedited Hearings

When a bankruptcy case is commenced, a stay (injunction) is automatically imposed prohibiting creditors from taking most actions against a debtor or its property. The Code, however, provides procedures and standards for creditors to obtain relief from this stay. The first hearing on a relief from stay motion is often treated as a status conference at which the court sets a "final hearing" to determine the merits of the motion. Prior to the final hearing, briefs and evidence, usually in the form of declarations, must be submitted. At the request of parties and with court approval, limited cross-examination may occur at the final hearing.

Under previous law, a final hearing had to be *commenced* within 30 days of the initial hearing. The Act provides that the final hearing must now be *concluded* within 30 days of the initial hearing absent all parties' consent or "compelling circumstances." The advantage of the Act is that creditors should be able to obtain relief from stay more expeditiously. However, the time periods imposed may not allow adequate time for discovery. Thus, creditors will need to gather evidence prior to filing the motion, or some agreement will be necessary amongst all of the parties allowing the final hearing to conclude at a later date.

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Summary of Bankruptcy Amendments

Authority of Bankruptcy Judges to Conduct Jury Trials

Prior to the Act, there was considerable dispute over whether bankruptcy judges had the authority to conduct jury trials. The Act contains a jurisdictional provision allowing bankruptcy judges to conduct jury trials in civil matters if they are designated to exercise such jurisdiction by the district court and all parties to the action expressly consent. Although bankruptcy judges have less experience in conducting jury trials, a practitioner may be able to obtain a jury trial more quickly than in the state or federal courts.

Elimination of *DePrizio* Preferences

The Act will eliminate substantial litigation prompted by poorly drafted preference recovery statutes in the Code. The modifications to these statutes effectively overrule the infamous *DePrizio* case and its progeny. *Levitt v. Ingersoll (In re V.N. DePrizio Constr. Co.)*, 874 F.2d 1186 (7th Cir. 1989). Section 547 of the Code allows the recapture of preferential payments made within 90 days of a debtor's bankruptcy filing, as well as payments made within 1 year of bankruptcy if the transferee is deemed to be an insider. An insider, more specifically defined in the Code, is a person related to or affiliated with the debtor. The *DePrizio* case held that payments made to noninsiders within 1 year of the bankruptcy filing, which benefited insiders (usually by reducing their contingent liability as guarantors of the debt), are recoverable from a noninsider pursuant to Section 550 of the Code. This meant that entities which had protected themselves by obtaining guaranties from insiders of a debtor, such as a corporation's officers, were often worse off in a bankruptcy setting than creditors who had not obtained guaranties. The *DePrizio* ruling was soundly criticized by most scholars and business professionals.

The only other major change to the bankruptcy avoiding powers is a clarification of the statute of limitations for bringing an avoidance action in a Chapter 11 case. Under Section 546 of the Code, a controversy arose over whether, and to what extent, the two-year statute of limitations for the bringing of avoiding power actions by a "trustee" applied to the debtor-in-possession. Section 546 of the Act provides that certain avoiding power actions during the pendency of a case must be commenced before the later of 2 years after the bankruptcy filing (the date on which the debtor becomes a debtor-in-possession) or 1 year after the appointment or election of the first trustee in a bankruptcy case, if such election occurs before the 2-year period expires.

Better Treatment

While the Code afforded lessors of nonresidential real property certain rights and remedies if debtors did not timely perform obligations under the leases, personal property lessors were often forced to resort to the bankruptcy court to obtain the same type of relief. The Act now provides that Chapter 11 debtors must perform nonconsumer personal property lease obligations starting 60 days after the bankruptcy case is filed. This provision of the Act should prevent personal property lessors from incurring substantial attorneys' fees and costs in attempting to obtain compliance with personal property leases where the debtor continues to use the property in a Chapter 11 case.

Compensation for Professionals

Often, a debtor or trustee will employ trial counsel as special counsel to commence or continue litigation. The Code provides that employment of special counsel must be approved by the bankruptcy court and provides standards regarding the compensation of such counsel. The Act clarifies and fleshes out the standards for allowing compensation to professionals in bankruptcy cases, many of which are derived from current case law. Special counsel should take into account that the court will review not only time spent on a case, but also rates charged, benefit to the estate, whether services were performed within a reasonable time commensurate with complexity, importance and nature of the issues involved, and the reasonableness of fees in comparison to that charged by other skilled practitioners. The Act further provides that the court shall not allow compensation for unnecessary duplication of services, services that were not likely to benefit the bankruptcy estate, or services unnecessary to administration of the case.

Single Asset Real Estate Cases

The Act reduces the ability of a debtor's whose sole significant asset is a single real estate project to delay foreclosure through the filing of a bankruptcy petition. The provisions regarding these "single asset cases" will apply where the aggregate secured debt does not exceed $4 million. "Single asset real estate" is defined as real property constituting a single property or project, other than residential real property with fewer than four residential units, which generates substantially all of the gross income of a debtor and on which no substantial business is being conducted other than the operation of the real property. In single asset cases, creditors secured by real property shall be granted relief from stay to foreclose on the 91st day following the bankruptcy filing, unless a debtor has filed a plan of reorganization that has a reasonable likelihood of being confirmed within a reasonable time, or the debtor has commenced making monthly payments to the creditor in an amount equal to interest at a fair market rate on the value of a creditor's interest in the real estate.

Protection for Security Interests in Post-Petition Rents

Generally, liens which attach to after-acquired property (known as "floating liens") cease to attach to property which the debtor acquires after the filing of the petition. Under the Code, there are exceptions to this rule, the most notable of which is for "rents." In recent years, there has been substantial litigation throughout

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the country concerning the issue of whether revenues received from the operation of a hotel or similar types of businesses were "rents." The Act makes it clear that all revenues from the operations of a hotel and like types of property will be treated as rents and that the floating lien on these revenues extends to post-petition assets.

Expedited Reorganizations of Small Businesses

In prior versions of the Act, provision was made for an entire chapter which would apply to entities with aggregate debt of not more than $2.5 million. This concept encountered strenuous opposition from the judiciary and private practitioners. Reflecting an apparent compromise, the Act does not create a new chapter but instead amends various provisions of Chapter 11, facilitating the speedy reorganization of persons and entities whose aggregate noncontingent liquidated secured and unsecured debts do not exceed $2 million. Among the most significant changes for such businesses are that the plan confirmation process is expedited, the debtor is given the exclusive right to file a plan within the first 100 days after the case is filed and all plans must be filed within 160 days after the case is filed. The court is also empowered to combine hearings on adequacy of the disclosure statement and confirmation of the plan.

In its entirety, the Act promotes judicial economy and expeditious resolution of bankruptcy cases. Practitioners should assume, however, that they will face further significant changes to the bankrupcy laws when the latest commission concludes its work and study.

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Titan v. Aetna — *A Derailment, Not A Detour*

In an article published in the July 1994 *ABTL Report for Northern California*, entitled "*Titan v. Aetna* – A Detour - Not A Derailment," author Norma Jean Formanek opined that the recent case of *Titan Corporation v. Aetna Casualty & Surety Company*, 22 Cal.App.4th 457 (1994) was incorrectly decided. Ms. Formanek's article contends that the *Titan* "court's application of rules of contract interpretation overlooked the purpose" of one of the provisions of the insurance policy at issue. The article also states that neither of the grounds for the *Titan* holding is "persuasive," that the Court "went astray," and that the holding "misses the very purpose" of a policy provision.

John Dito

In fact, the *Titan* case correctly applied the rules of contract interpretation and correctly decided that the "personal injury" endorsement to the comprehensive general liability (CGL) policy at issue did not provide coverage for clean up costs for environmental pollution.

The Formanek article generally states the facts correctly. Titan had produced ferrite at a New Jersey facility for nearly 80 years and, in the course of its operations, had polluted the site by disposition of trichloroethylene (TCE), a hazardous substance. In 1985, Titan decided to close the facility. However, New Jersey law required Titan to clean up the site as a condition of the closure.

Titan tendered a claim under its Aetna CGL policy for the costs of cleaning up the site in compliance with the New Jersey statutory requirements. Aetna denied the tender on various grounds, including the "absolute pollution exclusion," which barred coverage for any "property damage" or "bodily injury" arising out of any environmental pollution. Titan argued that the "personal injury" provision of the policy provided coverage despite the pollution exclusion. The trial court agreed with *Titan*. The Court of Appeal, in an opinion by Justice Charles Froehlich, reversed and held that the pollution exclusion unambiguously excluded coverage.

The Aetna Policy Provisions

The two relevant provisions of the Aetna policy at issue in the *Titan* case were the pollution exclusion and the personal injury coverage provision. The pollution exclusion provides that there is no coverage for "[b]odily injury" or "property damage" arising out of the "actual, alleged or threatened discharge, dispersal, release or escape of pollutants...at or from premises owned, rented or occupied by the named insured" or which are "at any time transported, handled, stored, treated, disposed of,

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or processed as waste by or for the named insured...." The pollution exclusion also excluded coverage with respect to ". . . any loss, cost or expense arising out of any governmental direction or request that the named insured test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants." This exclusion is commonly – and accurately – referred to as "absolute." *See, e.g., Alcolac, Inc. v. St. Paul Fire and Marine Ins.*, 716 F.Supp. 1541, 1545 (D.Md. 1989).

The "personal injury" provision in the Aetna CGL policy includes coverage for injury arising from such offenses as "false arrest, detention, imprisonment and malicious prosecution" as well as "libel and slander and wrongful entry or eviction or other invasion of the right of private occupancy;..."

In recent years, some policyholders have attempted to obtain coverage for any number of events under the personal injury provision. Titan argued that the pollution constituted a "wrongful entry," and that Titan was entitled to recover its costs to clean up the pollution. In the *Titan* case, the trial judge held that the property damage *was* covered under this "personal injury" provision. The Court of Appeals reversed, and emphatically rejected the argument that "property damage" caused by environmental pollution constituted "personal injury" under the Aetna policy.

The rejection of the argument by the *Titan* court is eminently correct. First, the contractual provisions are unambiguous, and long-standing California law requires the contractual interpretation made by the *Titan* court. Second, the *Titan* decision is consistent with other California authority and with the weight of authority from other states.

Contract Interpretation

The *Titan* court correctly held that the "trial court's approach violates basic principles of contract interpretation." *Titan*, 22 Cal.App.4th at 473. The *Titan* court said that it should interpret contractual language "in a manner which gives force and effect to every clause rather than to one which renders clauses nugatory." *Id.* at 474. The court observed that, if Titan's contention were correct, then the absolute pollution exclusion would *never* operate, because "personal injury" coverage would always extend to damage caused by pollution. The *Titan* court held that the trial court's interpretation would render "the pollution exclusion a dead appendage to the policy." *Id.*

Moreover, the terms "wrongful entry," "eviction," and "other invasion of the right of private occupancy" have commonly understood meanings. They connote a tort of intentional dispossession of another from realty. "Eviction" requires "dispossession by process of law; the act of depriving a person of land or property which he has held or leased," and presupposes a landlord-tenant relationship. *See Black's Law Dictionary* (5th Ed. 1979), p. 489. "Wrongful entry" occurs when someone dispossesses another by acquiring a possessory interest in the property, when one "wrongfully enters and possesses without any title." *Humes v. Cramer*, 286 Pa. 251, 133 A. 262 (1926).

The *Titan* court also gave effect to the principle of *ejusdem generis*, which instructs that "where general words follow a specific enumeration the general words should not be construed in their broadest sense but should be read as applying to the same general class of things as the specifically enumerated things. [Citation omitted.]" *Titan*, 22 Cal.App.4th at 474, 14. The principle of *ejusdem generis* has particular application to the offense of "other invasion of the right of private occupancy," as it connotes the same type of offense as "wrongful entry" or "eviction." The *Titan* court cited *Warranch v. Gulf Insurance Co.*, 218 Cal.App.3d 356, 359-361 (1990), in which the Court of Appeals held that the policy "applied to wrongful evictions, entries or other similar violations of quiet occupancy." The *Warranch* court observed that "'Occupancy' ordinarily refers to 'the taking and holding possession of real property under a lease or tenancy at will.'" *Id.* at 359. *See also, Martin v Brunzelle*, 699 F.Supp. 167, 170 (N.D. Ill. 1988). (In application of *ejusdem generus*, the terms "wrongful entry" and "eviction" have "commonly understood meanings.").

Finally, the *Titan* decision interpreted the "personal injury" portion of the policy as "being limited to damages *other* than" injury to realty. *Titan*, 22 Cal.App.4th at 474 (emphasis in original). The court cited with approval decisions from other jurisdictions that have held that "personal injury" coverage is limited to injuries personal to the occupant, as distinct from damage to the realty.

Other Authorities

The courts of a number of jurisdictions, including Florida, Minnesota, Pennsylvania and New York, have reached conclusions identical to that of *Titan*. *See Leek v. Reliance Ins. Co.*, 46 So.2d 701, 704 (Fla. Dist. Ct. App. 1986) ("Simply put, one cannot 'injure' property any more than one can 'damage' a person. Stated another way . . . personal injury is injury to a person."); *Inland Constr. Corp. v. Continental Cas. Co.*, 258 N.W.2d 881, 885 (Minn. 1977); *O'Brien Energy v. American Employers*, 629 A.2d 957 (Pa. Super. 1993); *County of Columbia v. Continental Ins.*, 189 A.D.2d 391, 595 N.Y.S.2d 988, 991 (1993); *Gregory v. Tennessee Gas Pipe Line Co.*, 948 F.2d 203, 209 (5th Cir. 1991).

The *Titan* decision cited *O'Brien* for the proposition that "[c]overage for such [environmental damage] claims is specifically excluded by the pollution exclusion. To hold otherwise would emasculate the clear and unambiguous provisions of the pollution exclusion *and could* not be justified except as an unwarranted straining to reach a result different [from] that intended by the parties." *Titan*, 22 Cal.App.4th at 475 (emphasis omitted).

Other Policyholder Arguments

The Formanek article argues that the *Titan* court "went astray" for two reasons. First, the personal injury coverage appears in an endorsement and therefore "requires" the application of "additional contract interpretation rules." Second, an insured who is "accused of nuisance or trespass by means of toxic release onto real property" should be covered by the personal injury provision.

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BARRY P. GOODE

On ENVIRONMENTAL LAW

ENVIRONMENTAL lawyers are witnessing an event rare in the law: the birth of a privilege. Attorneys in other fields should take note, for the rationale behind the privilege is not confined to environmental law.

The newborn is the "environmental self audit privilege." It is beginning to emerge against great odds. Blackletter law suggests that privileges are disfavored.

Prosecutors argue no new privilege is needed. The U.S. Environmental Protection Agency ("EPA") resists the creation of state-by-state variants.

Nonetheless five states have already enacted the new privilege. Others, including California, are considering it. The U.S. Senate passed a resolution urging EPA to "seriously consider" the new privilege. EPA has held public meetings to that end.

The argument in favor of the privilege starts from two premises:

- We should do more to promote compliance with the environmental laws; and
- It is virtually impossible for even a well-intended company to be in full compliance, at all times, with all of our complex federal, state and local environmental regulations.

The second is an extraordinary statement. Knowledgeable environmental lawyers and engineers are saying aloud what had only been whispered: the law is so complex that no sizable company can comply with it at all times in all respects.

Faced with that problem, responsible companies have learned they can improve their compliance record if they conduct routine environmental audits, in a reasonably open process, and share the results with a significant number of their employees.

Why Not Do An Audit?

The problem is that even responsible companies do not feel free to audit so fully. They are concerned about risks such as these:

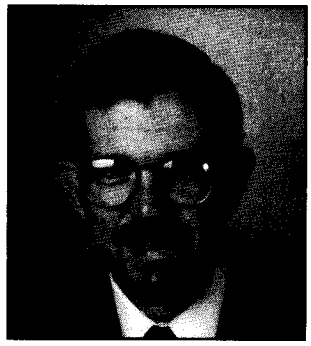
- a thorough audit will probably turn up some instance(s) of noncompliance with some law or regulation;
- EPA and the Department of Justice ("DOJ") have reserved the right to seek discovery of audits – and use them in enforcement actions;
- in addition to EPA and DOJ, enforcement can be undertaken by any number of State officials, local district attorneys, city attorneys, public health officers, fire officials, fish and wildlife personnel (and so on) as well as by environmental groups, citizens and toxic tort plaintiffs;
- the risk is not limited to civil actions. Criminal *mens rea* standards have been eased even while prosecutors' appetites for bringing criminal cases have increased.

These risks have lead to the creation of an environmental self-audit privilege. The details of the new laws vary. But the fundamental idea is that a company should be able to investigate its own activities, analyze the extent of its compliance with environmental regulations and report the findings to its employees. If it undertakes corrective action, then its internal report will be privileged. Its report will not become a "road map" by which a prosecutor can determine how best to prosecute it.

Why Not Have A Privilege?

Those who oppose creation of the privilege argue that existing law already provides sufficient protection. Proponents disagree. They say the three main sources of potential protection – the attorney-client privilege, the work product doctrine, and the common law – are unreliable for these purposes.

The Attorney-Client Privilege: To the extent corporate or outside counsel actively directs the audit, the attorney-client privilege should provide protection from discovery. But it is not that simple. Courts have second-guessed whether an attorney's role in an audit has been that of counsel or businessman, denying protection in the latter case. In addition, much of the value of the audit depends on the ability to disseminate its results throughout the company, which could jeopardize the privilege.



Barry P. Goode

Work Product: Many responsible companies wish to perform audits as part of a routine corporate management program, not necessarily "in anticipation of litigation." Absent the immediate prospect of litigation, many courts would not grant work product protection to a routine audit.

Common Law: During the past twenty years courts have begun developing a common law self-analysis privilege. But most decisions arise in other contexts and the path of the law has not been smooth. For every decision that permits a privilege, one denies it. A company cannot comfortably perform an audit "trusting" that a court will protect it from discovery.

Opponents say there is still ample reason for companies to comply with the law, even if that means doing audits that may be subject to discovery. They question whether there are really any "horror" stories of companies having self-audits used against them. Proponents say it does not matter; even the prospect of it is sufficient to cause thoughtful companies to shy away from audits. The bottom line is legislatures are responding favorably to those who urge the privilege.

The impetus to adopt this new privilege is clearly centered in the environmental law. But the rationale for it is hardly so limited. No doubt, tax, health care, labor, securities and other lawyers could argue that their areas of the law have become very complex and that it would enhance compliance if their clients could do privileged self-audits as well.

The debate is afoot. It will be heard in Sacramento and Washington again this year. Stay tuned.

Mr. Goode is a partner in the firm of McCutchen, Doyle, Brown & Enersen.

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Titan v. Aetna — A Derailment, Not A Detour

The Endorsement Argument

The Formanek article argues that "endorsements to policies control over the terms of the original policy" and cites 2 *Couch on Insurance* (2d ed.), § 15.30. However, endorsements are typically part of the policy as issued and therefore should be construed consistently with the other provisions of the policy. In fact, the same section of *Couch* that is cited by the Formanek article states: "An indorsement is not to be construed more broadly than the fair import of its terms considered in connection with the whole of the policy. It must be read in the light of the policy." *2 Couch on Insurance* (2d ed.), § 15.30.

In the *Titan* case, *both* the personal injury coverage and the pollution exclusion appear in endorsements, which further undermines the "endorsement" argument. Of equal importance, however, is the fact that the policyholder paid no premium for environmental pollution coverage. To hold in the face of an unambiguous exclusion that a policyholder has such coverage when the policyholder has not paid for it, would violate every principle of contractual interpretation pronounced by the California courts.

The "Chemical Trespass" Argument

The Formanek article concludes with the wishful thought that "...the analysis employed by other courts that have found the personal injury coverage triggered by environmental claims for trespass would not seem to apply to the *Titan* facts." However, *Titan* did involve a contention that property other than that of the policyholder had been polluted. Furthermore, subsequent cases are already dashing the roseate hope expressed in the Formanek article. Thus, in *Staefa Control-System, Inc. v. St. Paul Fire & Marine*, 847 F.Supp. 1460 (N.D. Cal. 1994), the court applied California law and followed the *Titan* case. In *Staefa*, a third person claimed that the policyholder had polluted adjacent real property, and alleged negligence, trespass and private and public nuisance against the policyholder. The St. Paul policy contained an absolute pollution exclusion and a personal injury endorsement identical to the *Titan* policy. The court relied on the "well reasoned" *Titan* opinion and held that "it is simply not objectively reasonable for an insured to expect that pollution damage specifically excluded from coverage by its property damage provision would be covered under its personal injury provision." *Staefa*, 847 F.Supp. at 1474.

In *Hughes Aircraft Co. v. Hartford Acc. & Indem. Co.*, (C.D. Cal. 1994) CV 92-6031 LGB (JR), 8 *Mealey's Insurance Reports* #23 (4/19/94), the court had granted the plaintiff's motion for summary judgment prior to *Titan*. After *Titan*, the same court granted the defendant's motion to reconsider and found "as a matter of law that the trespass and nuisance claims...asserted...against" Hughes were not covered by the personal injury provision. The court rejected an argument that *Titan* was "distinguishable" because the claim "brought against the insured [in *Titan*] was a government order to clean up the insured site whereas here [*Hughes*] the claims brought against Hughes were for trespass and nuisance." The court held that the *Titan* "opinion was broad enough such that it did not turn on these factual distinctions. The [*Titan*] court broadly held that contamination to property is not covered by a personal injury endorsement regardless of whether the claim asserted against the insured is for trespass, nuisance or is a government clean-up order." *See also Truck Insurance Exchange v. Interstate Brands Corporation*, L.A. Sup. Ct. Case No. BC 045576, 8 *Mealey's Insurance Reports* #39 (8/16/94) (similar post-*Titan* rejection of the "chemical trespass" argument).

Ms. Formanek is an excellent lawyer and she expresses the policyholders' arguments in an able fashion. Nevertheless, the *Titan* decision is eminently well reasoned and the Supreme Court in fact denied numerous requests to depublish the decision. Ms. Formanek's prediction that *Titan* is not the "last word on the subject" amounts to wishful thinking on polluters' behalf. There is a proverb that, "If wishes were wings, then beggars would fly." After *Titan*, polluters' wishes for coverage under the personal injury provision are destined to be firmly earthbound.

Mr. Dito is a partner in the firm of Sinnott, Dito, Moura & Puebla in Los Angeles.,

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American system of adversary justice. While such exposure brings its own self-evident problems, there is reason to believe that people will emerge with a sense that even if the trial process works imperfectly, it still works far better than the alternatives.

Lawsuits and lawyers are also the focus of a debate with much broader potential consequences for ABTL's members. Litigation reform is part of the Gingrich-Dole "contract with (on?) America" that found so many eager offerees last November. And while concern with that issue may be less than about crime or welfare reform, there is no doubt that many people and businesses feel greatly aggrieved about a civil justice system that they regard – perhaps from personal experience – as neither.

It is not the role of ABTL to take sides in this debate. One of our strengths as a young organization is that we serve as a forum for all business trial lawyers. Both our membership and our Board reflect that diversity. Thus, I would only say (and, even here, I hasten to add that these views are purely personal), that it is important not to allow legitimate concerns over litigation *abuse* to become – or stimulate – an attack upon litigation itself. Rightly or wrongly – and I would argue strongly that it is the former – our system of government places a great deal of importance on litigation, not simply as a means of compensating victims of wrongdoing or securing the performance of private bargains, but as a broader mechanism for enforcing adherence to norms of social responsibility. That commitment is reflected in the large number of laws that provide for private en-

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CHARLES R. RICE

On SECURITIES

PLAINTIFF securities lawyers claimed a victory in December 1994 when the Ninth Circuit clarified (and arguably lowered) the standard for alleging the intent or scienter required for a securities fraud claim. This apparent victory seemed especially sweet to securities plaintiffs in light of recent appellate defeats that, among other things, effectively shortened the statute of limitations and eliminated aider and abetter liability for 10b-5 violations.

The Ninth Circuit's opinion, however, may not be much of a victory for securities plaintiffs. While the court relaxed the standard for pleading scienter, it apparently tightened the standard for pleading "falseness." The net effect may be the same for securities plaintiffs.

Pleading Intent

The Ninth Circuit initially affirmed the district court's dismissal of a securities fraud complaint for failure to satisfy the pleading requirements of FRCP 9(b). *In re GlenFed, Inc. Sec. Litig.* ("*GlenFed*"), 11 F.3d 843 (9th Cir. 1993). Judge Kelly, writing for a unanimous three judge panel, relied on two Second Circuit decisions in holding that such a complaint must allege "facts . . . [that] provide a basis for a strong inference of fraudulent intent." *Id.* at 848. *See O'Brien v. National Property Analysts Partners*, 936 F.2d 674, 676 (2d Cir. 1991); *Ross v. A.H. Robbins Co.*, 607 F.2d 545, 558 (2d Cir. 1979), *cert. denied*, 446 U.S. 946 (1980).

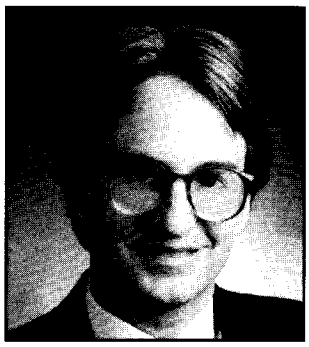
The Ninth Circuit granted a petition for rehearing *en banc* and, approximately one year after its first decision, an eleven judge panel unanimously vacated that decision. Judge Fletcher, writing for the *en banc* panel, stressed that FRCP 9(b) expressly provides that ". . . intent, knowledge and other condition of mind may be averred generally." *GlenFed*, 94 C.D.O.S. 9372, 9373 (9th Cir. 1994). Judge Fletcher noted that the Second Circuit's test might "weed out" undesirable "strike suits" but concluded that "[w]e are not permitted to add new requirements to Rule 9(b) simply because we like the effects of doing so." *Id.* The court also rejected a suggestion, which was derived from a First Circuit opinion, that "some inference of intent" be required. *See Greenstone v. Cambex Corp.*, 975 F.2d 22 (1st Cir. 1992). The Ninth Circuit concluded that "plaintiffs may aver scienter generally, just as the rule states–that is, simply by saying that scienter existed." *GlenFed*, 94 C.D.O.S. at 974.

Plaintiffs' victory on the scienter issue may be short-lived, because the Supreme Court may now address the split among the circuits. Congress will also consider this question in the coming term as part of the Republican's "Contract with America." One bill to be considered requires pleading specific facts that show the state of mind of the defendants.

Pleading Falseness

The Ninth Circuit did not stop with rejecting the "strong inference of *scienter*" test. It went on to stress that FRCP 9(b) requires that the "circumstances of the fraud" be "stated with particularity." In other words, the "circumstances indicating falseness" must be alleged. *Id.* at 9374. Pleading time, place and manner of the alleged fraud is not enough. Nor is it sufficient to allege facts that merely show that subsequent events have proven a statement to be wrong. *Id.* at 9374-75. Plaintiffs must "set forth, as part of the circumstances constituting fraud, an explanation as to why the disputed statement was untrue or misleading *when made*." *Id.* at 9375 (emphasis in original).

The concurring opinion of Judge Norris, joined by three other judges, expressed concern that the court's discussion "destabilizes settled Ninth Circuit law," *id.* at 9377, because it may be read as "creating an inference of falsity test that parallels the inference of scienter test," *id.* at 9379. If the *en banc* opinion is so read, the new formula may have almost the same practical effect as the rejected one.



Charles R. Rice

The *en banc* decision suggested only two examples of facts that would satisfy its "inference of falseness" test: (1) "inconsistent contemporaneous statements or information (such as internal reports) which were made by or available to the defendants," *id.* at 9375; or (2) a defendant's admission that "I knew it all along," *id.* at 9375 n. 9. Ironically, however, such admissions or contemporaneous inconsistencies (and probably any other facts that would support an "inference of falseness") would also satisfy the test rejected by the Ninth Circuit because they would give rise to a strong (or at least some) inference of scienter.

Securities plaintiffs will find it very difficult at the pleading stage to uncover and plead such required facts. The *GlenFed* plaintiffs satisfied the "inference of falsity" test by alleging, among other things, inconsistent statements at Board of Director meetings. *Id.* at 9375. The plaintiffs probably would not have had such facts, however, if they had not had "access to discovery materials obtained in a derivative action" before preparing their complaint. *See GlenFed*, 11 F.3d at 848. Plaintiffs without such a "head start" may find it very difficult to allege facts showing "falseness."

Conclusion

Plaintiffs' apparent victory in *GlenFed* may turn out to be illusory. The federal courts can and should continue to require plaintiffs to plead facts that show that a real fraud–and not just a mistake–occurred.

Mr. Rice, Editor of ABTL Report Northern California, is a partner in the firm of Shartsis, Friese & Ginsburg.

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Obtaining Maximum Benefit From ADR Phone Conferences

In our court the idea of trying ADR need not come from you. Counsel have already told us that the court rule encouraging serious consideration of ADR early in the case has made it easier for them to raise this issue with their opponents and their clients.

Be Creative

Use the Conference to design a creative process that will benefit your case. One of the assumptions behind the ADR Pilot is that each case presents a unique set of characteristics: facts, law, personalities and communications barriers that affect which ADR process should be tried and when it will be most effective. Bring that information into the ADR Phone Conference and use it to design a process that will overcome the barriers to fair, effective, efficient resolution of your case.

In a recent case, counsel were split as to whether to seek a magistrate judge settlement conference or ENE. Defense counsel insisted on a magistrate judge conference because her client, an insurer, would only agree to an ADR process conducted by a judicial officer. Plaintiff's counsel was adamant that she wanted ENE but was rather vague about her reasoning. After further discussion, it became clear that plaintiff's counsel was concerned that she would be forced prematurely into a settlement process before obtaining personnel records she felt were critical for her to assess the case. I recommended and the parties agreed to a two-tiered process: counsel would meet with a magistrate judge to resolve the discovery issue and then meet later with that judge, with their clients present, for settlement talks.

The Conference can also be used to design a process for global settlement even if all related cases are not filed in our court. Counsel often mistakenly assume that our ADR processes are only available to aid the Northern District case. In a number of cases, counsel in related cases in other courts are invited and have agreed to participate in our court's ADR process. This invitation can be made informally by the ADR neutral, our office or counsel themselves. In a recent case, one of our district judges, at the parties' urging, contacted the presiding Superior Court judge for the county in which the related case was filed and, with that judge's consent, issued an order assigning both cases to our court's mediation program.

Use the ADR Phone Conference as an opportunity to talk to the other side about the future direction of the case. It ought to be easy to pick up the phone and talk to opposing counsel. All too often it doesn't happen because other cases are more pressing and because, in initiating the call, you may fear you will be perceived as overly anxious to resolve the case. You can use the ADR Phone Conference as an opportunity to raise case management issues in a neutral, court-sponsored setting. The Conference can be a "mediated meet and confer" that can help resolve or organize a range of issues in preparation for your Case Management Conference. For example, counsel have used ADR Phone Conferences to agree to exchange documents as part of an expanded disclosure, stipulate to interrogatories, share witness information and produce insurance policies.

Recent Conferences

In one Conference, counsel in a labor case quickly agreed among themselves that the case was quite small and should probably be resolved prior to incurring the cost of the Case Management Conference. During the call, we negotiated a schedule under which plaintiff's counsel would contact his client and communicate a demand and the multiple defense counsel would confer and respond. Clearly this structure could have been developed through a number of direct phone calls among counsel, but those calls had not occurred.

Counsel in another case called at the time of their ADR Phone Conference to announce that they had settled their case. They said they would not have done so at such an early stage without the court's requirement that they meet and confer and discuss ADR options. The ADR Phone Conference was then used to set up a mutually agreeable schedule for counsel to exchange settlement drafts, finalize their agreement and file their dismissal with the court.

The Conference brings all counsel together at a scheduled point in time in a setting where they are encouraged to think creatively about how to move the case forward effectively. It also creates an early moment in the life of the case for everyone to focus on the case, in the same way that a trial, a motion or a conference with the judge will focus the parties later in the case. Use this opportunity to move your cases toward a just resolution efficiently, whether that resolution is by settlement, motion or trial.

Ms. Smith is Director of Alternative Dispute Resolution Programs, U.S. District Court for the Northern District of California.

COMING EVENTS

April 11, 1995	MCLE Dinner: *Intellectual Property Litigation – Getting Your Story Across* Sheraton Palace Hotel Cocktails at 6:00 p.m. Dinner at 7:00 p.m.
October 13-15, 1995	Annual Seminar: *Cross Examination* Loews Ventana Canyon Resort Tucson, Arizona

Call Sharon Litsky (415) 772-6746
for tickets or information.

MARY MCCUTCHEON

On INSURANCE

ALLOCATION issues under Directors and Officers Liability policies present challenges to the practitioner seeking coverage, as D&O polices usually do not contain the express duty to defend found in general liability policies. A body of law evolving primarily in the federal courts addresses principles of allocation of defense and settlement costs under D&O policies.

The most common allocation issue arises when the insured Corporation is sued along with its Directors and Officers, and all defendants are jointly represented by a single defense firm. D&O insurance does not insure the Corporation for its own wrongful acts. It insures the Directors and Officers for their wrongful acts, and insures the Corporation only for its indemnification obligation to its Directors and Officers. Thus, when the Corporation and its Directors or Officers are sued together, the insurance carrier will claim that its obligation to pay for defense costs and settlement of any claims against the Directors and Officers is mitigated by the presence of the Corporation. The carrier will demand a substantial contribution from the Corporation towards defense and indemnity costs.

Several factors can assist a practitioner seeking to negotiate a maximum allocation for the carrier's contribution on behalf of the Directors and Officers. First, some insurance policies now expressly contain an allocation provision, requiring that the insurer, the Corporation and the Directors and Officers "use their best efforts to determine a fair and proper allocation of the settlement amount as between the [insurer] and the [insureds]." While a carrier will rely on this language in seeking an allocation, the *absence* of this language in a policy can support an argument that no allocation is appropriate. If the insurer wanted the right to allocate, it should have made it clear in the policy. Moreover, this language refers to allocation of "the settlement amount." It does not refer to reimbursement for defense costs. Arguably, then, the insurer has waived its right to allocate defense costs.

Furthermore, when the Corporation's liability is vicarious in nature only, and was caused solely by the activities of its insured Directors and Officers, courts have held that allocation is inappropriate. *See Harbor Insurance Company v. Continental Bank Corporation* (7th Cir. 1990) 922 F.2d 357, 367. ("To allow the insurance companies an allocation between the directors' liability and the corporation's derivative liability for the directors' acts would rob [the insured] of the insurance protection that it sought and bought.") By contrast, where the Corporation's liability does not stem from acts committed by its Directors or Officers, allocation to the D&O insurer is inappropriate. *See Reliance Group Holdings v. National Union Fire Insurance* (N.Y.App. 1993) 594 N.Y.S.2d 20. Allocation also becomes more difficult when the insured Director or Officer has the benefit of a defense in the underlying action which is not available to the Corporation. *See First Fidelity Bancorporation v. National Union Fire Insurance Company of Pittsburgh, PA*, 1994 WL 111363 (E.D. Pa.).

Some courts apply the "reasonably related test" to allocation, which provides for coverage of defense costs which are "reasonably related" to the defense of covered claims or individuals. *See Continental Casualty Co. v. Board of Education of Charles County* (M.D.Ct.App. 1985) 489 A.2d 536. In that situation, allocation is not appropriate even if those costs also benefit uncovered claims or parties. With this test, if a coverage attorney can demonstrate that the same costs would have been incurred whether or not the Corporation was named in the lawsuit, allocation is not appropriate.

Other courts apply a "relative exposure" test. That test is more likely to result in a greater allocation of liability to the Corporation, as it takes into account factors such as the potential effect of the "deep pocket" factor on liability, the source of funds that paid the settlement, and the burden of funding the defense. However, at least one court applying that test, *Safeway Stores v. National Union Fire Insurance Company*, 1993 U.S.Dist. LEXIS 2006 (N. D. Cal.) did so because the parties agreed that the "relative exposure" test was the proper method of allocation. Moreover, one of the more recent published decisions in the Northern District, *Raychem Corp. v. Federal Insurance Company* (N.D. 1994) 853 F.Supp. 1170, is very favorable to insureds on allocation. While accepting in theory the "relative exposure" test, the court states that even under that test allocation is only appropriate "if, and only to the extent that, the defense or settlement costs of the litigation were, by virtue of the wrongful acts of uninsured parties, higher than they would have been had only the insured parties been defended or settled. This has been referred to as 'the larger settlement rule.'" *Id.* at 1180. In other words, if the same settlement would have resulted if only the Directors and Officers had been named, then no allocation is appropriate – in effect, the "relative exposure test" has collapsed into the "reasonably related test."

Mary McCutcheon

It is interesting to note that, even in cases applying the "relative exposure test," courts have allocated a hefty portion of defense and indemnity expenses towards the D&O insurer. For example, in the *Safeway* case, Judge Jensen allocated to the insured Directors and Officers 75% of the defense and settlement expenses incurred in connection with shareholder lawsuits arising out of Safeway's acquisition by Kravis, Kohlberg & Roberts ("KKR"), even though Safeway and KKR were parties to the lawsuit along with the Directors and Officers.

A careful review of allocation cases teaches that, while at first blush allocation may appear to be appropriate under a number of tests, in fact, courts generally recognize that insured Directors and Officers, as well as the Corporations purchasing their insurance, should be entitled to the full benefit of their coverage.

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forcement. In fact, the very idea of a common law system implies a strong commitment to adversary adjudication. It is for many of the same reasons, of course, that abuse is not only possible but tempting and it is appropriate to be concerned about such abuses. But it is the sin we should hate, not the sinner. We should encourage reform where it is needed, but resist attacks upon civil litigation as such and, in particular, efforts to make trial law and trial lawyers scapegoats for a broader set of social concerns.

So what does this have to do with ABTL? Several things. One of the very best things we, as trial lawyers, can do to preserve confidence in the adversary system and the litigation process is to make sure that when it is used, it is used appropriately. That means efficiently and courteously and for the purpose of securing the just adjudication of legitimate controversies that cannot be resolved by other means. ABTL has taken an important leadership position on this issue through its Guide to Professional Practice. To date, thirty-one law firms and six corporations have formally adopted the ABTL Guidelines, and they have received a great deal of favorable press coverage and commentary from the Bay Area legal community (including many judges). We will continue to encourage support of these guidelines.

We promote the same goals through our dinner programs. While these programs often are about the "nuts and bolts" of trial practice, I am struck by how often they also are about the profession of being a trial lawyer. There is no surer way to preserve civil litigation as an important and positive democratic force than to insure that we uphold – and pass on to younger lawyers – its finer traditions.

The statewide ABTL Annual Meeting is the monthly program writ large. This year it will be held on October 13-15 at the spectacular Ventana Resort in Tucson, Arizona. While we intend – as in past years – to offer trial practice demonstrations along with commentary from experienced federal and state judges, we have decided to focus this year on a single aspect of trial practice: cross-examination. Of all the things that trial lawyers do, none is as exciting, as varied, or as challenging as the effective cross-examination of a difficult witness. Our plan is to have an array of the very best practitioners of this colorful art demonstrating (and talking about) the hows, whens, and whys of the subject.

As always, we expect to augment the formal demonstration programs with special events. (A speech by Justice Anthony Kennedy and a private interview with Chief Justice Malcom Lucas were featured at last year's annual seminar in Hawaii.) We also will offer ample time to explore the beautiful desert and canyons surrounding Tucson or to play golf or tennis. The annual seminar also provides an unparalleled opportunity for the informal exchange of views among lawyers and between bench and bar. Those opportunities, I am convinced, are vital to the health of our profession.

The Northern California ABTL is entering its fourth year. That's still very young if you're raising children, but it's adolescence for an organization, with all that that implies. Art Shartsis and Jerry Falk, along with the other officers and our Board (plus consistently high quality programs), have established ABTL as an important part of the Bay Area legal community. My challenge is to keep the organization exciting for those who have supported it in the past and to make it attractive to even more of the Bay Area business trial bar, particularly younger lawyers and lawyers outside of large firms. I welcome your thoughts and suggestions as well as your support and assistance.

Mr. Bomse is a partner in the firm of Heller, Ehrman, White & McAuliffe.