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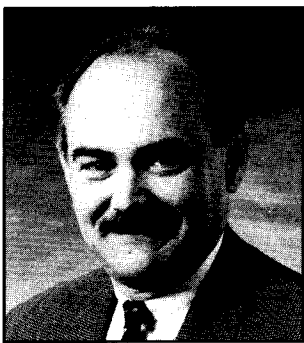
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Practical Thoughts On Alternative Pricing

THE proclamations in the "law as a business" literature that the billable hour is dead are premature. But the movement towards the "alternative fee," or "alternative pricing" (the term I prefer because it seems more accurate), has passed the point where it can be considered just another fad. I say that with some resignation, because many lawyers — myself included — continue to believe that the hourly rate system is a good and fair one, with nothing wrong with it that improved communication with clients wouldn't fix. Good lawyers do not abuse their clients by protracting litigation or performing unnecessary work. Good lawyers talk to their clients and work toward the client's definition of success, which may not be winning at all costs. Nonetheless, perception is often reality, and clients perceive that at least some of their lawyers needlessly over-litigate. Part of the cause of that evil is presumed to be the self-interest that hourly bill-

ing creates to churn matters rather than complete them in the most economical manner. Eliminate hourly bill-

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James C. Krieg

What I Wish All Lawyers Knew About Law & Motion

TWO years ago I was given the honor and the responsibility of presiding over the Law & Motion Department of the San Francisco Superior Court. This assignment may be the most interesting in the entire court system. San Francisco is a small court, but the issues raised are often ones of first impression in complicated cases and the attorneys who practice before the court are some of the best practicing law today. With this unique exposure to the best and the worst attorneys have to offer, I have a list of things I wish someone had taught me when I was practicing law.

Civility. One of the things that makes all of our jobs unnecessarily unpleasant is the vitriol that attorneys display in oral argument and briefs. Attorneys should know that the court neither reads, listens to nor believes the insults that are exchanged between counsel and that the only person who appears incompetent and petty in these circumstances is the one making the insults.

As a lawyer, I was as guilty as anyone when I "whined" to the court that the other side was unfair, but as a judge these complaints appear childish. In fact, the best attorneys ignore their opponent's behavior and get to what the judge cares about, the merits of the case. Besides being ineffective advocacy, all the bickering is incredibly expensive for the clients and the civil justice system.

Demurrers. The most abused and useless motion I see in Law & Motion is the demurrer. Practically the only times that a demurrer helps resolve issues are in fraud cases, where the facts need to be pleaded with greater specificity than other causes of action, and cases where the Statute of Limitations may have run or been tolled. In almost all other cases, the pleading defects are easily

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Hon. William Cahill

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What I Wish All Lawyers Knew About Law & Motion

fixed. Demurrers add nothing to the litigation and merely educate your opponent. Of course, if attorneys improperly use demurrers to increase the cost of litigation for their opponent, sanctions are warranted.

Oral and Written Argument. It is obvious that both counsel and the court must have legal authority for their positions and rulings. A difficult situation is presented when your opponent cites authority and you have to argue that, despite that damaging case or statute, your position should prevail. Attorneys are sometimes effective in distinguishing their opponent's authority and arguing that it should not apply to their case. However, when asked what authority the court *should* apply they have no answer, other than repeating their argument that their opponent's authorities are "distinguishable."

This argument of course does not help. *Some* legal authority *must* apply for there to be a ruling in your favor. The best attorneys are prepared to answer this harder question and explain what the rule should be and why ruling in their favor is fair and correct under the law.

Another difficult situation is the case of first impression, where there is no law on point. This occurs more often than one might suspect, happening 3-4 times a week in San Francisco Law & Motion. It is ineffective to argue that "there is no authority for my opponent's position," while neglecting to mention that there is no authority, at all, for any party's position, including your own. One major difference between being a judge and being a lawyer is that a judge has to decide the case, not just argue it. When I was practicing law I spent much of my time developing arguments which I hoped would be persuasive. Now my job is to be fair, do the right thing and make reasoned decisions according to the law. If you want the court to adopt your position in a case of first impression, you must convince the judge that the result you want makes sense under the law and is fair. Ask yourself what you would do if you were the neutral party deciding your dispute.

A more obvious tip for oral argument is to answer the court's questions. I frequently ask a question to which I really need an answer and have the attorney reply, "I'll get to that in a minute, but first..." and then proceed with a prepared speech reciting their papers. I may have a dumb question, but please remember that you know the case a lot better than the court and I need an answer to my dumb question before I can rule.

It also would help if, before writing the brief and before oral argument, attorneys would ask themselves, "What is the hardest question I can be asked? Where is the weakest part of my case?" If you answer that question honestly and have a reasoned response which would create a fair result, you can turn a losing argument into a winning one. Often though, when confronted with a difficult question, counsel either provides a nonresponsive answer (hoping the court did not notice) or concedes the point by silent or ineffective argument.

A lot of Law & Motion is spent on meritless arguments. Some attorneys seem to believe that losing one minor point is the end of their case. The best attorneys

simply concede their losers and move on. Among other things, this has the effect of gaining credibility with the court. The counsel that does not argue issues without merit is perceived as someone who may have a point when he or she chooses to take a stand. The attorney who argues everything is frustrating and, one suspects, may not have the best case.

Finally, Law & Motion arguments must be brief and succinct. There is neither the time nor the need to be clever or give an impassioned jury speech. If you have not made your record in your papers, it is usually too late to do so at oral argument. There are long calendars and the attorneys in the audience need to get to their matters and get back to their offices. When the court permits argument to go on too long or when an attorney is not making sense, I can see the attorneys in the audience begin to roll their eyes, shake their heads and confirm my feeling that all of our time is being wasted. Clients pay too much money for us to waste their money (and everyone else's) on long-winded oral or written argument.

Reply Briefs. It is unacceptable to include new facts and new arguments in a reply brief. The opposing side does not have an opportunity to respond, it is not fair, and it should not be considered by the court. A moving party should only reply to the arguments in the opposition; everything else must be in the opening brief.

With that said, reply briefs can be very important if they effectively address the opposition's arguments and are not simply a recitation of the opening brief. Also, do not ignore an argument in the opposition, even if you think that it is ridiculous. It can be argued that you are conceding your opponent's "ridiculous" position.

Motions for Reconsideration. The easiest way to avoid such motions is to do the motion correctly the first time. Often, the arguments for these motions amount only to attorneys saying, "If I knew the court was going to rule against me, I would have done a better job." That is not an effective argument under C.C.P. Sec. 1008. Recent changes to that statute make it clear that the Legislature does not want the court's time wasted by counsel repeating their same motions over and over.

However, there are times when the Court simply makes a mistake. It is my practice to change a wrong decision at the trial court level, rather than waste time and money by completing the case in Superior Court and then having the Court of Appeal correct my wrong decision so that the entire case must be relitigated years later. That is not anyone's idea of justice. If I am wrong, I will correct my mistake, but if the attorneys are making their tired arguments a second time because they simply disagree with the ruling, sanctions are appropriate.

Page Limits and Petty Rules. As an attorney, I used to be frustrated by court-imposed page limits, requirements to highlight exhibits, have a table of contents and attach copies of cases and many other "petty" rules. I believed that these rules were a waste of time and money and were a quirk of the judiciary to make things easier for the court at the expense of the attorneys.

Now, while I would agree that there are still some silly rules, I am convinced that many of the rules are absolutely necessary. There is simply too much to do, and

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many of these rules help me get to the merits of a motion faster and better.

As an attorney I thought my cases were very complicated, needed extensive briefing and could not possibly be discussed within artificial page limits. I thought my cases were special. Now after two years in Law & Motion, I see that many attorneys have complicated, special cases, but I have yet to see a case that needs a page limit waiver. The best attorneys can explain the most complicated case in 15-20 pages and an easier case in 5-10 pages.

People write literally pages trying to explain to the Law & Motion judge the basic standard for demurrer, the burden of proof for summary judgment or the liberal policy for allowing amendments to complaints. Arguments are repeated three and even four times. Briefs quote long sections of cases or worse yet long sections of pleadings. The court, if it is doing its job, reads the actual cases, not the excerpts in the briefs. I am convinced now that page limits are necessary and work and that, as an attorney, I did not have the most complicated cases in the court. I merely had cases like everyone else which could and should be adequately briefed within the page limits.

It also really helps to highlight deposition testimony and provide copies of out-of-state authorities. The tables of contents are invaluable, as are argument headings. Without this help, we simply could not get through 20-45 motions a day with any semblance of quality.

Sanctions. If attorneys would represent their clients as zealously as they represent themselves after being sanctioned, there would be less need for sanctions and clients would get much improved representation. It is not uncommon to have an attorney come back to court two or three times on motions for reconsideration or relief under C.C.P. Sec. 473 to avoid paying \$500 in sanctions and, when that fails, go to the Court of Appeal. Interestingly, sometimes the arguments get more persuasive, but most of the time the arguments become more strident, especially if the sanctions need to be reported to the State Bar. The arguments are also rarely effective and often result in more sanctions for frivolous motions.

I award sanctions when an attorney's conduct is causing his or her opponent absolutely unnecessary expense by frivolous motions or dishonest and bad faith tactics. I believe that in those circumstances, if the court does not sanction the attorney who is causing the problem, the court is actually sanctioning the innocent party who has had to pay its attorney to respond to worthless motions or dishonest conduct. It's only fair to even the cost and reimburse the party who respects the court process and litigates with integrity.

Under new C.C.P. Sec. 128.7, sanctions are going to be easier to award and, I hope, will stop some of the "scorched earth" litigation that some firms are now practicing. However, attorneys need to distinguish sanctionable conduct from tough litigation. Most sanctions requests are denied because the conduct amounts to zealous advocacy, not dishonest or bad faith conduct.

Attorneys who are successful in winning sanctions need to be aware of the need to prepare an order with appropriate findings. In order to survive an appeal, the order cannot simply recite that "sanctions are awarded." Findings of fact must be included.

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Patent Cases: The Role of the Trial Lawyer

PRIOR to 1982, patent law, like admiralty and bankruptcy, was a legal specialty complete with its own courts, its own bar association, and its own arcane legal principles. Only a small number of practitioners entered the field, many of them knew one another, and there tended to be only limited interaction with the Bar at large. Even now, most patent lawyers know by heart their Patent Office registration numbers.

The Federal Circuit

The isolation of the patent lawyer was destroyed by the creation of the Federal Circuit Court of Appeals in 1982. Led by Chief Judge Howard T. Markey, the Federal Circuit set out to revitalize patent law, to reinvigorate the patent system, and to remedy the perceived failure of the courts to protect adequately the value of American intellectual property.

The changes in patent law, and the increase in the value of patents, were almost immediate. Prior to the creation of the new court, some judges had been notoriously hostile to the monopoly envisioned by a patent and to the legal and factual complexity of patent cases. In some circuits, no patent had been held valid in the preceding thirty years.

The Federal Circuit set out to destroy this hostility and to restore a respect for patent protection in this country. In at least four areas this court dramatically increased the strength of patent holders

All issued patents are presumed to be valid by statute. The Federal Circuit put teeth into this presumption by repeatedly requiring defendants who sought to prove a patent invalid to bear the burden of proving every element of an affirmative defense by clear and convincing evidence. The court made it clear that clear and convincing evidence requires a degree of deference to the Patent Office and a presumption that the governmental tasks of examining the patent had been accomplished correctly.

In early decisions, the Federal Circuit reversed the denial of preliminary injunctions and affirmed the few injunctions that had been granted by trial courts. The court went to great lengths to emphasize that interference with a patent holder's monopoly was itself irreparable injury for the purpose of the traditional equitable balancing tests. Thus, an accused infringer could not use the prospect of a damages award to convert the patent owner into an involuntary licensee.

The Federal Circuit proved receptive to the development of damage theories, making it substantially easier



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for a patent holder to recover lost profits, instead of royalties, and to demonstrate that actual profits had been unfairly reduced by the sale of infringing products. By upholding claims of willful infringement, the court held out the possibility that actual damages could be increased up to three times, and that attorneys' fees might be awarded to the prevailing party.

Finally, the Federal Circuit, in its early years, demonstrated an affinity for trial by jury, leading to a tremendous increase in the number of patent cases tried to juries throughout the country.

Patent Litigation Today

As a result of these dramatic changes, patent holders found themselves with suddenly valuable property rights, attorneys who were willing to take cases on contingency fees, and receptive juries who were routinely instructed that the patent at issue was presumed valid. Defendants, on the other hand, found themselves facing preliminary injunctions that threatened to, and in some cases did, close down businesses, a requirement that they obtain opinions from patent counsel and then waive the attorney-client privilege in order to avoid treble damages, and the battle of proving that complex patent claim language did not "read on" their own, often complex, products. The predictable result was a series of "major" jury verdicts against accused infringers, followed by a movement, first by defendants and later by plaintiffs, to experienced trial lawyers who, while perhaps less technically trained, had developed skills in presenting complex issues to judges and juries.

Today, of course, this movement to general practice trial lawyers has reshaped the identity of the litigation departments in most general practice firms. Today, every major Bay Area firm boasts an intellectual property department and a string of patent cases pending in the federal courts. My own firm has thirty-four trial lawyers who specialize in intellectual property litigation, with a heavy emphasis toward patent work.

Even at the current time, after the Federal Circuit bench has turned over at least once and the pendulum has swung back in the areas of injunctive relief and love of juries, the number of patent lawsuits continues to grow and to present opportunities for trial lawyers.

While the client's need for trial expertise is evident, what is it that encourages general practice trial lawyers to add patent work to their specialties in criminal defense, securities, antitrust or, as in my case, airport litigation? Although it is impossible to generalize a formula that would be true for every attorney, the following are the mix of attractions that has drawn the people I know into intellectual property in general and patent cases in particular.

Patent Cases Go To Trial

While I do not have the actual court records to prove this assertion, my own observations at my firm and articles in the legal newspapers confirm that, if you actually want to try a civil case, a patent case is a good one to have. In the "old" days, patent cases between large

companies generally settled with cross-licenses or token royalties. Today, particularly in the Bay Area, patent cases tend to be litigated for one of two reasons: market share or substantial damages.

Many of the patent cases we see are not brought for money. Rather, they are brought to enforce the seven-teen-year monopoly that a patent bestows. Young industries, such as medical technology or biotechnology, tend to invest in new products that are surrounded by patent protection. Because of the delay inherent in patent prosecution, a successful product enters the market, and draws competitors, before the patents protecting it issue. Once the patents issue, competitors are told to cease and desist — because the patent holder expects to reap greater profits through its own sales (to be reinvested in second and third generation R&D) than it could obtain through a stream of royalty payments. Frequently, a patent monopoly is the only protection a new entrant has against a larger, more efficient competitor.

The second motivation for patent suits is the more traditional search for damages. Lured by aggressive damage theories and a process inclined toward the patentee, plaintiffs believe that if they can get to the jury they can recover large verdicts, have them trebled, and recover their own attorneys' fees as well.

Whichever the motive, settling patent cases is extremely difficult. Most companies are unwilling to abandon accused products without a fight. Similarly, successful companies are generally unwilling to share their hard-earned profits with unknown "inventors."

This is, of course, fertile ground for trial lawyers. There is really nothing like rejecting a billion dollar settlement demand at a judicially-supervised settlement conference when you know that, if the jury finds the patent valid and infringed, the damages will be a billion dollars.

A second reason why patent cases often try is that, at least until very recently, many federal judges were unwilling or unable to devote sufficient time to master the complex records necessary to grant summary judgment motions. Because almost every substantive patent motion requires the court to examine not only the patent, but the full prosecution history, substantive motions tend to be large, time-consuming and technically complex. Faced with already overburdened dockets, and a contagious aversion to patent cases, many judges routinely found triable issues of fact that could only be resolved by juries.

Patent Cases Require the Best of Jury Skills

Because of the complexity of their subject matter, and the fact that most jurors are not born with an intuitive understanding of patent law, patent cases call upon the trial lawyer to develop to the maximum her abilities to simplify and to educate. In order to get a juror (and even a judge) to the point where she is willing to grapple with the issues and pit her own view against that of a patent examiner, it is necessary to communicate a general understanding of the technology at issue, to break out and simplify the issues of conflict, and to provide the fact finder with the tools necessary to render a decision. Given the time constraints that are frequently imposed, the ability to simplify becomes paramount.

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To accomplish these tasks in a courtroom setting without boring an audience to death requires the ability to choose and work with witnesses, to conduct examinations in a manner that can be readily understood by the public at large, and to use the new graphics technology to teach without pain — to interest people in the issues. Because of the technical sophistication of the parties, the amounts at issue, and the need to communicate complex technical information simply, patent cases tend to be the proving ground for the electronic teaching tools that are rapidly transforming the courtroom.

While patent law itself is a well defined body of law, its recent evolution has opened up numerous issues of first impression as the tectonic plates of patent law and traditional trial practice have come together. Those who wonder whatever happened to all those forensic economists who used to call themselves antitrust experts need only look in the IP departments of large firms. The Federal Circuit continues to lend a sympathetic ear to novel damage theories, and there is no shortage of experts willing to work to support them.

An interesting case in point is the interplay between the doctrine of willful infringement and the attorney-client privilege. Early on, the Federal Circuit made clear that the only sure-fire defense to the threat of a treble damage verdict was the ability to prove that the defendant had obtained a competent legal opinion of invalidity or non-infringement. In order to make that showing, however, defendants were required to waive the attorney-client privilege. This "patent law" defense immediately crashed upon the rules of privilege law, where the effects of a "voluntary" waiver can be catastrophic. Numerous trial court opinions in patent cases struck down attempts to limit such waivers in scope or time. A defendant who had chosen the patent lawyer who had previously given the legal opinion used as a defense to be her sole trial counsel found herself in an intolerable conflict.

When these issues began to bounce back to the Federal Circuit, the Court responded with a typically appellate suggestion: bifurcation. The Court "suggested" that trial courts bifurcate liability from damages. Thus the willfulness issue, and the attendant waiver, could be postponed to a time if and when damages had to be examined. This suggestion has met with mixed results in busy trial courts, who are hesitant to see every patent case become two cases. The experienced trial lawyer is in a better position to anticipate the trial court's concerns and argue in a practical way whether bifurcation will, on the facts of that case, lead to more efficient docket management.

Patent cases present a traditional set of interesting strategy issues on questions of venue, how many defendants should be named, whether or not to seek preliminary relief, etc. In addition, however, the interplay between the U.S. Patent Office and the courts presents strategic opportunities unique to patent cases. The U.S. Patent Office has a number of administrative procedures, such as interferences to determine priority of invention or reexaminations to consider the effect of prior art on

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ADR and Bankruptcy Cases: The Northern District Program

IN recent years, court systems and litigants have responded to a perceived increase in the expense and delay in business litigation by turning more frequently to alternative dispute resolution ("ADR") programs and techniques. This trend is apparent in bankruptcy matters as well. ADR solutions are being attempted in a wide range of bankruptcy matters, from large-case Chapter 11 plan formulation to lender non-dischargeability actions against individual consumer debtors.

Use by parties to bankruptcy disputes of ADR methods apart from those sponsored by the courts is also on the rise. For example, in the Chapter 11 case of Breuners Furniture, the final terms of a plan of reorganization were worked out with the assistance of a court-appointed mediator, Peter J. Benvenuti of Heller, Ehrman, White & McAuliffe in San Francisco.

Following several other bankruptcy courts nationwide, the Bankruptcy Court for the Northern District of California has inaugurated a formal ADR program. The program has now been in place for approximately a year. Experience under the program provides some information concerning the usefulness of ADR techniques in bankruptcy disputes.

The Bankruptcy Court Dispute Resolution Program ("BDRP") is described in the court's General Order No. 12, which took effect on July 1, 1994 ("G.O. 12"). In principle, ADR may be used for any type of controversy arising in a bankruptcy court context, whether in a contested matter, an adversary proceeding, or a contested plan confirmation. There are a few narrowly drawn exceptions not eligible for the BDRP such as, for example, compensation of trustees and examiners, employment and compensation of professionals and matters involving contempt or sanctions. See G.O. 12, ¶12.1.

The ADR neutrals in the BDRP are a panel of "Resolution Advocates" appointed by the court. The panel was deliberately not limited to attorneys, because some bankruptcy disputes might be resolved more effectively by persons with financial or business expertise. The panel is also diversified geographically, with members spread from Eureka to Monterey. Panel members serve without compensation for their time or expenses.

The initial panel for 1994-95 had 67 members. The roster of panel members, available from the Bankruptcy Court clerk, gives very brief sketches of each panelist's background. Interested parties can therefore review the roster to select a particularly appropriate panel member.

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ADR and Bankruptcy Cases: The Northern District Program

Typically, parties have the opportunity to agree upon a Resolution Advocate and an alternate. If the parties don't agree, or the judge otherwise deems it appropriate, the judge can designate a Resolution Advocate.

A bankruptcy matter is typically assigned to the BDRP upon the joint request of the parties. Participation in the BDRP has been voluntary, but a bankruptcy judge has the power, at the request of any party or on the judge's initiative, to designate any specific matter to the program. An order assigning a matter to the BDRP will specify the assigned Resolution Advocate and one alternate and specify any special instructions from the court.

Once a Resolution Advocate is appointed, the process moves forward much as in any other ADR setting. (Counsel should consult General Order 12 for the procedural details.) The parties submit written statements of the case, authoritative representatives are required to attend conferences, the discussions are confidential, and the rules of evidence do not apply.

The BDRP process, however, does *not* alter or toll any time limits or deadlines for any aspect of the pending dispute, including pleading or discovery deadlines or hearing dates, unless the court orders otherwise. G.O. 12, ¶5.2. Parties who seek a breather from pending deadlines to talk should seek the appropriate scheduling relief as part of the BDRP assignment order.

Other Routes to ADR in Bankruptcy Matters

General Order 12 provides that parties in a bankruptcy matter may customize ADR methods to fit their situation. G.O. 12, ¶ 5.1. The parties may always propose the use of a particular method of ADR which they think may prove helpful, and may suggest the scope and powers of the ADR neutral's assignment before appointment. Parties may also come into court with their own proposed ADR neutral; nothing requires AAA-type selection from a list provided by the court or others.

In the Breuners Chapter 11 case, the debtor had proposed a plan of reorganization which was unanimously opposed by the official creditors' committee. During the course of what promised to be an expensive confirmation fight, the matter was sent to mediation. With the assistance of the mediator in two all-day mediation sessions, agreement on consensual plan terms was reached a few days before the confirmation hearing, and the plan was confirmed. For a case of this size, the cost of the mediator's services, just over \$18,000, was modest in light of the outcome achieved.

Counsel should be aware that the increasing enthusiasm for ADR in the bankruptcy courts also means that occasionally bankruptcy judges in other parts of the country are sending matters to ADR even when the parties haven't asked. As permitted by the local rules of the Southern District of New York, the bankruptcy judge in the Macy's Chapter 11 case assigned the parties to a mediator without a request by the parties. See Bankr.

S.D.N.Y. General Order N-117, ¶1.1.

Preliminary Results

The BDRP is administered by a Bankruptcy Court judge designated by the chief judge. The designated judge receives administrative assistance from a Bankruptcy Court staff member, currently staff attorney Lynne M. Higgs. Ms. Higgs reports that, from July 1, 1994, to April 15, 1995, 74 matters were assigned to the BDRP. For concluded matters, the settlement rate was 62.5%.

Mediation was the ADR technique employed in more than half of the matters. Early neutral evaluation and settlement facilitation were the other two techniques most often used. The average BDRP conference lasted about four hours, with a range from one-half hour to eleven hours.

A wide variety of matters was referred to the BDRP. As expected, the largest number (twenty-nine) were nondischargeability cases. Case administration matters, such as objections to claims, numbered about twenty-three. The remaining twenty-two included very diverse matters, from toxic cleanup to partition of property.

Bankruptcy court sponsored ADR programs have been in place for some time in other districts around the country, including the Southern District of New York and the Southern District of California. Most recently, in February and March 1995, formal ADR programs have been adopted in California's Central District (G.O. 95-01) and Eastern District (G.O. 95-1). These new programs closely resemble the Northern District program.

Candidates for ADR in Bankruptcy Matters

A few types of bankruptcy disputes come readily to mind as candidates for ADR. When the amount at stake is moderate and the parties both recognize litigation expense as disproportionate to the amount in controversy, ADR may well make good sense. The BDRP, offering an uncompensated ADR neutral, may prove particularly attractive for such cases.

ADR may also be worth considering, just as outside bankruptcy, when one or more parties' positions have strong emotional components (often true in nondischargeability cases). A neutral participant could help focus on the objectively likely range of legal and/or economic outcomes. Reaching agreement may also be easier when the neutral participant offers a sounding board who is not also "the one who did this to us."

Parties might also simply be used to business ADR. Even though substantive bankruptcy law will probably make the negotiating leverage, and some other aspects, somewhat different, such "ADR-ready" parties should find it easy to use ADR in the bankruptcy setting.

In many larger or more substantial matters, it is unlikely that the parties will turn readily to ADR, primarily because they are likely to believe that they are capable of resolving their own issues, either at the negotiating table or in court. On the other hand, when the amount at stake is very substantial, the matter is complex, and negotiations have experienced difficulty or stalemate, ADR might be appropriate.

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validity, that can be pursued even after a patent has issued. Whether or not to invoke such procedures, when to invoke the procedures, and considering whether or not litigation is likely to be stayed in deference to a Patent Office proceeding are additional strategic questions that often require a close working relationship between the general trial lawyer and the registered patent attorney who will be conducting the administrative proceedings.

When one is fortunate enough to represent a client in patent litigation, one is exposed to all of this "legal" excitement, in addition to the usual fun of learning a new case, working with new technology and meeting the witnesses that one finds in most litigation matters.

Is There A Future for Patent Trial Lawyers?

In April, 1995, the Federal Circuit decided *Markman v. Westview Instruments, Inc.*, 34 U.S.P.Q.2d 1321 (1995), holding that issues involving the interpretation of patent claim language are issues of law that should be decided solely by the court. Since, in many cases, the question of infringement turns on the disputed meaning of a patent claim, the role of juries has been sharply circumscribed. Those who have been troubled by the increase in patent trials immediately began to cheer the dawning of a new era, where patent cases will mostly be resolved on summary judgment, and general trial practitioners will move on to false advertising cases, or some other new plaintiffs' fad. The cheering reached new heights in June 1995, when the U.S. Supreme Court agreed to review *American Airlines, Inc. v. Lockwood*, 33 U.S.P.Q. 2d 1406, cert. granted, 63 U.S.L.W. 3857 (No. 94-1660, June 6, 1995), in which a panel of the Federal Circuit had recently held that patent validity issues had to be tried to a jury.

In my view, it is a touch too early to begin the death march for patent trials. While it is true that *Markman* will change the dynamics of patent trials (my colleague, Don Chisum, filed the amicus brief in *Markman* that suggested the theoretical rationale ultimately adopted by the court), *Markman* does not change many of the factors that have led to the dramatic increase in patent litigation. Despite *Markman*, successful plaintiffs will continue to enforce monopolies and recover generous damages. Thus the stakes have not been reduced. Similarly, the educational skills of trial counsel will still be at a premium even though the audience will have greater experience. I personally expect to see an increase in separate court mini-trials, with greater use of technical and legal experts to try claim interpretation issues. Even in traditional summary judgment motions, there will be an increased use of graphics and filmed affidavits. Ironically, by encouraging more issue resolution in advance of trial, *Markman* may have made patent trials more manageable, thus allowing more of them to be tried.

For now, however, for young civil lawyers who seek courtroom expertise, intellectual property practice is one of the fastest routes to the podium.

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Whether such a complex dispute would be taken to the BDRP would implicate at least two concerns: Does the BDRP offer an ADR neutral with the sophisticated bankruptcy skills needed, and if so, could that ADR neutral reasonably be expected to take on such a dispute without compensation? The answers to these questions are probably yes and no. Among the panel Resolution Advocates, there are certainly some with the skill and sophisticated experience to handle matters of any likely degree of complexity. Such practitioners, however, will probably not be willing or able to take on a complex matter which could easily take many days without compensation. Custom-designed ADR, with appropriate compensation arrangements between the parties and the ADR neutral and approved by the bankruptcy judge, will probably be necessary for these matters.

ADR in bankruptcy matters is a relatively new arena, with increasing activity. The current Northern District program seems to be best suited to the resolution of smaller day-to-day disputes. As the Breuners and Macy's cases demonstrate, however, ADR programs have the flexibility to handle major operating cases. Practitioners, especially those handling disputes particularly well suited to ADR, would be well advised to acquaint themselves with ADR procedures in the Northern District of California and other courts in which they practice. As in other areas of the law, the use of ADR in bankruptcy matters can only be expected to grow.

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Practical Thoughts on Alternative Pricing

ing, the reasoning goes, and you eliminate the incentive to over-litigate.

As the managing partner of a good-sized law firm over the last few years, I have been consulted frequently on issues relating to alternative pricing. Assuming that it is here to stay, I have tried to put some of the concepts into a more comprehensible context for our lawyers, and I will try to do the same here. Alternative pricing is not rocket science. Following are a few practical and common-sense observations and suggestions for dealing with what appears to be the way we will conduct at least some of our business for a long time to come.

Alternative Pricing: What Is It?

The term "alternative fee" is used to describe so many things that it has almost lost all meaning. Speaking generally, it is used to describe any arrangement for billing professional services other than multiplying the billable hours worked on a matter by standard hourly rates.

The "alternative" appellation has been applied to many

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rate arrangements that law firms have been using for years and aren't very "alternative." For example, the "alternative" umbrella includes things like simple rate discounts (e.g., reducing a \$250 per hour rate to \$230, or offering a percentage reduction), volume discounts (e.g., 10% off standard rates for the first \$500,000 of work, 12% off the next \$500,000, etc.), discounts tied to prompt payment (e.g., 5% if invoices are paid in full within 30 days), and the "frequent flier" discount (usable only as a credit on future fees). Using "blended rates," or charging one rate for all lawyers, has also been around for some time. But none of these arrangements — which amount to nothing more than simple reductions in billing rates — are particularly "alternative."

True alternative pricing, to be appealing to corporate counsel, must address not only the question of rates, but the predictability of total fees. Predictability does not equate to a rate reduction alone. The biggest variable in litigation is usually time, which a rate reduction does not affect. Predictability requires some limitation on the total fees for any particular piece of litigation. That ordinarily means some form of a fixed fee or "not-to-exceed" figure. A fixed fee can be negotiated for part or all of a matter, or for an entire collection of matters. You can quote a fixed fee for a case evaluation, an investigation, a particular motion, some or all of discovery, trial, and/or appeal. "Task-based billing" is essentially heading toward fixed-fee pricing for pieces of litigation.

At our firm, we have experimented with other forms of alternative pricing that do not provide complete predictability but do provide incentives for promptly achieving a client's goals. If, for example, a client wants a case settled promptly, we may agree on a goal for a reasonable settlement range and then begin work on a "declining billing rate" basis. As time goes on, our billing rates drop; the longer the litigation lasts, the less we charge for each additional hour of work. We have an incentive to get the matter resolved quickly.

We have also experimented with modified contingencies on the plaintiff's side, where we start billing at our standard hourly rate, and at various levels our hourly rates begin to decline and our contingency interest increases. We have also explored "defense contingencies." Here, we agree with our client at the beginning of a case on what a good, fair, or poor result might be. We then discount our standard rates for the case until conclusion. If we produce a superior result with lower costs, we share in the upside.

There are no limits to the arrangements possible. You can create an arrangement that is most consistent with your client's goals and fair to you.

Experience shows that the demand for alternative pricing is inversely proportional to the amount at stake. In other words, if you do not want to have to compete in the alternative pricing arena, you had better have the good fortune and foresight to limit your practice to the highest-end, "bet-the-company" kinds of cases where the demand for alternative pricing is lowest. However, in time, even that work will become competitive enough that alternative pricing will become a factor in landing

it. Basically, it is in the area of generic and repetitive litigation with relatively low exposures that the demand for alternative pricing is greatest.

Not All That Complicated

For some reason, lawyers who can grasp the most sophisticated concepts in a case they are litigating often have a difficult time coming to grips with the mechanics of alternative pricing. They are inexplicably intimidated by the idea and seem to focus on the many ways a fixed-fee arrangement can go off the track.

Compared with the billable hour system, alternative pricing is a bit of a new world. However, there is no need to fear losing one's shirt. To begin with, clients really don't want that to happen. While clients are interested in more cost-effective and predictable means of pricing legal services, they also realize that driving their lawyers out of business will not, in the long run, help them. Accordingly, most alternative pricing arrangements can be constructed with safeguards to avoid the potential downside in the event of serious miscalculations. Provisions for renegotiation under specified circumstances (e.g., new pleadings materially change the scope of the matter) are the most common.

Developing a facility for alternative pricing requires, more than anything else, skill with budgeting litigation. Certainly, things can occur during litigation that are beyond your control, but most can be anticipated. If you budget carefully, and allow for some contingencies, you should not be afraid of fixed-fee arrangements. Once you develop a facility for budgeting and a reasonably reliable data base (formal or not) as to the usual time taken to perform certain functions, you can come up with good ballpark figures for alternative pricing proposals.

Many lawyers complain that they are handicapped in crafting alternative pricing proposals because they don't know their true costs. It would be nice if the true costs of providing legal services could be calculated readily and with precision, but for most law firms that day is a long way off. "Costing" legal services is surprisingly complex; many law firm consultants have worked at it for years with uncertain results. However, you do not need absolute certainty on the cost front before you can make a reasonably intelligent alternative pricing proposal. One way to check the reasonableness of a proposal is to use your profit margin. Most firms know what their profit margin is on an ongoing basis. A firm's overall profit margin may not precisely reflect the margin for work billed and collected at "standard rates" (which is probably a bit higher than the overall margin, because at most firms a good bit of work is done at below standard rates), but you can approximate within a reasonable range. Once you have carefully budgeted a given matter using your firm's standard hourly billing rates, and then added a contingency element, you can apply the approximate profit margin to calculate how low you can probably go without compromising your ability to earn some profit on that matter. As an example, assume your firm has an overall profit margin of 35%. Also assume that you have budgeted a piece of litigation — up to trial — at \$80,000. Because the opposition is known to over-litigate, you have added a 25% contingency to reach a total budget

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ZELA G. CLAIBORNE

On CONSTRUCTION

A NUMBER of states have code provisions which allow parties to use special masters or referees to assist with case management and resolution. See, for example, California Code of Civil Procedures §§ 638-9 and FRCP Rule 53. Special masters can serve a variety of very useful functions in handling and/or assisting in the resolution of a lawsuit. In fact, the use of a special master is one of the most flexible of the ADR tools available.

Management of Discovery

A special master can assist counsel with the efficient management of discovery. In large construction cases, a special master often orders the establishment of document depositories so that all parties can have free access to project documents. Also, a special master can hear discovery disputes promptly and, for example, order the production of documents that may have been inappropriately withheld by a party on privilege or other grounds.

Further, a special master can help counsel reach agreement on how to limit or even avoid lengthy written discovery. In addition, a special master can work with counsel to cut the cost of depositions by helping them reach agreement on which depositions are really necessary as well as on appropriate ways to limit areas of inquiry during depositions. Perhaps counsel can agree to take the depositions of only a limited number of key witnesses.

By assisting in the management of discovery, a special master can save the parties the cost of extensive law and motion activity. He or she also can save the parties money by working with counsel to limit discovery and by being available to enforce any discovery stipulations reached by counsel as the case moves forward.

Establishing Damages

As part of assisting with discovery management, a special master may be able to help the parties reach agreement on damage figures in an efficient fashion. For example, in a construction defect case, a special master may work with counsel to establish deadlines for a survey of the scope of the defects and subsequent repair proposals. Then, a special master can establish additional deadlines for obtaining contractor bids on the repair schemes proposed by both plaintiffs and defendants. Finally, the special master can meet with all counsel and party representatives to reach agreement on an acceptable repair at the lowest reasonable price. Thus, the parties may be able to reach agreement on a damage figure and then hold a mediation in order to reach agreement on amounts to be contributed by each party in settlement of the case. Meanwhile, the special master can work with the presiding judge to obtain a continuation of the trial date as needed to allow for resolution by ADR.

Mediation

At an appropriate stage of the litigation, it may be helpful to ask a special master to serve as a mediator or settlement judge. A special master can be particularly effective since, after managing discovery, he or she will have learned the facts of a complex case and, hopefully, will have some rapport with counsel and party representatives.

A case currently being handled in our San Francisco office provides a useful example. The case involves the construction of a large residential/commercial project in San Francisco. During construction, the cost of the project rose from \$83 million to approximately \$156 million. Many parties and attorneys are involved in the case and several parties claim millions of dollars in damages.

In order to manage the case as efficiently as possible, counsel have agreed that the case will proceed in three phases, including the mechanics' lien and fraud claims, claims for delay and cost overruns, and claims for damages due to construction defects. The case is singly assigned to a superior court judge, and the parties have employed two special masters to assist with case management.

The judge and the special masters have helped counsel reach agreement on case management issues and have helped facilitate discovery. Now that they are familiar with the case and with counsel, the special masters are involved in several weeks of mediation. Although it is unlikely that the entire case will be resolved in the mediation, it is hoped that the issues can be narrowed and that some parties can be settled out, leaving a case of a more manageable size to be tried later in the year.

Conclusion

A special master can serve a very flexible role in managing and resolving construction disputes. Particularly when counsel cannot reach agreement on how to proceed, a special master can serve as a "process designer" to assist counsel in finding an appropriate means for handling the matter. Ideally, a special master will have more time than a judge to devote to a case and can work with the assigned judge to manage the case effectively. A word of caution: when selecting a special master, counsel must be sure that the individual really has enough time to devote to the case. Otherwise, the process will only add to the cost of litigation and may not be more efficient than working through the court. When the parties to a complex case have widely varying agendas, a special master can provide the strong leadership needed for efficient case management. A special master can encourage counsel to reach agreements to streamline case management and can enforce those agreements so that the parties can reach resolution more quickly and inexpensively than would be possible in conventional litigation.



Zela G. Claiborne

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



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of \$100,000. You can be reasonably comfortable that you will not lose money and will make some profit if you propose handling that matter for a fixed fee somewhere above \$65,000. In our example, you probably wouldn't want to enter an agreement for a fixed fee below \$80,000 - \$90,000 (which allows a nice profit if the matter is not over-litigated, and a small one if it is). Any proposal you make should probably be above that figure if you fear that you have underestimated the time required. Applying your profit margin to your budgeted figures should give you some sense of how much room you have to move. If you handle the matter efficiently, you can improve your profitability.

When The Client Asks

It is unusual today to receive a request for a proposal where the client does not solicit the firm's proposal for an alternative pricing arrangement. Even if omitted from the request for proposal, the question invariably arises during the beauty contest or some other stage in the discussion. Given the popularity of alternative pricing with corporate counsel, failure to respond intelligently to a request for an alternative pricing proposal is an almost certain way to lose the work.

Any lawyer pursuing a piece of work should have a minimum of two alternative pricing proposals ready to discuss with the client. The proposals do not have to be overly sophisticated and oftentimes can remain little more than a concept until the client provides more concrete information about the scope of services required. It is obviously better to have given serious thought to alternative pricing before you submit your proposal or walk in the door for the beauty contest, rather than mumbling a few words about your willingness to consider any proposal the client might make and then shuffling away.

Gaining an Advantage

In the future, great amounts of time necessarily will be invested in the nonbillable exercise of structuring pricing arrangements for clients. You should view alternative pricing as a marketing opportunity. While potential clients are more likely to be swayed by past successes in similar matters, an intelligent approach to alternative pricing can set you apart from the crowd. If you have a well-crafted alternative pricing arrangement when meeting with a potential new client, you show that you are interested in providing efficient services consistent with the client's definition of success in the case (settlement, economic resolution, vindication of principle), and you will have a leg up on the competition.

Responses to client requests for proposals often have to be generated quickly, with a great deal of thinking being needed in a short period of time to develop alternative pricing strategies appropriate to the matter. It is therefore important that people knowledgeable about the concepts be readily available to assist in crafting new proposals as the need arises. Accordingly, it is a good idea to designate one or two lawyers in the firm as alternative pricing gurus who can work with your chief financial officer in creating new arrangements as neces-

sary. If your firm requires approval of non-standard fee arrangements, an expedited approval process for alternative pricing proposals should be created. There is also a great deal to be said for continuity with these arrangements, so that you are not tripping over yourself and taking inconsistent positions. Designated experts can develop a library of past proposals and create an institutional memory of approaches previously taken.

The marketplace is telling us something with its current fascination with alternative pricing. The trend, given the buyer's market for litigation services, seems to be toward the evolution of a new form of lawyer, with new sets of skills prized over others. It used to be that clients would accept a certain amount of inefficiency in handling a matter if the result was good. Today, clients are demanding both results and efficiency. The lawyers who will succeed will be those who view matters in the context of the client's business, and provide high-quality legal services efficiently. Along the way, they will also become the experts at alternative pricing.

*Mr. Krieg is managing partner in the firm of
Bronson, Bronson & McKinnon.*



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What I Wish All Lawyers Knew About Law & Motion

Quality Litigation

I and many other judges admire the intense advocate who argues honestly, strongly and effectively. Such lawyers create more work for us because they are aggressive and raise a lot of issues that must be decided properly, but they care about their profession and clients.

Far too many attorneys do not appear to care. Their papers are sloppy, their oral arguments are tentative and disorganized and they clearly do not like being lawyers or respect the process. When they lose, they blame everyone but themselves.

Litigation is a tough business and many very significant things are decided in court which permanently and significantly affect clients' lives. The adversarial system is hard on the participants, but both judges and attorneys have to care about quality and our professions to make it all work. Despite what has happened to the "business of law" recently, we cannot lose our idealism. What we do matters to a great many people.

An attorney told me once that every five years attorneys should be clients and judges should be lawyers so that we remember what it feels like and how important our jobs are to those for whom we work. That was not a bad idea; it would remind us that there are significant stakes riding on our work and the integrity with which we perform it.

*The Honorable William Cahill is a judge of the
San Francisco Superior Court.*



STEPHEN OROZA

On CREDITORS' RIGHTS

ONE of the most difficult problems which insolvency lawyers encounter is deciding, often under extreme time pressure, whether the situation faced by their client will be made better or worse by aggressive litigation action. All insolvency lawyers have been in situations where only an *ex parte* attachment or injunction prevented serious harm to their clients. Those same lawyers, however, have also seen potentially promising workout situations unravel because one or more parties took precipitous action, such as the attachment of crucial business assets, which was ultimately not beneficial even to the party who took it.

The problem is often made worse by the fact that insolvency lawyers are brought into the case very late. Accordingly, they might have little or no knowledge of the circumstances giving rise to the debtor's problems, the personal character of the "other side" or the financial and legal data upon which any sound strategic decisions must ultimately be premised. In such circumstances, where a prompt decision is required, there would seem to be little choice but to determine and act on the client's assessment of the situation.

For the reasons discussed below, however, basing a strategy on the client's judgment alone can have serious limitations. Clients are often hostage to misperceptions which arise quite naturally out of the relationship between a troubled company and its creditors. Insolvency lawyers can correct for these misperceptions, but only if they recognize their origins.

The managers of a failing business spend ever-increasing amounts of their time explaining to creditors why they are not being paid timely. They have less and less time to do the things that motivated them to go into business initially, activities they believe would eventually bail everyone out. In their effort to keep the business going, even otherwise honest managers often stop dealing forthrightly with creditors, an expedient they believe is forced upon them by circumstances.

For most people, dealing with these day-to-day realities is a stressful and dispiriting enterprise which ultimately results in a beleaguered "bunker" mentality. The debtor's managers genuinely begin to see their creditors as predators whose unreasonable demands have contributed to, if not caused, the failure of the business. This "fact" in turn justifies management's less than total candor with creditors.

A similar dynamic is at work on the creditor side of the equation. When creditors lose faith in the debtor's explanations and awaken to the gravity of the situation, they feel betrayed and exposed to criticism for having been "suckered" into passivity. They are therefore usually in a state of high anxiety and primed to demonstrate

their willingness to take "strong action."

Under these circumstances, creditors often "get tough" with the debtor and demand payments the debtor cannot make, lending credence to management's view of its creditors. They also demand information from the debtor about its assets, liabilities and business prospects, information which is vital to any potential workout. If they do not get it, they assume (sometimes rightly) that the debtor is hiding the information for improper reasons. The debtor believes (sometimes rightly) that creditors want the information only so that they can take legal action to dismember the debtor and thus do not provide it. Trust between the parties evaporates and both sides, believing they are perceiving the situation accurately, repeatedly reinforce the worst fears each has concerning the motivations of the other.

Insolvency lawyers often enter into this cheerful situation at about this point. Because of the circumstances described above, they are often under pressure to "get tough" with the other side and take some form of aggressive action. The job of the lawyer under these circumstances is to determine as quickly as possible whether his client will actually be benefitted by aggressive action or whether it would be better to promote an exchange of information which will allow the parties to explore a workout.

Rather than simply accede automatically to the client's wishes, it is often useful to convene an immediate face-to-face meeting between the principals and their attorneys. Counsel can inquire into the areas which are of concern to the adverse party, advise the adverse parties of his client's concerns and suggest reasonable means for addressing both. For example, if a debtor is concerned that information given to the creditor to evaluate a workout will be used against the debtor in pending litigation, counsel can suggest a procedure appropriately limiting the use of information obtained outside formal discovery.

Counsel can also take the opportunity to express some understanding of the situation in which his adversary finds himself, an approach which often helps promote fuller and more candid discussions. The adversary's reactions to such overtures, whether receptive or unreceptive, can provide invaluable insights into his basic character and reasonableness which are useful in planning strategy.

If the adverse party is receptive to reasonable requests which preserve the status quo and allow exploration of a workout, then workout possibilities can be fully explored. If the adverse party is unreceptive to reasonable requests, then counsel can proceed with whatever more aggressive action seems appropriate. It is almost always better, however, if the lawyer makes a first-hand assessment of the prospects for peace.

Mr. Oroza is a partner in the firm of Lillick & Charles.



Stephen Oroza



Letter from the President

I RECENTLY had an opportunity that I do not have nearly often enough these days. I went to dinner with three of our firm's younger lawyers with whom I happen to be working. Among the things we talked about is the fact that it used to be more fun, and more satisfying, to be a young lawyer. Certainly that is true in big firms, like Heller, Ehrman.

I am still a little young to be reminiscing about the good old days, but when I started practice, in 1967, thirty lawyers (as we then were) was a big firm. You knew everyone and most of their wives (Heller, Ehrman did not hire its first woman lawyer until 1968, and we were far from behind the times) and families. Even Sidney Ehrman, who then was in his 90's, had an idea of who I was.

Going out to dinner when you were working late was part of the ritual, like sitting around with David Balabanian or Mel Goldman in Lloyd Burke's courtroom on Friday morning waiting to see when he would show up for his 11 a.m. Law and Motion calendar. I always checked to see if someone had an important motion on his (no women judges, either) calendar. If so, I would hang around to watch people like Moses Lasky or Joe Alioto or Bob Raven. I often would drop by Judge Zirpoli's court just for the pleasure of watching him. Or I would spend an hour sitting in on a trial. Nobody in the firm encouraged me to do it, but certainly nobody objected. After all, it was one of the ways you learned — before all the big firms started having elaborate training programs for their young litigators.

Being a young trial lawyer these days is a job. It may still pay relatively well and the cases may be interesting (assuming you can get close enough — or step back far enough from your little corner of them — to see the whole picture). But it's not the same as it was. And lots of people and lots of things are responsible; and, surely, some of this is just nostalgia. But there are opinion polls and statistics out there to say that not all of it is — as if we needed those things to tell us.

So, is there anything to be done? We adopted Guidelines at ABTL about being courteous (because we no longer could rely on the "family" to teach it). It's not as easy to have Guidelines about making the practice of law fun, or reestablishing a sense that the practice of law is not, in fact, just a business — despite everything our clients and Steve Brill keep trying to tell us.

Maybe I'm just flailing away at the tide, but I think there are a few things we can do. Certainly, we can provide more opportunities for young lawyers to learn by watching. Explain to your client that it will not be charged for the extra lawyer sitting with you in court or

at a deposition. Encourage young lawyers to go out to court and observe. Try to pass on a sense of history and continuity — about your firm, the practice of law in the Bay Area or the legal profession generally.

Don't give in to the temptation to treat law as just a business. That isn't the way it was and it doesn't have to be that way now, either. Doing an excellent job is rewarding for its own sake. So is talking about exciting and difficult legal issues. Schmooze a little more.

Remind your young lawyers (and yourself, if need be) about the role we play in upholding the rule of law — something that is much under siege these days. San Francisco and the Bay Area has a unique history of public service by its lawyers. Encouraging young lawyers to take part in that tradition is a fine way to make them feel good about the career they have chosen.

And, of course, there's always dinner.

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



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