

abtl REPORT

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The Accidental Appellor

MANY attorneys venture into appellate practice infrequently. It is a rare opportunity for a stimulating dialectic with three superior judicial intellects. It is an opportunity to contribute to society's enduring system of dispute resolution. It is an opportunity to pull your case out of the porcelain fixture, jurisprudentially speaking. Numerous seminars and treatises ably address the technical requirements of appeals. The purpose of this article is to reveal some of the more subtle, unacademic aspects of appellate practice, so that you can avoid those telling little faux pas that may mark you as an appellate neophyte.

Federal or State: You Say Potato, I Say...

The federal and state appellate systems differ in certain significant ways. For instance, in federal court, the winners below are not respondents, they are appellees. (There is a specific but heretofore undiscovered learning disability that makes it difficult for many of us to make the

ee/-or calculation. If you are among those who must

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A Mediator's Thoughts on How To Mediate More Effectively

I N a mediation, the parties and their counsel attempt to negotiate a voluntary agreement to settle an existing dispute. Professor Roger Fisher, Director of the Harvard Negotiation Project, defines a "good outcome" of a mediation as either:

1. no agreement, or
2. an agreement, which contains the following elements:
 - a. the result is better for each party than the alternative of continuing the dispute,
 - b. the result satisfies the substantive interests of the various parties (however defined), at least acceptably,
 - c. the agreement embodies an elegant solution that is the best among the options considered,
 - d. the process was credible: no participant feels taken advantage of, and
 - e. any commitments for future action are realistic and legally enforceable.

Although some would view this as a rather lofty wish list, experience has shown that these goals are achievable. Keeping these elements in mind as you prepare for and participate in the mediation can increase the chances that the result will be favorable to your client.

Prepare to Negotiate

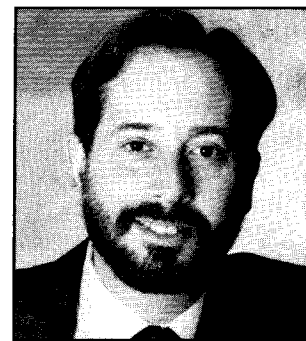
Mediation is a powerful tool, which, if successful (as more than 80% are), will lead to a settlement. Thus, the result of a mediation can be as significant as the conclusion of a trial or the grant of a motion for summary judgment. Mediation, therefore, warrants a comparable level of preparation.

Preparing to mediate, however, differs from trial prepa-

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How To Mediate More Effectively

ration in a few key ways. First, you are preparing to *negotiate*, to attempt to persuade the other side of the superiority of your case and your solution. Second, mediation requires that all parties agree to a particular settlement. The proposed agreement must, at a minimum, satisfy certain fundamental interests of the opposing parties – whether purely financial (e.g., the net settlement amount), business-related (e.g., the retention of certain valuable contracts) or emotional (e.g., the need for an apology or some recognition of fault by the other party). The art of mediating effectively includes not only fine advocacy, but the ability to craft winning solutions that are acceptable to opposing parties. Some would say that this is the essence of good lawyering.

Assess The Case From Your Adversary's Point of View

To fully prepare for mediation, one needs to gather as much information as possible about the perspectives of opposing clients and counsel. Some of the most effective mediative presentations that I have witnessed discuss the other side's views and respond to them before making an offer or proposal for settlement.

The following is a checklist of questions to consider:

1. Who on the other side is the key decisionmaker?
2. Is there someone on your side who could best communicate with that person?
3. Why has your opponent chosen mediation?
4. How do they view the case? If you believe there to be important misconceptions on their part, how can the mediation serve to educate them (e.g., with expert presentations)?
5. What financial, business or personal interests must be met for there to be an agreement?
6. Are there particular issues or impediments to settlement that need to be addressed before an agreement can be reached?

Make Sure that All Necessary Decisionmakers Will Be Present

For a mediation to conclude as efficiently as possible, all necessary decisionmakers should be present to hear the presentations and proposals, evaluate offers and demands and formulate responses. Having important decisionmakers on telephone standby is extremely inefficient and can prevent the parties from reaching closure. In a recent mediation of a wrongful death claim, the parties agreed that the insurer for the defendant located on the east coast – a critical party – could participate by telephone. The mediation proceeded expeditiously (on the west coast). As sometimes occurs in mediation, the defendant indicated that it would not increase its offer until the plaintiff reduced its demand below a certain dollar figure. This was done to communicate to the plaintiff the defendant's view of the range in which the case could settle. It was also done to stop the symmetrical movement toward the mid-point between the last offer and demand. After much deliberation, the plaintiff acceded to the defendant's request and

reduced its demand accordingly.

Unfortunately and unbeknownst to the parties at the mediation, the defendant's decisionmaker in the east was no longer reachable (it being 6:00 p.m. there) and the negotiations ground to a halt. With the defense unable to increase its offer, all parties were extremely frustrated. The plaintiff felt betrayed, questioned the credibility of the process and reconsidered its reduced demand. Although the case settled several days later, a lot of unnecessary time was spent "smoothing over" the effect of that unfortunate turn of events and bringing the parties back into the negotiation.

Prepare Important Contractual Language in Advance

Where it is likely that specific contractual language will be necessary to settle a case, it can be extremely helpful to prepare that language in draft form and introduce it at the appropriate time in the mediation. For example, agreeing on the scope of a release can be one of the most difficult parts of settling a complex case, so don't wait until the end of the mediation to draft and present the other side with your proposed language.

The scope of release and indemnity provisions are often raised at the tail end of lengthy negotiations, when the parties believe that a settlement in principle has been reached. Beyond the disappointment and inconvenience of returning to the bargaining table to negotiate this significant and often emotionally-charged term, introducing the release at the end of a negotiation can severely jeopardize the settlement. It can cause the parties to backtrack in their negotiating positions and lead to renegotiation of previously "settled" issues in exchange for the requested release. At worst, it can terminate settlement discussions after hours, perhaps days, of negotiation.

For example, in a recent mediation, the parties spent two days negotiating the financial aspects of a settlement. The defendant's request for an indemnity at the end of the second day of negotiation was met with cries of "we never contemplated indemnifying you for this; we have been negotiating over a release, not an indemnity." The request for an indemnity sent the negotiations into turmoil with the parties accusing one another of bad faith bargaining. Although an agreement was ultimately reached, it took weeks of additional discussion. Had the indemnity been raised earlier as part of the defendant's "substantive" settlement proposals, the plaintiffs could have evaluated it in the context of the other terms. This would also have avoided the inefficiencies in reaching closure and the breakdown of communication that resulted from the perception that a new term was raised at the end of the negotiating session.

By contrast, in another recent mediation, the scope of the release and its settlement value were negotiated throughout the mediation. In that insurance coverage dispute, the insured offered to settle its claims against various carriers for different amounts depending on the breadth of releases provided. The inclusion of the release as a substantive deal point throughout the negotiation provided an analytical framework for the discussions and avoided the surprise of injecting a new term at the eleventh hour.

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How To Mediate More Effectively Opening Presentations Should be Directed to the Opposing Parties

Most mediations begin with a presentation by each party representative that lays out that party's view of the case and proposal for resolving it, followed by a discussion among counsel, clients and the mediator. Opening presentations and the discussions that follow are important for the simple reason that, in many cases, they constitute the first time that clients and counsel — for both sides — will have met for the sole purpose of discussing settlement. Indeed, even in the most heavily litigated cases, these presentations can be the first time that the clients hear a cogent presentation of the other side's case. The presentations can educate all participants in a straightforward, credible and nonconfrontational way.

The tone and content of the presentations are also important. The most effective presentations are made in a reasoned, business-like manner, without unnecessary posturing and threats. Threatening words only detract from the positive content of the presentation, alienate the other side and decrease their willingness to consider the proposal being made. Further, the presentation — which should be delivered in what we refer to as the mediation tone — should explicitly or implicitly recognize the substantive interests of the opposition and be directed to the decisionmakers on the other side.

Consider Bringing Experts

It is often helpful to include persons with particular subject matter expertise in the mediation, either as presenters themselves or as support in the negotiations. This is becoming a more common practice in larger, more complex cases. In environmental cases, for example, the consultants who investigated the contamination and authored the remediation plan can be helpful in presenting one's scientific case or responding to arguments made by the other side. Similarly, in a recent insurance matter, it was very helpful to have the in-house psychologist explain a company's policies in evaluating and administering claims for psychological injuries. In contrast, in a real estate matter, it was an *impediment* to settlement that neither party brought along its expert appraiser who performed analyses at issue in the mediation. Finally, where the size and complexity of a case justifies it, it is often very helpful to hire a neutral expert to assist the mediator in understanding, and testing, the strengths and weaknesses of the parties' positions.

First Offers or Demands Must Be Justifiable

The first offer or demand in a mediation should be justified by the facts and law of the case and consistent with the negotiation history, if any, among the parties. Unreasonable opening offers or demands can doom the mediation from the start. For example, in a recent personal injury case, the plaintiff made a settlement demand of \$75,000 before the mediation. Hearing nothing from the defendant, he made a statutory offer to compromise, under C.C.P. section 998, at a slightly higher amount. At the beginning of the mediation, the defendant offered \$25,000 (in addition to \$10,000 already paid for defendant's medical treatment) as its opening offer.

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The Ten Most Frequent Errors *in Litigating Business Damages*

E**RROR #1** Using the "chronological sequence" method to depose an expert.

Most business litigators use the following "chronological sequence" to depose an expert: 1) the resume, 2) the assignment, 3) documents provided, 4) conversations with counsel, client, and others, 5) analyses done, 6) opinions, 7) exhibits for trial, and 8) further work planned before trial. Throughout this process, the expert can refresh his memory of the case and his analysis and decide how to tailor his opinions at the end to match what counsel has revealed in his questions. Most importantly, the expert can figure out how to finesse the fact that he still has not received some important information, still has work to do, may change his opinions, and may have entirely different exhibits at trial. The big fight between counsel as to a) whether the witness was adequately prepared for the deposition, b) whether counsel can continue the deposition, and c) whether opposing counsel has to provide revised exhibits *takes place at the end of the deposition when everyone is ready to leave the room.* The lawyer appears to have had a "meaningful deposition." The witness was paid at the start. So how much leverage is left?

The following "pre-emptive fences approach" forces the expert to reveal himself and make choices earlier in the deposition: 1) What exhibits will you use at trial. 2) What assignment were you given? 3) Is there any part of that assignment that you have not completed? 4) Will doing that work change these exhibits? 5) What changes? 6) When can we continue your deposition? 7) What are the areas in which you will be offering opinions, 8) Only those areas? 9) No opinions about __? 10) What is the basis for __ opinion? 11) What documents, conversations, meetings and reference materials support that opinion? 12) What parts of your education, work experience, publications, etc. qualify you to offer that opinion?

This approach forces the expert (and opposing counsel) to make critical decisions early in the deposition. The deposing lawyer can have his checkbook out while he is asking the first few crucial questions. If he doesn't like the answers, he can declare that the witness was not ready for the deposition and reschedule it (and payment) for a later date when the witness promises to have all his work and exhibits completed.

Error #2 Not hiring an economic damages witness early enough to assist in discovery.

A typical disaster scenario. The damages expert gets hired two days before the deadline for expert disclosure.



James Plummer

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Litigating Business Damages

A pile of documents and depositions arrive at the expert's office a week later. When the expert calls the litigator to ask for key data that was not in the pile, the litigator says "It looks like we never asked for that in the document request or at the depositions. Oh, by the way, they want to take your deposition next week." The expert must do a damages analysis that makes assumptions about key facts and then alter those assumptions depending on trial testimony. This often results in poorer analysis and testimony and increases expert costs by a factor of 2 or 3.

The damages expert can avoid this problem by helping to word interrogatories, document requests and expert witness disclosures. In addition, many damage experts know the styles of opposing litigators and damage experts and can predict their damage approaches. Damage experts can also craft deposition scripts for percipient and expert witnesses.

Error #3 Not knowing how to deal correctly with issues of diminution in business value.

If the plaintiff business has been "destroyed" or greatly diminished before trial, it is important to appraise what the fair market value would have been. Although it is possible to assume that the firm would have grown beyond that date, this tactic ordinarily backfires because the jury regards it as

speculative and overreaching. (See Plummer, "Is the Value of a Firm the Upper Limit on Future Lost Profits in Business Litigation?" *Litigation Economics Digest*, fall 1995.)

When the plaintiff firm has failed before trial, defense counsel sometimes try to avoid measuring lost profits separately by having an expert value the plaintiff firm immediately prior to the alleged wrong and asserting that this value includes any profits that would have been earned thereafter. This is incorrect because a) it denies the plaintiff lost profits between the alleged wrong and the trial, especially the period prior to the failure of the firm, and b) it requires the appraiser to "put on blinders" as to events between the alleged wrong and the trial, even though the law allows such events to be considered by a jury. Apart from the technical errors, this approach makes the defense look mean spirited and overreaching.

Error #4 Not taking into account the fact that the plaintiff is an owner-operated corporation.

Suppose an owner-operated corporation has been damaged so much that it fails before trial. The damages will consist of lost profits prior to trial, plus what the fair market value of the firm would have been on the trial date but for the wrongful acts. However, there is a problem here. The lost profits before trial include the compensation and profits of the owner. However, the estimate of the fair market value of the firm on the trial date is based on profit levels net of the compensation of the

owner-operator.

An attorney drafting a complaint for such a corporation needs to consider whether to add the owner as a plaintiff. If he does, he may increase that individual's exposure to an award of attorney fees or a cross-complaint. On the other hand, if the owner is added as a plaintiff, he can claim lost personal income extending beyond the date of trial. This discounted value of future lost earnings can be estimated in a similar manner as personal injury claims (with offsetting alternative income).

The alternative tactic is not to list the individual as a plaintiff, but claim damages for the business beyond the trial date. Then the individual's compensation losses are part of the business' future lost profits. However, the discount rates for future lost profits may be considerably higher than those used for personal lost earnings. More importantly, it may seem less credible to claim lost profits beyond the trial date for a failed business.

If the owner is not a plaintiff, defense counsel may seek to reduce the company's claim for lost profits by the amount of owner compensation. If the owner is a plaintiff, defense counsel may also claim attorney fees or file a cross-complaint against the individual as well as the corporation (which may be judgment proof).

Error #5 Believing that all CPAs are qualified to offer lost profits or business appraisal testimony.

Only about 6 out of every 1,000 CPAs is a member of either the American Society of Appraisers or the Institute of Business Appraisers. Testimony on lost profits is not nearly as treacherous as testimony on business appraisal, and does not require as much technical knowledge, so perhaps 60 of every 1,000 CPAs would be qualified to do that. Those are still very lousy odds.

Some lawyers simply ask a local tax CPA: "Have you testified before?" When the CPA answers "Yes," they feel very comforted. They shouldn't be. Most of these local tax CPAs have testified only in divorce cases or in very small business disputes.

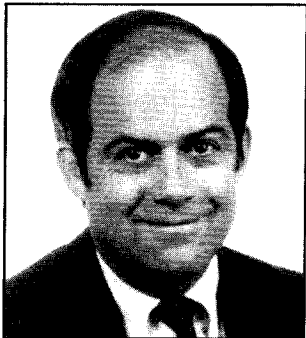
Some lawyers consider only whether the CPA would "qualify in court." Unlike federal courts, most California state courts use no formal qualification procedure for experts, unless the other side objects (which rarely succeeds). So, of course the CPA would "qualify." The real issue is how they will stand up on unfamiliar ground. Local tax CPAs are particularly at sea when they have to deal with exotic litigation situations, like Section 2000 business appraisals, high tech startups, valuation of intellectual property, or valuation of minority interests.

In lost profits cases, the most important issue is not how to calculate lost profits from lost revenues. The most important and difficult issue is "What would the level of revenue have been but for the alleged wrong?" That requires forecasting, a task that CPAs on the other hand are not only untrained to do, but trained to avoid. Economists, on the other hand, are specifically trained to do forecasting, but they can get too creative and aggressive.

Error #6 Not knowing when and how to deal with "unjust enrichment."

A claim for unjust enrichment, can be made in causes of action for fraud, constructive fraud, duress, conversion, mistake, or theft of trade secrets. Many business

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Litigating Business Damages

complaints can be written to include these causes of action. Claiming unjust enrichment does not ordinarily bar claiming lost profits as well in these or other causes of action.

Because the case law on unjust enrichment (formally a subset of "restitution," rather than "damages") is much thinner than on lost profits, many litigators are unfamiliar with the concept and reluctant to use it. However, precisely because the concept is not well known to many litigators, it can throw the other side off balance. An even smaller percentage of damages experts have experience with unjust enrichment, even though it is often easier to measure than lost profits.

Error #7 Confusing Incremental Lost Profit Margin with Gross or Net Profit Margin.

Where the wrongful act has caused a nonfatal loss of revenue, the plaintiff's expert frequently argues that lost profits should be measured by multiplying the amount of lost revenue by the historical *Gross Profit Margin* (gross profit as a % of revenue), while the defendant's expert argues that lost profits should be measured by multiplying the lost revenue by the historical *Net Profit Margin* (gross profit minus overhead, all as a % of revenue). This dispute can devolve into a fruitless search for accounting definitions. Actually, it is rare for either the Gross Profit Margin or the Net Profit Margin to be appropriate for measuring lost profits.

The legal standard is to measure the *change in net profits* (before taxes) that resulted from the alleged wrong. However, that is not done by use of the Net Profit Margin, which is simply the *average* ratio of the net profit to revenue for a given period. In spite of the word "margin," there is nothing "marginal" about a Net Profit Margin. What is needed to measure the *change* in net profits is the *Incremental Lost Profit Margin*, which measures how much net profits will change as a result of a *change* in revenue. This is the most important single concept in lost profits analysis. (See Plummer & McGowin, "Key Issues in Measuring Lost Profits, *Journal of Forensic Economics*, 1993.)

Error #8 Not having a separate "industry expert" to work with the damages expert.

In many smaller business cases, the most economical approach is for the damages expert to "get up to speed on the industry" and do double duty. For larger litigation, especially for exotic industries, this is too much of a gamble. A damage expert can help find a good industry expert by calling trade associations, trade journals, or consulting firms serving a given industry. Litigators worry that opposing counsel can then make the damages expert look as though he is a member of the litigation team instead of an independent expert. In our experience, however, this never happens.

The damages expert, who is usually more experienced in litigation, can help the industry expert get ready for issues like mitigation of damages and whether other factors could have decreased revenue and profits.

Some litigators want to erect "Chinese walls" between their experts and have all communications go through

counsel. If many "consultants" are hired and only a few will actually testify, this may be a good idea before the list of witnesses is finalized. In most business litigation, however, it is a very bad idea to keep the expert witnesses isolated from one another. They can waste a lot of time and money in doing inconsistent analyses. More importantly, they cannot brainstorm with one another. Attempting to keep the experts isolated usually arises from the litigator's inexperience or a "control freak" mentality that does not serve the client's interests.

Error #9 Hiring the wrong real estate appraiser or allowing inconsistencies between the appraisal and damages testimonies.

Many litigators do not know how to shop for real estate appraisal witnesses. Get an appraiser who is familiar with a particular real estate market. The appraiser should have ASA (American Society of Appraisers) or MAI (Member of Appraisal Institute) after their name. They should have a college education. (Many older MAIs do not.) Ask for lawyer references from similar cases. Look them up in *Trials Digest* or in *Jury Verdicts Weekly*. Conduct a mock question and answer session.

In most real estate or environmental litigation, there are long periods in the future involved — e.g., the time necessary to clean up a site. The damages expert will be using a discount rate to convert future cash flows to present value. The *discount rate* used by the damages expert is quite different from the *capitalization rate* used by the real estate appraiser. If the real estate appraiser has modern training, he will recognize that, *for litigation*, he must use market-derived cap rates for appraisal, and not expose himself by constructing a "build up cap rate" (which adds up elements of real return on investment, expected inflation and "risk premium"). If the appraiser does not have modern training, he will not be able to explain that the capitalization rate will ordinarily be lower than the discount rate by the annual rate of expected growth in net income for similar properties in that market.

Error #10 Not having damage experts familiar with business failure rates.

Everyone has heard the statistic that 75% of new business fail within five years. Defense counsel often take this pot-shot on cross-examination of plaintiff's expert, but it can be dangerous. Failure rates for smaller businesses go down dramatically with the number of employees, and years in business and with whether they ever turned a profit. For larger businesses, statistical studies show that the risk of failure increases as certain key financial ratios get weaker. For startup high tech firms, there are dramatic differences in risk as firms move through the stages of new venture development.

A defense counsel not familiar with these subtleties can see the potshot backfire. A sophisticated damages expert can explain to you (and later the judge or jury) how these nuances affect your case.

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The Accidental Appellor

draw a complicated diagram to figure out who a subrogee is, do not practice appeals in the federal system. Of course, for consistency and symmetry, the loser in federal court should be the "appellor," but the preferred term is still "appellant.")

The federal system uses Blue Book citation form. The state courts have made up their own system that has kind of a Zen approach to commas and dates. Also, in state court, case citations are parenthesized; in federal, they are naked. In fact, the state system is just more colorful, literally. In state court, depending on your appellate vehicle of choice, your brief may be any one of eight festive hues, ranging from a lovely pistachio to a classic alabaster. (C.R.C. 44) In federal court your brief will generally be red or blue. (F.R.A.P. 32(a))

The state appellate jurists are "justices." Not so in federal court. As members of the federal appellate bar are wont to say, "There is no 'justice' in the federal court." They are "judges." (That this passes for humor among appellate attorneys should give you pause.)

One of the wackiest differences between the two systems is the choice of court names. The state system implies that appeals are so special and deserving of undivided attention that the court only considers them one at a time. It is the "Court of Appeal." In an apparent attempt to reflect how truly busy it is, the federal system has a "Court of [Many, Many] Appeals."

Most important, while the state system generally affords 60 days within which to file a notice of appeal (C.R.C. 2(a)), the federal system generally allows only 30 days (F.R.A.P. 4(a)).

Before You Get Too Far

Make sure the appealed judgment or order is appealable. Although there is a certain logic to the "single final judgment" rule, its numerous exceptions are not entirely obvious. For instance, the following orders are immediately appealable in state court: granting a motion to quash service (C.C.P. § 904.1(a)(3)); granting a motion to stay or dismiss because of inconvenient forum (C.C.P. § 904.1(a)(3)); granting or dissolving an injunction (C.C.P. § 904.1(a)(6)); granting a motion for new trial (C.C.P. § 904.1(a)(4)); denying a motion for JNOV (C.C.P. § 904.1(a)(4)); and certain orders made after appealable final judgments (C.C.P. § 904.1(a)(2)).

The following orders are not immediately appealable: sustaining demurrers, *Mounger v. Gates*, 193 Cal.App.3d 1248, 1254 (1987); denying judgment on the pleadings, *Fraser-Yamor Agency, Inc. v. County of Del Norte*, 68 Cal.App.3d 201, 207 (1977); granting or denying summary adjudication or denying summary judgment (C.C.P. § 437c(1)); or denying a motion for a new trial, *Leaf v. City of San Mateo*, 150 Cal.App.3d 1184, 1187, n.2 (1984). In exceptional circumstances, review by petition for a writ may be warranted. Otherwise, appellate review of these orders must await entry of a judgment (or, in some circumstances, order of dismissal, see C.C.P. § 581(d)).

In federal court, there are fewer statutory exceptions to the "final judgment" rule. However, a nonappealable

ruling can be, upon a party's application, certified by the district court for immediate appeal. The Court of Appeals then has discretion to accept or reject the certified ruling. (28 U.S.C. § 1292(b).)

The Record

Appealed judgments and orders are presumed to be correct, and the appellant must overcome the presumption by showing error demonstrated in the record. Because the court generally will not consider anything not included in the record on appeal, designation of an adequate record is essential. The record typically consists of the reporter's transcript, the clerk's transcript, and trial exhibits.

In state court, the appellant must file (in the trial court) a notice to prepare the reporter's transcript within ten days of filing its notice of appeal. (C.R.C. 4(a).) In the Ninth Circuit, the appellant must notify the appellee of what proceedings he intends to designate within ten days of filing the notice of appeal (Cir. R. 10-3.1(a)), and then, within 30 days of filing the notice of appeal, must order them. (Cir. R. 10-3.1(c).)

The clerk's transcript consists of documents that have been filed or lodged in the trial court. In state court, the designation of its contents must also be filed in the superior court within 10 days of the filing of the notice of appeal. (C.R.C. 5(a).) Those of us who chose law because it did not involve heavy lifting are sometimes surprised at the size of the clerk's transcript: there is a direct relationship between the number of documents you designate and the bulk of the record.

However, the state system now allows, and the federal system requires, certain methods of do-it-yourself record preparation that offer numerous opportunities for fun: a "joint appendix" in state court (C.R.C. 5.1), or the "excerpts of record" in federal court (Cir. R. 30-1). When assembling your own record, take care to use clean copies. A negative effect may be created by comments in the margin such as "What a dolt this judge is!" or "Yikes! They're right. We should settle this case NOW." Also, do not include only those documents that support your own arguments. The record must include certain documents, such as the appealed judgment and the notice of appeal (C.R.C. 5.1(b)(1), Cir. R. 30-1.2(a)), and should include all documents, including those to be relied on by the respondent or appellee, that are necessary to decide the issues (C.R.C. 5.1(b)(2), Cir. R. 30-1.2(a)). In federal court, however, briefs are not generally supposed to be included (Cir. R. 30-1.3).

(Very) Brief Writing

There are numerous good seminars on effective brief writing, so detailed review is not necessary here. However, a few postulates do bear reiteration. They all fall generally into the "Less Is More" category.

Do not use Latin. Also, do not use words like "perfidious," "chimera," or "quixotic." The only purpose of words like these is for the GRE and LSAT; they were invented solely for test-taking purposes and were never intended to be used. They rarely appear in print and have never once been used in actual conversation. In fact, a good rule of thumb is do not use any word worth

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CHARLES R. RICE

On SECURITIES

THE Senate and the House have each passed bills to reform securities litigation. If the differences between these bills can be reconciled, which seems likely as we go to press, Congress will soon pass the most significant securities legislation in decades. The final bill should help discourage bad suits, but some provisions may also hinder good ones.

The Case for Reform

Unfortunately the public debate over securities litigation has generated more heat than light. The usual suspects have weighed in on both sides, but their arguments consist largely of caricatures and anecdotes.

There seems to be a broad consensus, however, that something must be done about "strike suits," *i.e.*, meritless suits that are filed when a company's stock price falls after its earnings or products do less well than expected. Defendants complain that they must pay large settlements to avoid expensive litigation.

Discouraging Strike Suits

The courts have recently been trying to deal with the problem of "strike suits." As SEC Chairman Arthur Levitt has noted, federal courts are now dismissing securities cases on the pleadings more frequently. District courts are granting more motions to dismiss such cases by (1) ruling as a matter of law on issues like falsity, scienter, materiality, inquiry notice and even due diligence; (2) considering indisputably authentic documents, like a prospectus, that are "outside the pleadings"; and (3) refusing to accept conclusory allegations as true.

The pending bills will help further discourage "strike suits." Both bills require complaints to specify each misleading statement and the reasons why it is misleading. Moreover, both bills require the plaintiff to plead specific facts showing each defendant's *scienter*. Both bills would also stay almost all discovery until motions to dismiss are decided.

Each bill also contains a watered-down "losers pay" provision that should discourage cynical suits. The House bill requires the court to order the losing party to pay the winner's legal expenses if, among other things, the loser's position was not "substantially justified." The Senate bill only requires the court to award attorneys' fees if it finds a Rule 11 violation.

"Safe Harbor" for Projections

Some companies, especially high-tech companies with volatile stock, have been unfairly sued for fraud just because their predictions turn out to be wrong. The House bill establishes a "safe harbor" (under the Securities Exchange Act of 1934 only) for "forward-looking" state-

ments that explicitly warn that they "may not be realized." The Senate bill extends the "safe harbor" to the Securities Act of 1933 but adds a number of exceptions.

Here, Congress may be going too far. The SEC Chairman has warned that this provision would protect even willful fraud. Moreover, most circuits have already created a more limited "safe harbor" for predictions. Under the "bespeaks caution" doctrine, a projection is not misleading, as a matter of law, if it is accompanied by adequate cautionary language and specific warnings of the relevant risks. Investors would be better served if Congress simply codified this doctrine, which requires more noticeable and meaningful disclaimers than do the pending bills, and made the courts decide the issue before allowing discovery.

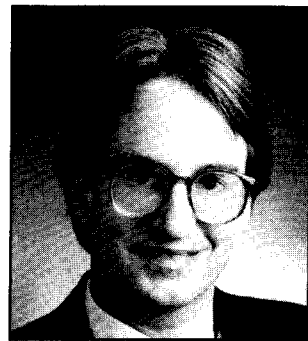
Tilting the Playing Field

Although most provisions of the bills are aimed at *meritless* suits, other provisions seem to impair *all* securities suits. For example, the House bill requires plaintiffs and their counsel, but not defendants, to post a bond to cover a possible attorneys' fees award.

Another provision would limit recoveries in even meritorious cases. Under the House bill, defendants found guilty of reckless, but not intentional, wrongdoing would be liable only for their "proportionate share," based on their respective comparative fault, of plaintiffs' damages. The Senate bill is similar but increases the liability of a reckless defendant if other defendants can't pay their own proportionate shares of the damages. Such reckless defendants would be liable to "small" investors (those with net worths of less than \$200,000, whose damages are more than 10% of their net worth) for all damages that cannot be recovered from the other defendants. For other investors, if some defendants are judgment-proof, reckless defendants would be liable under the Senate bill for only up to 150% of their own proportionate shares in order to make up the shortfall. Thus, both bills abolish the principle of joint and several liability when a defendant is "only" reckless. As a result, if any defendants are insolvent, the victims of securities fraud, rather than the reckless participants, may bear some of the loss.

The most culpable wrongdoer in a securities fraud (*e.g.*, Charles Keating) is often wholly or partially judgment-proof, so this provision would reduce recoveries even when plaintiffs prove their case. By one estimate, the plaintiffs in the Lincoln Savings case would have recovered about \$60 million less under this provision.

Securities litigation reform must balance the need to curb abusive suits against the need to protect investors. Some changes should be made, but Congress must be careful not to tilt the field against valid claims.



Charles R. Rice

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



The Accidental Appellor

more than 20 points on a Scrabble board.

Edit, edit, edit. If the court is tempted to squeeze lemon juice over your brief and hold it up to a mirror to discern the hidden message, perhaps another edit is warranted.

Do not refer to the parties as "appellant" and "appellee." The court apparently prefers the use of the actual names or descriptive terms such as "the employee" or "the injured person." (F.R.A.P. 28(d).)

Also, do not use plastic covers, staples, string citations, footnotes, more than 20 pages, or the word "clearly." Finally, one of the most arcane hallmarks of a neophyte appellate attorney is the use of pleading paper. Appellate courts have an odd indifference to line numbers.

Standard of Review

An important appellate concept that escapes many is the standard of review. The applicable standard for each issue should be stated in the brief clearly and candidly. (See F.R.A.P. 28(a)(6).) The standards range from abuse of discretion (otherwise known as "don't bother"), to substantial evidence ("we applaud your optimism"), to *de novo* ("trial court? We don't need no stinking trial court"). A mystery to both the novice and the seasoned appellate attorney is the lack of a relationship between the standard of proof in the trial court and the standard of review in the appellate court. For instance, a decision concerning an issue that must be proven with clear and convincing evidence or a preponderance of the evidence at trial will be affirmed on appeal if the court's file once passed near an admitted piece of evidence. See *Rubin v. Los Angeles Fed. Savings & Loan Assn.*, 159 Cal.App.3d 292, 298 (1984).

Oral Argument

There is no right to oral argument in the federal appellate court. (F.R.A.P. 34(a), Cir. R. 34-4.) If the court sends notification that the case is being submitted without oral argument, the parties have ten days within which to file a statement of the reasons why the court should hear oral argument. (Cir. R. 34-4.)

There is a right to oral argument in state court. *Moles v. Regents of Univ. of Calif.*, 32 Cal.3d 867, 871 (1982). The court, however, frequently sends an invitation to waive oral argument. Read it carefully. The districts, and the various divisions within them, word their notices differently. Some schedule the argument and then invite the parties to waive it. Others, however, state that argument will not be scheduled unless requested within ten days.

Bear in mind that the amount of time you spend preparing for oral argument seems to be inversely proportional to the amount of time you will actually argue. Also, as you prepare for oral argument, you will for the first time notice all that is wrong with your brief. Most divisions will allow you to submit a short letter citing additional, recent authorities a week before the argument. (See F.R.A.P. 28(j).)

You may find you have arrived at the courthouse half a day early, the words "jack-knifed big rig on the bridge"

having prompted a profoundly premature departure. Even so, lay off the coffee. It will exacerbate your natural trembling to the point that, at the podium, you will be a mere blur to the justices. It will also necessitate countless trips to the rest room, the need for the last of which will be acute just as the clerk calls your case.

An underdeveloped and little known principle of psycho-jurisprudence insures that you will feel small and stupid. The courtroom provides a great deal of reinforcement for this. The ceiling is usually ornate and high, and the gallery could accommodate 200. The only thing missing is an organ. (Actually, the Ninth Circuit's Pasadena courthouse is scandalously lovely. I hope to vacation there some day.)

The justices are elevated, removed, and impassive. Do not waste your jury speech on them. Do not hire a sympathetic looking shill to impersonate your client. These people could sit, cool and dry-eyed, through Fontine's death.

Although you have studied the judicial profiles and committed the justices' press photos to memory, you will not be able to distinguish them once they are dressed identically and seated in a different zip code. The challenge is to match a photo taken at the beginning of the Industrial Revolution with the judge's current appearance. The Third District is kind enough to provide a crib sheet at the podium identifying the justices.

Although the court provides you with water at the counsel table, it would behoove you to consider this water entirely ornamental.

Your appearance is important. Even if you are taking advantage of the state court's new phone-in argument, dress up. Karma-wise, it can't hurt. A good rule of thumb is to take your fashion cues from the justices themselves: simple, dark, minimal accessories.

You cannot say what you would really like to say during argument. ("I'm not sure that the record fully reflects it, your honors, but this guy is really a space alien," or "Please excuse my shoes; it was still dark when I left this morning and I couldn't tell the color.") If it is any consolation, the justices also cannot ask the questions they would really like. ("How do you get your hair to stick straight up like that?" "Do you really think the fuchsia pumps were the best choice this morning?")

Bear in mind that your comportment during your opponent's argument may be noted. Do not: double up in mock laughter, stick your finger down your throat and feign vomiting, or play paper-scissors-rock with co-counsel. Just sit there, ignoring the mushroom cloud over your head. If you believe you have won, do not high-five your way out of the courtroom, screaming in your opponent's face, "I'm going to Disneyland!"

The Court's Opinion

Although all courts of appeal deny that they decide cases before oral argument, a few divisions are suspiciously prompt in their issuance of the opinion. They hand it to you on the way back from the podium. Glance at the top of the first page. If it has been stamped in big letters "TO BE PUBLISHED IN THE OFFICIAL REPORTS," use it to your best advantage immediately. Chances are it will be decertified before you get to your car. The

Continued on Page 10

MARY MCCUTCHEON

On INSURANCE

MONTROSE *Chemical Corporation of California v. Admiral Insurance Company* (1995) 10 Cal.4th 645, resolved some, but not all, outstanding environmental insurance issues. The opinion (particularly the footnotes) contains intriguing clues as to how the unresolved issues ultimately may be decided.

In *Montrose*, the California Supreme Court adopted the "continuous injury" trigger of coverage for third-party liability insurance cases involving injuries occurring over a number of policy periods. It also concluded that the "loss-in-progress" rule does not defeat coverage for such injuries as long as the insured's liability is not yet established.

The Duty To Indemnify

As with other recent coverage decisions (e.g., *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254; *Horace Mann Ins. Co. v. Barbara B.* (1994) 4 Cal.4th 1076), *Montrose* only decided whether the insurer owed a duty to defend a lawsuit. Footnote 9 of the opinion states that even where an insurer has a duty to defend "it ultimately may have no obligation to indemnify either because no damages were awarded in the underlying action against the insured, or because the actual judgment was for damages not covered under the policy." The opinion provides little guidance, however, as to how to determine whether an "actual judgment" is for damages covered under a policy, although footnote 16 suggests that indemnity might depend on the unique injuries caused by the hazardous substance in question.

The introductory paragraphs of the opinion state that the standard general liability policy "provides coverage for bodily injury and property damage that occurs during the policy period." (Emphasis added.) Thus, there is no reason to suspect that the Court would apply a different trigger to indemnity than to defense. Presumably, if an insured is held liable for damage occurring during certain policy years, it will be insured for that damage. And if the liability judgment does not specify when the damage occurred, the insured should be able to introduce proof of the time of damage in a subsequent coverage proceeding.

Allocation Between Insurers And The Insured

Still to be decided are the mechanics of how a continuous loss occurring over several policy years would be allocated between insurers. Also not addressed is allocation of a loss occurring during a period of time which includes one or more years in which the insured did not purchase coverage, purchased it from a now insolvent insurer, selected coverage containing extremely large retentions, or obtained policies with absolute pollution exclusions.

How a loss is apportioned may depend on whether the dispute is solely between insurers, or involves the insured as well. *Montrose* denounces cases which have "muddied the waters" by failing to make such a distinction: "In suits between an insured and an insurer to determine coverage, interpretation of the policy language, and in the case of ambiguous policy language, the expectations of the parties, will typically take precedence." By contrast, the Court explains, "different contractual and policy considerations may come into play in the effort to apportion such costs among the insurers. The task may require allocation of contribution amongst all insurers on the risk in proportion to their respective policies' liability limits, such as deductibles and ceiling or the time periods covered under each such policy."

In footnote 19, the Court rejects the holding of *California Union Insurance Co. v. Landmark Ins. Co.* (1983) 145 Cal.App.3d 462, that two successive insurers are jointly and severally liable for the full amount of continuous damage occurring during successive policy periods. Insurers have seized upon this footnote to assert that an insured with gaps in coverage participates in the loss just like another insurer. Footnote 1 of the opinion, however, states that "...any reference to 'successive' policies is intended to also include policies or policy periods which are temporally separated from one another by gaps or lapses in the coverage periods." This language, coupled with the Court's distinction between inter-carrier disputes and disputes involving insureds, supports a conclusion that where there is a gap in coverage, the policies remaining in force assume the obligations for the missing policy periods.

Stacking of Limits

While the Court criticizes *California Union*, it discusses without any criticism *Gruol Construction Co. v. Ins. Co. of North American* (1974) 11 Wash.App. 632, which held that successive carriers can be liable for a continuous injury up to their aggregate policy limits — i.e., policies can "stack." In view of its distinction between inter-carrier and insured-insurer disputes, how the Court deals with issues such as the stacking of limits (currently before it in *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1992) 29 Cal.App.4th 98; review granted, 834 P.2d 1147; review limited, 840 P.2d 266), the obligations of excess insurers and the stacking of deductibles may well depend on whether the ox getting gored belongs to an insured or another insurer.

In *Montrose*, the coverage bar received definitive answers to two critical coverage issues. It now awaits the resolution of *Stonewall* and *Armstrong*. Both insurers and insureds will claim to find clues in *Montrose* as to how the Supreme Court will rule in those pending cases. Given the fact-specific nature of continuous injury coverage disputes, only one thing is certain — each decision will leave open at least as many questions as it answers.

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



Mary McCutcheon



Continued from Page 3

How To Mediate More Effectively

In response to that offer, however, the plaintiff demanded \$150,000, claiming that its case had improved by 100% since the \$75,000 demand was made. The plaintiff had great difficulty, however, justifying such a drastic increase. The defendant believed that the plaintiff had not come to mediate in good faith. The increased demand altered the playing field so dramatically that reaching a settlement was impossible. Whether plaintiff had not properly evaluated its own case or had merely chosen an overly aggressive negotiation style, the perceived lack of credibility of that offer effectively forced the other side from the bargaining table.

A Last, Best and Final Offer Should be Made with Care

It is important to enter a mediation knowing one's bottom line. This should represent the point beyond which it is better for you not to settle — taking into account the risks of an adverse verdict and the transactional costs of going forward with the dispute. By contrast, we commonly refer to one's BATNA (the Best Alternative To a Negotiated Agreement) as the "best" realistic course of action (and probable result) available to a party if an agreement cannot be reached (e.g., continuing to litigate or dropping the suit). Keeping your bottom line and BATNA in mind while mediating will stop you from ending the negotiations too early or going too far. One's bottom line should be modified, however, if new information learned in the mediation suggests that a change is appropriate.

Similarly, a "last, best and final" offer or demand must be credible and should be made only after all other options have been considered (and rejected). In labor-management negotiations, the "first, fair and final offer" has been found to be an unfair labor practice. In "legal" mediations, opening with one's final offer can also be seen as unfair. Even when well-intentioned (i.e., to speed up negotiations), it is the antithesis of negotiation. Delivering an ultimatum ordinarily alienates the other side, escalates the conflict and poses an obstacle to resolution. Moreover, based on convention and practical experience, the recipient of a "first and final" offer will probably not believe it to be so.

Listen To The Other Side And Remain Flexible

Because mediation is a process not only of persuasion, but of education, you can hear things from opposing counsel, their clients and the mediator that you might not otherwise hear in a deposition, court proceeding or more traditional settlement conference. By listening for new information and real and potential points of resistance, you can gain a better understanding of the interests that must be satisfied for the opposition to agree to your proposal. Remaining flexible enough to incorporate this information into any settlement proposal will increase the chances of success.

A good example of this occurred in a recent mediation of a dispute between medical providers and the parents of a minor child whose treatment violated the reli-

gious beliefs of the parents. The monetary offers and demands were very far apart — reflecting a disparate valuation of the case — and there was not much confidence in the room that the case could settle. During the course of the mediation, however, it became apparent that the parents were less concerned about money than their belief that doctors and hospitals did not consider their religious convictions in deciding among available treatment options. To satisfy that interest, the hospital offered the plaintiffs time and space to educate its medical professionals about these issues. This offer, together with a significantly reduced financial settlement, allowed the case to settle. By creatively incorporating information learned in the mediation, the defendant modified its proposal for settlement without compromising its own interests.

Lester Levy is a Senior Mediator with JAMS/Endispute in San Francisco. In addition to mediating business and insurance cases, he is the Northern California Director of JAMS/Endispute's environmental ADR program. Mr. Levy was formerly a trial lawyer with Munger, Tolles & Olson in San Francisco and Los Angeles.



Continued from Page 8

The Accidental Appellor

opinion itself will, no doubt, be thoughtful, well crafted and legally sound. On occasion, it will also be entertaining. (I wonder if Judge Kozinski is available for weddings and bar mitzvahs. My personal favorite is the case concerning standing, which he officially retitled "Someone claiming to represent Oil & Gas Co. v. Duryee" and in which he referred to the "putative appellant" as "him/her/it/them." 9 F.3d 771, 773 (9th Cir. 1993).

If you wish to pursue the matter further, the options include seeking publication or depublication (C.R.C. 978, 979), a rehearing (C.R.C. 27, F.R.A.P. 35, 40), or review by the California Supreme Court (C.R.C. 29) or the U.S. Supreme Court (Supreme Ct. Rules 10-20). Bear in mind, however, that your chance of success diminishes as you travel along the continuum of options, and that, for instance, the California Supreme Court is serious about the need for a ground for review under California Rule of Court 29.

Conclusion

The process is generally time-consuming and expensive, and you may be trapped in appellate purgatory for years. As a very rough rule of thumb, figure two years from the date of the notice of appeal to decision (slightly longer in federal court, slightly shorter in most state court districts). By the end, your goals may become redefined by the recognition that you have pretty much lost control of your case. You may find that you no longer strive to affect public policy or the evolution of the republic's common law. Instead, you strive to preserve a shred of personal dignity, figure out what a remittitur is, and close the file.

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



BARRY P. GOODE

On ENVIRONMENTAL LAW

FIRST I graded my students.

Then I was given *their* evaluations of my Environmental Law course. "I enjoyed the semester" wrote one, "but I don't think the school should offer this course until the law settles down." That was 1981. We are still waiting.

Since then, West's *Federal Environmental Statutes* has grown from 754 pages (large type) to 1776 pages (small type); from nine statutes to twenty-one. EPA's portion of the Code of Federal Regulations has grown from 5,890 to 13,674 pages. Congress promises still more changes. This is hardly a settled area.

So it is surprising that one of the most significant developments in the field comes from the creative use of a mid-19th century fraud statute to prosecute violations of late-20th century environmental laws.

Cracked Cannons and \$500 Screwdrivers

Civil War profiteers defrauded the government and milked the Treasury. The False Claims Act was passed in 1863 to penalize them. Major amendments in 1943 weakened the law. Major amendments in 1986 strengthened it.

Today the FCA makes it illegal "knowingly [to] present... to...the United States a false or fraudulent claim for payment or approval." (31 U.S.C. Section 3729(a)(1).) "Knowingly" is defined to mean "that a person...acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required." (Section 3729(b).) Violators are subject to civil penalties of \$5,000 to \$10,000 per violation, plus treble damages. (Section 3729(a).) The statute of limitations may be up to ten years. (Section 3731(b).)

The FCA permits private parties (called *qui tam* plaintiffs or relators) to sue in the name of the United States. Although there are serious barriers to private actions, a successful relator is entitled to between 10% and 30% of the amount recovered, plus a possible award of attorneys fees and expenses. (Section 3730(d).)

So defense contractors are punished for defrauding the Treasury. How does this relate to environmental law? Directly — as many federal contractors and grantees are learning.

Permit Violations = Pentagon Fraud?

For example, federal acquisition regulations require that certain contracts contain a "Clean Air and Water" clause (48 CFR 23.105, 52.223-1 and -2) which requires (i) compliance with all "inspection, monitoring, entry, reports, and information" requirements under the Clean Air and Clean Water Acts, and (ii) "best efforts" to comply with all standards under both acts. Contracts may

require more.

Indeed, the complaint in *United States ex rel. Fallon et al. v. Accudyne Corporation*, 880 F.Supp. 636 (W.D. Wisc. 1995), alleged that defendant's "numerous" government contracts required:

"...that all work be performed in accordance with applicable federal, state and local environmental laws and regulations, including the Clean Water Act, the Clean Air Act and the Resource Conservation and Recovery Act."

The *qui tam* plaintiffs also charged that to obtain the contracts Accudyne

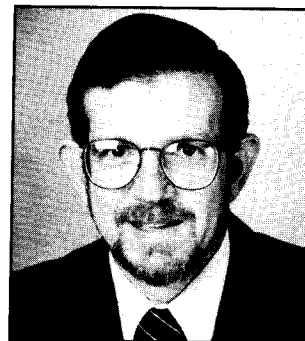
"submitted pricing information to the United States Department of Defense which falsely represented that Accudyne's cost to complete the contracts for which it bid would include all costs associated with environmental compliance."

Since, plaintiffs charged, Accudyne was not in compliance with all environmental laws (and had not incurred the costs of compliance), it violated the False Claims Act when it sought payment from the government; it falsely claimed "that it complied with the contractually incorporated environmental regulations in order to induce payment under the contracts." (880 F. Supp. at 638.)

Accudyne argued these were environmental law citizen suits in disguise which should not be permitted. It brought — and lost — the expected motions. Finally, faced with a charge that each and every application for payment under the contracts was a separate violation of the FCA (and with related, non-environmental charges brought by the United States), it reportedly settled for \$12 million.

There are very significant obstacles to a successful *qui tam* prosecution. Nonetheless, *Accudyne* is no longer an isolated case. FCA claims have been brought against Rockwell International for alleged environmental violations at Rocky Flats (144 F.R.D. 396 (D.Colo. 1992).) Suit has been filed under the FCA against a Cincinnati tugboat operator who allegedly violated the Clean Water Act while bringing coal to the Tennessee Valley Authority. A recent issue of *Inside EPA* reports "the practice of bringing [FCA] suits...has exploded in Ohio where several cases have...recently been filed." Although it seems an overstatement, a former employee of the Defense Department's Inspector General is reported to have said: "Compliance with environmental law is obligatory in any government contract. Therefore, noncompliance entails a false claim."

All this from a statute championed by President Lincoln. Maybe it does not matter whether the law is settled. Even "settled" law can be surprisingly unsettling.



Barry P. Goode

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



Letter from the President

TWO events that I attended recently brought home to me how much the focus of litigation is shifting from its "art" to its "science." Heller, Ehrman's California litigators (all 100+ of them) held their annual weekend retreat in October. We spent a great deal of time hearing about the "re-engineering" of our department so that we can be more efficient in handling documents and making use of the latest computer techniques and other litigation management devices. In contrast, ABTL's Annual Meeting in Tucson was an exciting two days devoted to the art of cross-examination. In the

keynote address that kicked off the conference, Mike Tigar not only demonstrated how artful (and entertaining) good cross-examination can be, he specifically cautioned against the increasing tendency of lawyers to rely on "mechanical contrivances that distance you from the jury."

Count me in the Tigar camp. Technology doubtless has its place, but I'm not sure we're doing either our young lawyers or the cause of justice any great service by this fascination *du jour* with web sites, platforms and the like. Maybe it's apocryphal, but I like the story that when David Boies of

Cravath was taking depositions in the IBM litigation, he used to tell his associate to "give me your ten best documents," and off he'd go. Also, convincing a jury that you're "just a simple country lawyer" is going to be a lot harder with your laptop in front of you and your documents on CD-ROM. What I worry about is not just appearances, but the reality that technology is supplanting, not supplementing, the attention to detail and creativity that makes great trial lawyers great. If I had my way, I'd leave the "re-engineering" to the "re-engineers" and have our lawyers spend time reading good prose and watching experienced trial lawyers do their thing. At our Annual Meetings, for example.

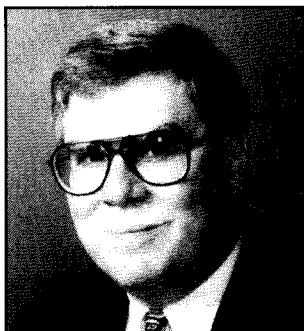
While I'm on the subject of the Annual Meeting, I am pleased (though certainly not surprised) to report that the Northern California bench and bar once again outshone all the rest, not only in lawyering but in wit, charm and spirit. Kudos to our lawyer participants, David Balabanian, Jim Brosnahan, Barbara Caulfield, Raoul Kennedy and Art Shartsis, and to Judges Bill Cahill, Sue Illston and Gene Lynch. Equal credit, and thanks, go to our Annual Meeting Chair, Al Pfeiffer of McCutchen, for braving the perils of new parenthood and antitrust trials to help plan another memorable ABTL Annual Seminar.

Once you start expressing appreciation to people, it's hard to stop, particularly when they are so deserving. I also thank my partner, Rob Fram, for putting together a series of highly informative and entertaining dinner programs this year. I am indebted as well to the Northern California ABTL Board and to my fellow officers for their support and wise counsel. My assistant, Sharon Litsky, was indefatigable in her enthusiasm for ABTL and in her

attention to its every need. Finally, my secretary of nearly (gulp!) 25 years, Mary Macdonald, should receive some small (and wholly inadequate) expression of the boundless appreciation I have for her help over the many years we have been together. Thanks, Mary.

When I took office a year ago, I expressed apprehension about Northern California ABTL's "adolescence." Thanks to all of the aforementioned and many others, the homework is getting done on time, a little Clearasil is taking care of the acne and the weekend partying is not out of hand. I leave to my successor and friend, Steve Schatz, an organization that is successfully finding its way in the world. That is a good thing, because we are in for some difficult times as a profession and as a society. Like it or not, lawyers (indeed, trial lawyers) and judges are at center stage. We need a forum where we can meet informally, exchange views and, thereby, perhaps, contribute in some small way to restoring the fabric of a badly frayed social order.

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



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COMING EVENTS

December 12, 1995 MCLE Dinner: *Introducing the New Federal Judges*
Sheraton Palace Hotel
Cocktails at 6:00 p.m.
Dinner at 7:00 p.m.

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