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Tips for Preventing Credit Losses

THE telephone rings and your client launches into a discussion of a potentially big collection problem with a customer. Possibly the client has just heard that a major account is in serious financial trouble and wants to know how it can protect its right to get paid; or perhaps a shipment is about to be delivered to a problem customer and the client wants to know if it must perform.

Lillian G. Stenfeldt

This article outlines a number of situations that arise with increasing frequency for companies that sell to a customer in financial distress. We address credit, collection and workout issues in a way that will be useful to counsel or a client who is considering how to deal with such problems. Possible solutions and the client's rights and remedies when a customer defaults in payment and/or files for bankruptcy are discussed.

Most of the ideas here are based on experience, California Commercial Code provisions and other California law. Of course, this article is not a substitute for legal research and advice based on specific facts.

As a starting point, a client should have both a credit policy for customers and a procedure for confirming the customer's financial condition, particularly new cus-

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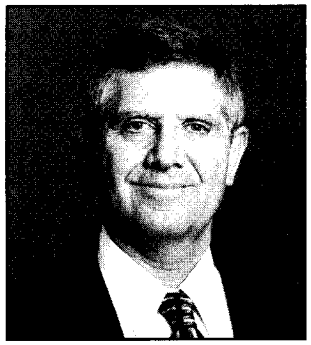
Also in this Issue

On the Causes of Popular Discontent with Lawyers

IT used to be that at university graduations it was only the new doctors who jeered the new lawyers. At graduations today, jeering the lawyers is pretty much universal.

Disparagement of lawyers is a commonplace of the talk shows, where the nation's values are proclaimed. Lawyer jokes, some quite funny, replace no longer acceptable ethnic humor.



David M. Balabanian

Lawyers are concerned about this – some out of fear that popular discontent will find expression in ways hostile to their interests and others simply out of discomfort at being the subject of wide-spread disapprobation. Some just lack a sense of humor.

There are many opinions about this hostility. Here are mine.

Some of it comes with the territory.

To be admitted to practice, lawyers take an oath of unpopularity. They promise "to defend the Constitution against all foes, foreign and domestic." The most abiding foe of the Constitution is the American public. That is, after all, why we have a Constitution.

Lawyers make society just and safe and free. There will always be people – at times even a majority – who do not want justice, safety or freedom for others. Hostility toward criminals, toward the deviant and the profane, toward the latest immigrant wave, toward all who violate society's norms, finds expression in hostility toward those whose job it is to defend their rights.

Sadly, this tendency to identify lawyers with their clients finds support in the view, advanced by some lawyers and even some legal ethicists, that lawyers should decline to represent interests of which they personally disapprove. This effort to make the profession respectable must necessarily produce the opposite

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Tips for Preventing Credit Losses

tomers and those with financial difficulties. It is also necessary to have a reliable system for senior executives to track large exposures and aged, unpaid receivables as well as to closely monitor those customers that miss a payment or are habitually late. Nonpayment or late payments can quickly accelerate into large dollars of credit exposure without such monitoring .

There are numerous alternatives for obtaining background information about a customer, although cost may be an issue. A relatively inexpensive source of useful information, in addition to a client's industry contacts, can be various computer data bases. A law firm may have superior access to such data bases than will the client. Lexis, Westlaw, D&B and other services can be used to obtain payment history, place of incorporation, the date and place of filed liens, suits and judgments, ownership history, a description of the customer's business and names of the officers and media reports about the customers.

If a customer is in bankruptcy, another source of information is the individual bankruptcy court, which will often have lists of new filings and docket information about existing cases available on-line. Our firm has monitored these services for clients on a daily or weekly basis. It is especially useful to obtain this information early in order to stop shipments or exercise certain reclamation rights (discussed below). Finally, some clients may wish to hire private investigators.

Remedies Available Before Bankruptcy

When a customer files for bankruptcy, short-term remedies against the customer will be substantially limited (*i.e.*, it may be too late for the client to improve its position). If a customer has not filed for bankruptcy but has become insolvent or has failed to pay for the client's goods on the originally agreed terms, the client can consider taking the following steps:

Request Information and Adequate Assurances. If the client reasonably believes that a customer will be unable to pay for a sale of goods, the client has the right to request, pursuant to California Commercial Code § 2609, that the customer provide assurances that it will perform its obligations. If the customer fails to supply such adequate assurances, then the client, in appropriate circumstances, may stop shipping or repudiate the sales contract.

One form of adequate assurance is to require a customer to show that it can meet payment schedules. For example, one can request detailed financial data from troubled companies, including weekly projected cash flow reports, weekly actual cash flow comparisons, consolidated financial statements, weekly production schedules, purchase orders, contracts or deliveries, written plans regarding collection efforts and cost-reduction actions by the customer. Basic cash flow information is usually the most meaningful, but circumstances will dictate the precise information needed.

Withholding or Stopping Delivery. If a customer on prepaid sales terms fails to make a payment that is due on or before delivery of the goods, delivery can be withheld. Moreover, in situations where trade credit is extended, goods in transit to a customer also can be stopped and reclaimed if the client discovers that the customer is insolvent or fails to make a required payment on a "cross-defaulted" contract. This right of stoppage generally is unavailable after the customer receives the goods or in certain other circumstances involving custodians.

Cash Terms. A client may insist on cash terms if the customer is suspected of being insolvent or is otherwise a problem credit.

Letters of Credit/Other Payment Mechanisms. A client may insist on a letter of credit to assure payment or on pre-payment by the customer placing funds into an escrow account to be released upon delivery of goods. Another idea is an agreement for direct payment by related or parent companies or even a third party (perhaps an ultimate buyer or distributor of the goods).

Reclamation Rights in Credit Sales. If the client has shipped goods on credit in the ordinary course of business, and subsequently discovers that the purchaser was insolvent when it received the goods, the client may preserve the right to reclaim the goods by making a proper demand for the return of the goods within ten days after the customer's receipt. This remedy, provided by California Commercial Code § 2702, is a powerful weapon for a client who acts very quickly. In addition, if within three months before delivery of goods, a customer has misrepresented its solvency to the client (*i.e.*, through the financial information requested from the customer) or if there is a bankruptcy filing by the customer shortly after it receives goods, then the client may be able to preserve its reclamation claim for a period greater than 10 days after the delivery. A client may want to include a representation as to customer solvency in its form purchase order so it will have evidence of such a misrepresentation.

There are important procedural requirements and limitations on a client's reclamation rights. For example, the remedy is not available if the seller knew that the buyer was insolvent before delivery and made the delivery anyway. The client's reclamation rights are subordinate to the rights of a "good faith" purchaser, including a holder of a perfected security interest in after-acquired property. Also, reclamation rights are unavailable unless the goods remain "identifiable," *i.e.*, separate and distinct from other goods into which they might be installed or incorporated. The Commercial Code provides the necessary requirements for the notice of reclamation. Clients and their attorneys must act quickly and accurately to avail themselves of this right.

The Bankruptcy Code Amendments effective October 1, 1994, provided an additional ten days to give a notice of reclamation under certain circumstances involving bankruptcy. The seller of goods must, in general, send the reclamation notice within ten days after receipt by the debtor or, if the ten day period expires after the commencement of bankruptcy within twenty days after such receipt.

Reclamation Rights In Cash Sales. Reclamation rights also extend to cash sales if the payment tendered (*e.g.*, a check) is dishonored. If a customer "bounces a check" in a cash sale, then the client can reclaim the

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goods without complying with the "ten-day" rule and other requirements governing credit sales.

Consignment. As commonly understood, a "consignment" occurs when a client delivers goods to a customer for resale but the goods remain the property of the client. This arrangement creates a number of difficulties for the client, because the customer's creditors may assume that the goods belong to the customer and may be unaware of the client's continued ownership. The goods then can become subject to the claims of those creditors unless they are put on notice of the consignment. To protect the client's rights to the goods, the creditors should be put on notice by filing a UCC financing statement, with a statement of ownership of the specific goods. We recommend the same procedure if the client's goods are being held by a third party who, for example, packages the goods.

Lawsuit. Of course, a client can always sue to collect the debt and seek prejudgment attachment or appointment of receiver or keeper.

Involuntary Bankruptcy. The client can consider filing an involuntary bankruptcy against the customer pursuant to 11 U.S.C. § 303 if it has not been paid and the customer is not paying its debts as they come due. However, this remedy must be used with care. If the client was wrong and the customer was not insolvent, the client could be liable for damages caused to the customer. Also, usually the client will have to join with two other creditors to initiate a bankruptcy case, so unilateral action may be difficult. An involuntary petition is probably most useful when the client is concerned that the customer is about to pay out available money to favored creditors or insiders (which may or may not involve fraud) to the detriment of the business.

Workout Agreements. If the customer is unable to make scheduled payments, the client might consider a "workout" agreement with the customer to modify the original payment terms in order to assist the customer in meeting its short term obligations. A workout agreement also can be used by the client to formalize the customer's acknowledgment of the debt, its commitment to provide information to the client, or the grant of a security interest in the goods or the customer's other property. The customer often will ask the client to "forbear" from filing a lawsuit or an involuntary bankruptcy petition, in effect, to "stand still" or agree to a "moratorium" on collecting its debt except as allowed by the agreement. A workout agreement also commits a customer to the new payment schedule and can clarify the parties' expectations and agreements. The workout agreement also can confirm non-preferential applications of funds and clean up problems between the parties (through, for example, a release of claims). The workout agreement is often helpful when the client is supplying goods to its customer on an ongoing basis for cash on the condition that the customer pays down the old debt on a payment schedule.

Effect of Bankruptcy Filing

Voluntary bankruptcies are most commonly filed by debtors under Chapter 11 or Chapter 7 of the

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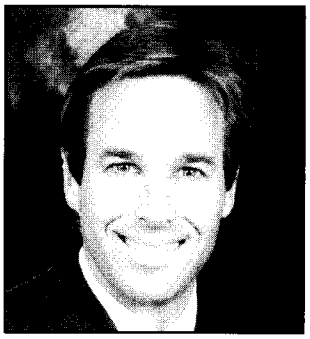
Technologies for Courtroom Presentation

SOME form of computer or video technology is now being used in nearly every major trial in this country. Increasingly, these presentation technologies are also being used in mediations, arbitrations and even in motion practice before the court. Judges, like the rest of society, comprehend better and learn more quickly what they see than what they hear. These technologies provide an organized and persuasive means to present a myriad of evidence and theories. Yet most attorneys are only peripherally aware of the different options available.



Kevin Hout

Let's say you have a complicated case going to trial in 6 months. It has documents – 30,000 pages, you say? ...and photographs – 400 of them! ...and there are 40 witnesses whose depositions were videotaped. ...and yes it does involve complicated expert testimony about a manufacturing process and a big toxic plume. ...and of course it involves complicated damage calculations. Hmmm, sounds like you might need some help. This article discusses the different options for presenting each of these types of evidence to a jury, judge, arbitrator or mediator, and how to make the best use of available technologies.

Documents

Let's begin with those 30,000 pages of documents. That's about 15 banker's boxes. The first step would be to determine how many of them are key documents to the case. There are rarely more than 100 pages of key documents per case. The rest are supporting documents. For the key documents, it is essential to present them in the most memorable way possible.

Video laserdisc. The TV news shows learned over a decade ago that a smooth video presentation of a key document can be very persuasive. Borrowing on TV's precedent, the video laserdisc with barcode control provides an effective method for presenting key documents in the legal arena. As is done by the news stations, the document is presented in a series of images. First, the entire page is displayed, then the key phrases you want the jury to remember are either pulled out or character generated (recreated text) and that key text is displayed over a ghosted image of the original document. Keep in mind that the entire page of a document will not be readable on screen without some form of close-up or highlighting. The pulled out highlight lets the viewer see a close-up view of the actual document, which works fine if the document is legible, has large text and narrow margins. If the document is not as legible, then we recreate the text ourselves in a video paintbox and display it over the ghosted

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image of the whole document. With this "character generated text," we can change typeface and color, and use ellipses to take out unimportant portions of the text. The resulting document presentation effectively focuses the viewer's attention on just the phrases you want them to read. (Television news stations almost always character generate the text to focus the viewer's attention. This makes it most easy to read, and viewers don't question that the recreated text is accurate.) The final document highlight is placed onto the video laserdisc and a barcode reader will allow you to access that document when you need it in the courtroom. Other access systems, including touchscreen and computer keyboard control, are less commonly used.

Video laserdisc is an extremely valuable tool to use with the critical documents (and parts of documents) in your case, like the "smoking guns" about which you want to keep reminding the jury. Once you have these images on a laserdisc with a barcode, you can randomly access them easily when cross-examining and impeaching the other side's witnesses.

FTI uses both the Pioneer Laservision and Sony CRV Disc systems. The Pioneer Laservision system provides good, high quality video playback, better than your VCR at home, and almost comparable to what you see directly on television. Each Pioneer disc holds up to 30 minutes of moving video (this is comprised of 54,000 video frames, each of which represents 1/30 of a second of running video). FTI generally recommends the Pioneer system for small cases in which you know well ahead of time what materials you will need to present. A typical application might be a vehicle accident case which includes a computer animation, some live video, several photographs and a police report. The chief advantages of this system are the low cost and ready availability of the players. Good Pioneer players can be rented all over the country and sell for under $1,000. The disadvantages are that you cannot add more material to a disc once it is created, and it takes up to 24 hours to get a new disc made. This shortcoming can make Pioneer systems impractical in cases where it is essential to make additions and adaptations to demonstrative aids during trial.

The turnaround problem is solved by using the Sony CRV Disc system. You can call the night before opening statement and add just one more document highlight to a disc. The Sony CRV discs are 2-sided, but only one side is playable at a time. Each side holds 24 minutes of video (43,500 video frames). The Sony CRV disc also has higher resolution, with clearer images and better color, than a Pioneer disc. The quality is equal to the images the jury is used to seeing on television. Your document highlights stored on CRV Disc are again accessible using either barcodes or a computer control system. If your clients can afford the higher cost of renting a Sony CRV Disc Player, it will give you greater flexibility and a clearer picture for the audience.

Visual Presenters (sometimes called visualizers). As for the other 29,900 pages in your case, there are several options. While you may have initially decided that these documents did not qualify as "key documents," that may change during trial. The simplest and least costly approach to present these documents is to use a visual presenter. ELMO, Wolf, Sharp and DOAR all sell visual presenters. A visual presenter is similar to an overhead projector except that it projects a hard copy page (rather than a transparency) onto a video screen or monitor. Visual presenters are fast replacing overhead projectors as the preferred system for courtroom use.

A visual presenter is actually a video camera on an extendible arm. The video camera captures a video image of the document that is placed under the camera. The camera generally has a zoom lens that allows you to zoom in on the exact portion of the document that you want to have on screen. You can then highlight the key phrase with your yellow highlighter or draw a circle around a key phrase with your red pen and have those highlights show up on screen, in color. The biggest advantage of the visual presenter is that the cost per document is $0 and it takes no pre-planning to use the device. You simply use the hard copy page from one of the 15 banker's boxes.

The biggest disadvantage to the visual presenter is that documents with small text and wide margins will not be readable on screen. Many attorneys have found visual presenters to be unacceptable because of this limitation. A second disadvantage is the "fumble factor." You can waste time and lose the jury's attention looking for the document and then further fumbling around zooming the camera and zeroing in on the right phrase. For these reasons, I recommend the visual presenters as a backup method for presenting unplanned documents rather than as your primary method.

Computer-based Presentations. The pre-planned document highlight images prepared for laserdisc, can also be presented directly from a computer. Using off-the-shelf software applications, document highlights can be accessed by touchscreen, keyboard commands or barcodes and presented using large, multiscan computer monitors or LCD video/data projectors. The document images will actually be clearer and more easily changeable than the laserdisc images. The only disadvantage is that you will need to have a computer (and probably a second back-up machine) and more costly multiscan video equipment set up in the courtroom.

Scanned Images. Another option for the presentation of all 30,000 pages is to scan them onto a computer and present those scanned images. Scanning involves much the same technology as your fax machine. The scanner goes line by line and space by space down the document and recognizes each space as either black or white. This information is then stored digitally in a computer file. The resolution of scanned images is measured in dots per inch (dpi). Most documents for litigation are scanned at 250 to 300 dpi. The resulting scanned images can be stored either on magnetic storage devices such as internal hard drives, or on optical devices CD-ROMs. When you want to display the images in court, the scanned image can be recalled using either a mouse, keyboard command, or barcode system. Once the scanned image has been recalled, you have the capability to zoom in on portions of the document and highlight portions of the document *interactively* within the computer. The sys-

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tems that are used to recall and present scanned images from a computer hard drive or CD-ROM are often referred to as multimedia presentation systems. As is implied by the name, these systems have multiple presentation capabilities to be described later in this article.

A number of different companies offer multimedia presentation systems. These systems have the ability to store huge numbers of documents for quick retrieval and interactive highlighting in the courtroom. With some systems you also have the capability to character generate text and place it over the scanned image interactively, in much the same way as is done with laserdisc. The cost per page to scan and code (enter background information into a database) the documents is generally less than $1.00 per page.

One drawback is that you must have a computer, and usually an operator, in the courtroom throughout the trial. With laserdisc systems, this is not necessary. These computer-based systems also tend to have more problems than laserdiscs or visual presenters. In the same way one always has an extra bulb handy for the overhead projector, we recommend you have a completely redundant computer system configured and ready in court.

Posterboards. With all this technology talk, let's not forget the value of a very effective "low-tech" alternative for presenting documents – the posterboard (also known as a foamcore board or simply a blow-up). It can be very important to vary the "technologies" you use to present your material, so the jury does not get burned out or overloaded with a single means of presentation. For example, if you project every document in your case on the video screen, the jury may not notice when you project your most important document. By having a few key images blown up larger-than-life and in a more tangible form, they will become set off in the jurors' minds and be more memorable.

You also have some options when creating posterboards. The simplest ar. 1 cheapest option is to just have the document enlarged and mounted on foamcore. A second option is to scan the document into a graphics software program but not enlarge it. Then pull-out or character generate text of the key phrase and display that text to the side of the small scanned image on a large board. This is the same effect as a video laserdisc highlight.

Videotaped Depositions

You say you have 40 witnesses whose depositions were videotaped? At an average of 8 hours per deposition and with 2 hours stored on each tape, that means you have about 160 videotapes containing 320 hours of videotaped deposition material. That would be 400 to 600 Laser discs at $300 to $400 each – clearly not the right answer. So what is the right answer?

There are several options for presenting videotaped depositions to the judge or jury. First, let's consider videotapes of witnesses you will be presenting in your direct case. While the most simple way to present your direct witnesses would be to simply play the entire deposition videos for the jury, this is rarely done. It makes me sleepy just to think about it. A second and much preferred method is to edit the full videotapes down to shorter videotapes, often changing the order of video excerpts to make the presentation flow more smoothly. If both sides stipulate, or if the judge rules in your favor, you can add subject outlines into the edited video so the jury can better follow the testimony. As long as you can pre-plan the order of the presentation and do not need to change the timing or sequencing in court, videotape works fine.

For impeachment purposes and to present short segments of the videotaped depositions in your opening or closing statements, video laserdisc or CD-ROM work well. With laserdisc, I do not recommend putting the entire deposition on disc. Instead, only the key question and answer sequences from the depositions should be edited out and placed on disc. You can select the video excerpts you want by either marking up the transcript and having your video vendor do the excerpting or by specifying date and time from the date/time stamp on the actual tapes. Both the Pioneer and Sony systems store good, high quality video and allow for quick and simple recall of specific video segments. Generally, no more than a total of 30 minutes of material from an 8-hour deposition is really key information for impeachment purposes. You thus have access to all you need on just one laserdisc, but you can set up more than one player on-line at a time.

Another option is CD-ROM. Video can be stored on CD-ROMs, but it must first be digitized by the computer. In order to store a reasonable amount of material on the CD-ROM, the video must also be compressed. The most common form of compression for videotaped depositions is MPEG Compression. Using MPEG compression algorithms, up to an hour of low resolution video can be put onto one small CD-ROM. This apparent advantage of being able to put 60 minutes onto a CD-ROM versus 30 minutes on a laserdisc is balanced by the reduced quality of the compressed video on the CD-ROM. As compression technology continues to improve, the quality of compressed video is expected to become almost as good as uncompressed video.

Another advantage of CD-ROM for videotaped deposition storage is the cost – less than $200 to digitize and MPEG-compress 60 minutes of video onto each CD-ROM. Your 320 hours could be put onto 320 discs for a total cost of $60,000 or less without having to do any pre-planning or editing of the material. Using an 8 CD array, which costs less than $3,000, you would have random access to 8 hours of MPEG compressed video at a time.

The video is randomly accessed by linking the deposition video electronically to the deposition transcript in the computer. When you search the transcript, the computer system automatically searches the CD-ROMs for the corresponding video. Play lists of video can be created by typing in the page-line designations of the excerpts. If the judge rules on an objection during trial, the relevent video passage can be added or deleted from the presentation in real time in court. This is a major advance in the flexibility of using video depositions. I can safely project that, within the next couple of years, you will automatically be getting digitized video linked to the transcript for every video deposition. There will be little reason ever to work directly with tape.

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Technologies for Courtroom Presentation

Photographs and Physical Evidence

Of all the different techniques for showing photographs, by far the best is the visual presenter. The limitations on presenters for displaying documents do not carry over to photographs. Instead, the photographs show up remarkably well from the presenters and you have full control of the picture using the zoom lens on the presenter. Some of the newest models of presenters now come with 12-to-1 zoom lenses. You could zoom in on a one inch by one inch portion of a photograph and it would be diplayed full screen on a video monitor or video projector. Visual presenters also excel in the presentation of physical evidence. With the presenter's zoom lens, you can zoom in on an electronic circuit, broken piece of metal or other small object and blow it up to the full size of the TV monitor, in full color.

Photographs are simple to scan onto video laserdisc as well. Once the photographs are on laserdisc, they can be retrieved using barcodes, touchscreen or keyboard commands, and can be highlighted by attorneys or witnesses using a telestrator (a.k.a. the John Madden light pen).

Photographs and other paper exhibits can also be scanned onto CD-ROM or onto a computer hard drive using a color scanner. Once in the computer, you can zoom in on areas of the photographs or drawings interactively within the computer. As long as you do not need to zoom in too far, this technique works fine. Extreme close-ups tend to blur or become pixelated.

Other paper exhibits, such as blueprints, charts, and drawings generally do not do so well on visual presenters or laserdisc. Any exhibit that has thin straight lines will not present well using laserdisc. If you plan your graphs or charts with laserdisc or a visual presenter in mind, and design them with thick lines, proper colors and large clear text, they can be made to work. For the most part, however, CD-ROM or traditional posterboards will be safer alternatives if you have thin lines to display.

Complicated Expert Testimony

Manufacturing processes, toxic plumes, patented-device comparisons, fire-spread scenarios, building-collapse scenarios, construction delays, and vehicle accident reconstructions are but a few of the complicated areas of expert engineering testimony that are being offered routinely in today's courtroom. Add to that the explanation of complicated financial transactions, statistics, regression analysis, lost profits, royalty calculations, insurance tutorials, money laundering, frauds, and other expert business testimony and you have ripe ground for unparalleled mediator, judge, and jury confusion. Effective use of the available technology tools can make once dry expert testimony riveting and far more comprehensible to the trier of fact.

3D Computer Animation. For your complicated manufacturing process and your toxic plume, 3D computer animation provides a means to recreate a real or imagined world within the computer and to then play out different scenarios of how something works, or how something happened. In environmental cases, you can illustrate the growth of a three-dimensional plume over time, or illustrate how a facility evolved over time. In patent cases, you can illustrate gene splicing, computer chip manufacturing, or how complex computer or voice mail systems work. In products liability cases, you can illustrate plane crashes, animate fire spread scenarios, and reconstruct why driver A couldn't see driver B's car in the dark until they collided. A combination of 3D animation, live video, photographs and 2D paintbox animations might be combined to create an interesting and persuasive tutorial about a company, plant or manufacturing process. It is important to think creatively about how to present your case visually to the judge or jury. They will appreciate your efforts.

A number of PC-based and workstation-based software packages are now available to create 3D computer animations. The key to getting a good product is to work with experienced animators and producers. Because you can now buy a low-end animation program for under $1,000, anyone with a PC can claim to have computer animation capability. As with any other service out there, you generally get what you pay for. To create an accurate, admissible, artistic, and effective computer animation is not cheap or simple.

Computer-Based Presentation Systems. Simpler forms of animation or interactive graphics can be created and presented directly from a laptop computer. Money flows, information flows, timelines, etc. can be built up or animated on screen. These exhibits can be made interactive with hot buttons that cause movement or bring up further graphics. Interactive timelines might include miniature versions of documents. When you click on the miniature document, it blows up to full screen. When you then click on a portion of highlighted text, it brings that text up to full screen. Such presentations can integrate hundreds of graphic images and document highlight images into an easily accessible visual database.

Posterboards. Once again, let's not forget the value of well designed posterboard graphics. Most good graphic design shops these days are creating graphics directly on computer, using a variety of software packages. Some packages are definitely better than others in terms of their ability to create quality graphics, and there is a great variance in the quality of graphics that are produced. Anyone can now buy some software and make pie charts, bar charts and chronologies on computer, but then again anyone could write a legal brief with Word Perfect. The results vary greatly depending on the skill of the operator. Poorly designed graphics, with small text, bad color selection, and a cluttered layout are like a bad brief. They present the jury with a poor image of both you and your client. You are dealing with a visually sophisticated audience. The public is constantly bombarded by advertisements created by highly paid graphic designers. Well-designed graphics that integrate case themes, memorable images, clean design, and proper color and font selection present the jury with an image of you and your client as organized, professional, and well-prepared. Post-trial interviews of jurors indicate time and time again that juries do not punish companies for being professional and well prepared at trial. Jurors do criticize companies for being "sloppy."

Your professionally prepared graphics can be present-

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ZELA G. CLAIBORNE

On CONSTRUCTION

INCREASINGLY, construction lawyers are using limitation of liability provisions in project contracts to minimize the damages for which their clients can be liable. These provisions do not relieve a party from liability entirely but, instead, cap the amount of potential liability. The law on limitation of liability provisions is in flux and, in many jurisdictions, their enforceability is in question. In California, however, it appears that such provisions will be enforced when they are included in an arm's length transaction between parties of relatively equal bargaining power.

Only four states – California, Wisconsin, Texas, and Virginia – have directly addressed the issue of the enforcement of limitation of liability provisions by statute. Where no statute governs, courts around the country have been inconsistent in their willingness to enforce these provisions. In reaching decisions regarding the validity of particular provisions, courts generally attempt to balance the competing principles of freedom of contract, on the one hand, and the law's discouragement of parties' attempts to insulate themselves from their own negligence, on the other. Where there is no specific state statute, some courts have looked to the law pertaining to indemnity provisions and exculpatory clauses (and to the anti-indemnity statutes which prohibit them) for guidance on enforceability. Other courts have relied primarily on public policy rationales.

In California, Civil Code § 2782 prohibits certain indemnification agreements. However, Civil Code § 2782.5 provides that the anti-indemnification statute does not prevent parties to a construction contract:

> From negotiating and expressly agreeing with respect to the allocation, release, liquidation, exclusion, or limitation as between the parties of any liability (a) for design defects, or (b) of the promisee to the promisor arising out of or relating to the construction contract.

The key California case on this subject is *Markborough California v. Superior Court*, 227 Cal. App. 3rd 705 (1991). In that case, the contract limited an engineering firm's liability to the greater of $50,000 or its consulting fee. Specifically, the court addressed the meaning of the phrase "negotiating and expressly agreeing" within California's limitation of liability statute. The petitioner contended that, because the limitation of liability clause had never been "negotiated" or even discussed, it could not be enforced under Civil Code § 2782.5.

In determining the effect of the statute's "negotiating and expressly agreeing" language, the court looked to the legislative history of both the California anti-indemnity and limitation of liability statutes. The court concluded that, while the anti-indemnity statute was intended to change the common law by prohibiting one contracting party from avoiding all liability for its own negligence, the limitation of liability statute was intended to reaffirm and clarify the fact that limitation of liability clauses remained valid despite the indemnity clause prohibition. Therefore, Civil Code §2785.5 would not override existing law by imposing additional affirmative duties of disclosure in the context of contract negotiations. *Id.* at 712-713.

Limitation of Liability Clause Validated

The court's decision in *Markborough* was made under California's limitation of liability statute, but the court defined the scope of the statute's requirements by applying general rules of contract construction. The *Markborough* court reasoned that an exculpatory clause is essentially a contract of adhesion, for "the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services," and the purchaser is unable to obtain increased protection from negligence by paying additional fees. *Id.* at 716-17. Similarly, a limitation of liability provision may be unconscionable, and therefore unenforceable, where there has been an "absence of meaningful choice" of terms and where the purchaser had no opportunity to accept, reject, or modify the provision. Because the evidence indicated that the petitioner actually had had an opportunity to request a change in any of the provisions of the contract, even though the actual language of the provision at issue was not discussed between the parties, the court held that the limitation of liability clause was valid. *Id.* at 716.

Zela G. Claiborne

The court in *Markborough* noted that limitation of liability clauses are "important" where the beneficiary of the clause is involved in a high-risk, low-compensation service, and that such clauses generally had been found to be reasonable and valid. *Id.* at 714. However, a limitation of liability clause will be upheld only where it is the result of "an arm's length transaction between parties of relatively equal bargaining power." The court's strict contract interpretation encompassed the public policy of upholding only those contracts which are fairly negotiated.

Although the law surrounding limitation of liability clauses is developing in various courts across the country, it appears that, at least for the present, such provisions will be upheld in California if they are clearly and carefully drafted. The tension between principles of freedom of contract and the public policy of insuring that professionals remain responsible for their negligent acts is not easily resolved, and will likely fuel the controversy surrounding these provisions for some time.

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Technologies for Courtroom Presentation

ed to the jury in a number of ways. Foamcore boards are still an excellent, low technology choice. Color transparencies can also work well in darker courtrooms. Also consider projecting the graphics from the computer onto a screen using a liquid crystal (LCD) projector and some form of presentation software that lets you display graphics in sequence just like you would using an old-fashioned slide projector.

The Trial Web Site. A new innovation is to create a virtual web site for trial. The "home page" has hot buttons that are hyperlinks to databases of documents, video material, graphics or animations. The attorneys or experts can navigate to the different exhibits using touchscreen monitors. As Americans are quickly becoming familiar with the Internet, they will be comfortable watching you access materials in the same way. In testing even these sophisticated exhibits on mock jurors, FTI has yet to hear a mock juror say that the presentation looked too slick or expensive.

Courtroom Display

Now that you have scanned the documents, prepared your videotaped deposition materials on CD-ROM or laserdisc, and created these powerful graphics to support your experts, you need to have the judge, jury, or mediators see and hear all this. In general, the display system to be used will depend on the material to be presented, the size of the courtroom, the number of jurors, and the preferences of the attorneys and judge. Most judges in this country have now had video of some form used in their courtrooms. The judges often make the call on what sort of video set-up will be allowed. It is essential in planning your use of presentation materials to know your judge and consult with others who have appeared before the judge to find out what has been allowed in the past.

For mediations or arbitrations, where you have a large audience in a controllable setting, it is best to use one large video projector. You can either use an LCD projector or a 3-gun RGB projector. The liquid crystal projectors have improved significantly in the past year or two and will soon rival the most expensive 3-gun projectors in both resolution and light level. With even smaller groups, you can consider using just a large video monitor. If you need to present images from video sources (laserdisc, videotape or visual presenter) and computer sources, you may need to use a multi-scan monitor or video/data projector, which automatically adjusts its scan rate to either the video or computer frequency. You would then use a video switcher to route whichever signal you want displayed to the monitor.

For presentation to only a judge, we recommend one high resolution monitor, either multi-scan or single frequency, depending on the source materials.

For presentation to a judge and jury, we can use the single video projector, a series of monitors, or some combination. In the O.J. Simpson criminal trial, the set-up included a multi-scan LCD projector for the jury and several small computer monitors at the counsel tables and for the judge. The system was set up such that the judge and counsel could preview materials on their monitors, out of sight of the jury, and, once approved, the signal was sent to the projector. The different attorneys in the Simpson case used scanned images and graphics from computers, Sony CRV Disc players, videotape players, foamcore boards, and an ELMO Visual Presenter to present all the material. In many respects, the Simpson trial set the technology standard in the eyes of the American jury pool. Your jury will not be surprised or overly impressed when you use graphics and technology.

Conclusions

We have seen tremendous advances in the technology available for use in trials. Your imagination is the limit in terms of what can be put together. The only guarantee I can make is that the best technology solutions for your presentation will be different next year.

Now it is up to you to become familiar and comfortable with the different technologies and their pluses and minuses. If you use the technology smoothly and seamlessly, you will appear professional and well prepared for the jury. The technology won't win the case for you, but keeping the attention of the jury and gaining their respect as a good teacher and organized presenter are excellent ways to start.

Mr. Hout is a Vice President of Forensic Technologies International (FTI).

STEPHEN OROZA

On CREDITORS' RIGHTS

THE debate over the social utility of Chapter 11, and proposals to amend it, have become a permanent part of the landscape for bankruptcy lawyers. Ever since 1978, when the Bankruptcy Code was enacted, there have been continuing efforts to "reform" the system and relatively frequent amendments of what was once a fairly stable body of law.

While there is widespread agreement that Chapter 11 is broken, there is little agreement about how to fix it. Position papers issued out of the National Bankruptcy Review Commission (the "Commission"), created by Congress to review and propose changes to the bankruptcy laws, give us insight into the diagnoses and prescriptions of the two principal working groups concerned with Chapter 11 reform. In part because of the difference in their focus, these working groups see very different problems with, and solutions for, Chapter 11. One of the position papers also contains a proposal for a simple reform which could have far-reaching implications for the future course of Chapter 11 law and practice.

One of the Commission's working groups (the "Small Business Group") addresses the small business and single asset Chapter 11 cases which make up the great bulk of day-to-day Chapter 11 practice. The Small Business Group's proposed reforms seem to spring from the premises that: (1) the debtor-in-possession ("DIP") cannot be relied upon to act as a true "trustee" for its creditors; and (2) delay is a major contributor to the problems with Chapter 11. Consistent with these premises, the Small Business Group recommends reforms for "small" Chapter 11 cases (those involving debtors with $10,000,000 or less in gross annual income) such as: (1) mandatory status conferences which require the DIP to explain the progress of the case to the bankruptcy judge and creditors; (2) short deadlines for proposing and confirming a plan; and (3) streamlined plan confirmation and disclosure requirements. The Small Business Group is also considering giving independent third parties a greater role in the bankruptcy process, although it is careful to note that no consensus exists on this issue. These proposals would likely reduce the delay inherent in Chapter 11, reduce the cost of creditor participation and put the bankruptcy judge (and possibly other independent parties such as trustees) in the position of representing the interests of "the system."

The cost of these proposals, however, is that they stratify Chapter 11 so that it has different rules for "big" and "little" cases. Such a stratification will weaken "old" Chapter 11 precedent by giving rise to the argument that the "old" cases addressed the "other" kind of Chapter 11 case. Also, making the judge (and possibly independent third parties) more central to the process arguably puts the federal government back in the business of "refereeing" bankruptcy. The abandonment of this "interventionist" model in favor of a "competitive" or "adversary" model was a fundamental reform of the Bankruptcy Code.

The Commission's other principal working group (the "Chapter 11 Group"), seems to draw its lessons from the large public operating cases, in which creditors and equity holders, and their representative committees, are all actively involved in the case. In this context, an "adversary" or "competitive" model of the Chapter 11 process, which assumes that the conflict between evenly-matched parties will result in the most economically sound resolution of their disputes, is less problematic.

In contrast to the Small Business Group, the Chapter 11 Group seems to believe that the balance of power has tilted too much in favor of creditors, particularly classes of unsecured creditors who use what remains of the "absolute priority rule" to block the debtor's efforts to confirm a plan. Thus, the Chapter 11 Group suggests reforms such as: (1) relaxing the classification of creditor claims (thus allowing the debtor to isolate dissident creditors in separate classes); and (2) formally recognizing a "new value" exception to the absolute priority rule (which would allow equity to retain its interest in the debtor without paying creditor claims in full and thus weaken the ability of the creditors to block confirmation).

Stephen Oroza

One reform proposed by the Small Business Group holds the promise of addressing its concerns without stratifying Chapter 11. The Small Business Group has suggested that the DIP be given a fixed period of time to propose a plan, which time may be extended upon a proper showing. If the DIP does not propose a plan or obtain an extension, the court may take one of a number of actions, such as dismissing or converting the case. In order to obtain the extension, the DIP must demonstrate that it is likely to confirm a plan within a reasonable period of time.

This reform is subject to criticism because it seems arbitrary to force the DIP to justify its progress in proposing a plan even where there are good reasons for the delay and no creditor has complained. A variant of the principle could be employed, however, which would allow creditors to trigger judicial review of the DIP's progress if they believe it appropriate. For example, Sections 1104 and 1112 of the Bankruptcy Code (the provisions governing, respectively, motions to appoint a trustee in a Chapter 11 case and motions to dismiss or convert the case) could be amended so that, after some period of time from the filing has elapsed, the burden shifts to the DIP to demonstrate a likelihood that it can confirm a plan within a reasonable period of time. Unless the DIP carries that burden, a trustee can be appointed or the case converted or dismissed, as appropriate.

The Bankruptcy Review Commission has framed the debate over Chapter 11 well. It will be interesting and informative to see what recommendations it ultimately makes.

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

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Tips for Preventing Credit Losses

Bankruptcy Code. Chapter 11 proceedings involve a reorganization of pre-petition debt where the debtor remains in business as a debtor-in-possession (usually with the same management) and, thus, generally must pay post-petition debt as it is incurred. The debtor is allowed to conduct operations in "the ordinary course of business" without getting specific bankruptcy court approval, but the court must specifically approve all acts outside the ordinary course of the debtor's business. The debtor must file schedules of assets and liabilities with the court and a statement of financial affairs with detailed information about the company. The debtor also must file detailed monthly operating reports that describe (in general terms) the current revenue and expenses of the debtor. Creditors have the right to obtain further information through the use of Bankruptcy Rule 2004 exams, which are similar to document discovery and depositions in litigation.

Chapter 7 involves the complete liquidation of the company. The doors are locked, the business is closed down and the company assets are liquidated by a Chapter 7 Trustee appointed by the Court from a panel of bonded trustees. There are sometimes excellent opportunities to purchase assets out of Chapter 7 estates.

Automatic Stay. When a customer files for bankruptcy, the bankruptcy "automatic stay" prevents a client from taking any collection actions, including (i) bringing a lawsuit; (ii) enforcing a judgment; (iii) creating, perfecting or enforcing a lien; (iv) attempting to collect a pre-petition debt; or (v) even sending a customer a notice of termination of a contract. These rules are enforced strictly, and violations of the rules can subject the client to penalties.

Preferences. Simply put, a preference is a payment from the customer to the client on account of pre-existing debt that gives the client more than it would have received in a liquidation (*i.e.*, a Chapter 7 liquidation). A client receiving such a payment within 90 days before a customer files a bankruptcy petition must return the payment to the customer, unless there is a valid defense to the claim of preference. If the client is an "insider," the time period for a preferential transfer stretches to one year before the petition date. The debtor or trustee will seek to have preferential payments returned to ensure that all unsecured creditors receive equal treatment. There are a number of defenses to the preference actions, including (i) that the payments were received in the ordinary course of business; or (ii) that the vendor provided subsequent value to the debtor after the payment.

Nevertheless, a client should generally obtain the funds from its customer before a bankruptcy if possible, even if it appears to have no solid preference defense, and then negotiate regarding the preference action if a bankruptcy petition is filed and the issue is raised.

Classification of Claims. The bankruptcy laws treat creditors according to special rules of priority. In general, the highest priority creditors are those that have liens or security interests in the debtor's property and special creditors such as governmental entities and workers receiving wages. Unsecured creditors are the lowest priority creditors and must share in distributions of the debtor's assets after all secured creditors, administrative claimants, and other priority creditors are paid. It is rare that unsecured creditors get 100% payment. Plans of reorganization often provide for an ultimate payment of between 10¢ to 50¢ on each $1.00 owed. It is becoming more and more common that unsecured creditors receive only stock in the reorganized debtor. Thus, close monitoring and management of financially distressed accounts before bankruptcy is critical.

Protective Measures and Remedies After

Request for Notice. A debtor in bankruptcy must give notice to its creditors of major events that occur in the bankruptcy case. For example, the debtor must give notice of the bankruptcy filing, the claims "bar date" (*i.e.*, the date when creditors' claims must be filed), and, in a Chapter 11 bankruptcy, the plan of reorganization and related disclosure statements. Foreign clients should have a lawyer in the United States receive such notices because significant hearings may occur on very short notice in a Chapter 11 proceeding.

A client also can obtain all notices in a bankruptcy case by filing a "request for special notice." This is a good way to monitor the case, although some debtors' attorneys do not send all pleadings to those on that list.

Extending Credit. If a customer files for bankruptcy, a client can continue to supply goods to the customer on credit after the filing, and, if it does so, the client will have an "administrative claim" of the highest priority. However, it is not a guaranty of full payment. Some suppliers continue to supply goods on credit to customers in bankruptcy, but this should only be done with careful planning and legal assistance. A creditor usually has the right to refuse to deliver goods on credit to a customer in bankruptcy, even if it previously had agreed to do so. Many suppliers switch to C.O.D. delivery after a Chapter 11 filing.

Stoppage Rights. The client's stoppage rights also survive the customer's bankruptcy filing.

Reclamation Rights. A client can continue to exercise reclamation rights against a customer in bankruptcy, but this remedy is restricted. For example, *written* demand for reclamation must be made within ten days of the customer's receipt of the goods even if the customer previously has misrepresented its solvency. In contrast to its meaning outside of bankruptcy, some courts have concluded that the term "insolvent" in bankruptcy applies only to debtors whose liabilities exceed their assets. The bankruptcy court may also limit the client's right to recover the goods by granting the supplier a priority claim or lien against the debtor's property instead of allowing the client to pick up the goods. Finally, as in a nonbankruptcy situation, the remedy is unavailable if the goods have been sold to "good faith" purchasers or if they have been incorporated into other products.

A written demand for reclamation does not violate the automatic stay, but the client still must obtain bankruptcy court approval before it can take possession of the goods. Additionally, a client's proper exercise of the right of reclamation cannot be undone as a preference.

Most importantly, this remedy requires the client to monitor its troubled accounts closely in order to comply

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RACHEL KREVANS

On PATENTS

ON October 15, the U.S. Supreme Court heard argument in *Warner-Jenkinson Company, Inc. v. Hilton Davis Chemical Co.*, No. 95-728, on the continued validity of the "doctrine of equivalents": the rule that a person who makes, sells or uses a device which is not initially covered by a patent, but is altered only in "insubstantial" ways from a patented device, may still be liable for infringement. The question certified by the Supreme Court in *Hilton Davis* was sufficiently vague that no one knows whether the Supreme Court is considering defining the doctrine more narrowly, or eliminating it altogether, and questions at the oral argument gave few hints as to which way the justices were leaning. The case attracted a swarm of amicus briefs arguing a multitude of positions, some in favor of the status quo, some in favor of fairly radical curtailment of the doctrine, some suggesting that it be eliminated.

Among the many arguments for curtailing the doctrine were the following:

- An "insubstantial differences" test is inconsistent with the statutory requirement that patent claims be particular and distinct. The claims define the boundaries of an invention, and courts should not expand them.
- An "insubstantial differences" test allows patentees to do an end-run around the Patent and Trademark Office ("the PTO"). Patentees obtain coverage from courts through the doctrine of equivalents over subject matter that would not have been allowed by the PTO.
- "Prosecution history estoppel" mandates that patentees not use the doctrine to recapture claim scope they explicitly surrendered during examination in order to persuade the PTO to issue their claims.
- In enacting the patent laws, Congress struck a deliberate balance between on the one hand granting monopolies to encourage innovation, and on the other hand providing public notice to encourage designing around and incremental innovation. Because the doctrine gives a monopoly outside the subject matter on which the patent gives notice to the public, it upsets this balance.
- Businesses require certainty in claim scope to make informed research and development decisions. The doctrine of equivalents increases uncertainty, because even if a product is not described in a patent it might still infringe if a court concludes it is not "different" enough (and of course there is no formula to determine with certainty how different is different enough). In effect, the doctrine discourages incremental innovation.
- The doctrine is an equitable remedy to be applied in exceptional cases, and should therefore be limited to prevention of piracy by deliberate copyists.
- Again because the doctrine is an equitable remedy, courts should look at whether value was added by an alleged infringer; if so, the doctrine should not apply.
- The judge rather than the jury should determine whether there is infringement under the doctrine.

Some of these arguments have a facial appeal, but perhaps because I work so much in the biotech area, where a smart college student could take many important inventions outside the scope of literal infringement (by slightly changing the composition of the biological agent patented), I think they're all wrong.

The doctrine of equivalents fills a critical role in United States patent law. By deterring infringement through insubstantial alterations to a patented invention, the doctrine has protected the inventors' intellectual property rights and ensured fair returns on their investments in innovation, without creating an unreasonable uncertainty about the scope of patents.

The decision to practice near the borders of a patented invention is a calculated risk, requiring no more care than in other analogous areas of the law. Parties must make judgment calls, and patent attorneys, schooled in claim interpretation and familiar with the relevant technology, are eminently able to make such determinations. That they may sometimes be wrong is no reason to eliminate or severely limit the doctrine.

Rachel Krevans

Elimination or limitation of the doctrine of equivalents would result in a number of adverse consequences. First, patentees would claim a greater number of variants of their invention to attempt to gain protection against insubstantial changes. Such additional disclosures could cause an explosion in the verbiage a patent contains. Because the additional information disclosed would consist of insubstantial variations, there would be little corresponding public benefit from this disclosure, if any. Instead of reasonable notice of the scope of claims (including equivalents), competitors would be buried in "an avalanche of trivial information—a result that is hardly conducive to informed decision-making." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448-49 (1976).

Practices in Japan, where patents traditionally have been subject to narrow literal interpretations, substantiate this fear. Whenever a patent of value is published, competitors of the patentee will file excessive numbers of patents claiming minor variations, a practice known as "patent flooding." Without a doctrine of equivalents, competitors could do the same in the United States, to hem in important inventions and extort a cross-license at an unfair price.

The loss of the doctrine of equivalents, or a substantial reduction in its scope, would be a serious blow to many industries in which substantial innovation is currently underway. When it takes eight to ten years and hundreds of millions of dollars to bring a product to market, investors want to know that the end of the rainbow is a pot of gold for them, not for eager and clever copyists.

Until the Supreme Court decides, and perhaps even afterwards, an unfortunate uncertainty will persist as to the scope and application of the doctrine of equivalents.

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Causes of Discontent with Lawyers

result, by validating the notion that lawyers personally endorse their client's actions.

Some of it comes from the times.

For the first time in living memory, America lacks an external enemy. There is no national crusade in which the discontents and frustrations of the individual can be submerged in a struggle for the common good. Changing economic demographics are also eroding the historic confidence of many Americans that the future will be better for them or their progeny.

The result is generalized peevishness. The nation gnaws at its own knees. Every institution is questioned and criticized. Cynicism abounds. Particularly hard hit are institutions, such as the legal system, which make the greatest claims to probity and fairness.

Some of it comes from a craving for certainty.

Common to most lawyer jokes is a view of lawyers as "liars" – people who say things they don't really believe, people whose job it is make the weaker argument appear the stronger.

Americans have never had much appetite for moral ambiguity, and the dearth of clear cut moral confrontations on the world scene has only increased the craving for them on the home front. Popular entertainments offer Manichaen conflicts of good against evil, differing only in the amount and novelty of the violence visited upon the evildoers. Human actors, who, however heavily made-up, still exhibit some admixture of characteristics, yield to cartoon characters of unalloyed goodness or evil. Sport, with its definitive, if vacant, verities, holds the nation in thrall.

The justice system suffers mightily in comparison. Lawyers annoy the public by reminding it that there are two sides to issues as to which it very much wants to believe there is only one. Courts frustrate a public which just "knows" how cases should come out by their fussy insistence on proof and procedural fairness.

Some of it comes from the laws.

Just as lawyers share in the opprobrium of unpopular clients, so, too, they are held responsible for unpopular laws and regulations.

There are, no doubt, some bad or badly written laws, just as there are some defective or inefficacious products. But even wise laws sometimes earn criticism for the lawyer who must explain them to clients whose wishes they may seem thwart.

By and large, lawyers do a bad job of explaining the rule of law. Too readily they acquiesce in a view of law as a web of restraints which keep people from achieving their purposes, rather than a body of liberating rules without which there would be no safety, certainty or commerce.

Property, as the Crits regularly remind us, is solely a creature of law. This is particularly true of the property which the remarkably talented people of our area are creating in such abundance. High technology is possible only within a strong juridical regime. Pinkertons could protect Ford and Pullman. Only lawyers can protect software.

No less dependent on a vigorous legal regime is the process of capital formation now occurring at a pace never imagined. It is no coincidence that the only nation with a public market for the securities of nascent enterprises is the one with the most robust securities laws.

Lawyers would do well to remind their clients of these truths.

Some of it is deserved.

It's true. There are some bad lawyers – some greedy and evil ones, too. Maybe the level of probity is higher among lawyers than in the populace generally - as lawyers perennially claim - but that is irrelevant. The public expectation is higher still, and it is not being met.

And that is where this analysis leads. Behind every lawyer joke lies disappointment that lawyers are not better – better than others. There are few jokes about manufacturers, realtors or engineers. That is not because their work is inherently less risible or because the public finds them uniformly moral or public-spirited.

Rather, it is because, despite all the disappointment and cynicism of the times, the public still holds lawyers in high regard and expects much of them. Confidence in the legal system persists throughout our society, even in unlikely places. Outrage at perceived miscarriages of justice only makes sense if one expected better. Disappointment that lawyers are not deeply committed to the public interest is understandable only if one thought they were.

Far, then, from being a terminal indictment of the profession, the current criticism should be seen as what it is, a communal plea to a uniquely privileged profession to do its duty. And that is to defend the rights and serve the legal needs of all – the good, the bad, and the overwhelmingly most numerous, the in-between – to do so for a fee when possible and without one when necessary, to pursue improvements in the justice system without fear or favor, to work diligently and faithfully for our clients and, one hopes, not to lose our sense of humor in the process.

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Tips for Preventing Credit Losses

with the ten day notice provision.

Setoff Rights. If both the client and the customer owed each other money before the bankruptcy filing, then the client may be able to offset the customer's claim against its own claim. However, because of the automatic stay, this remedy requires permission from the bankruptcy court and may not always be available.

In conclusion, there are several concrete proactive steps a client can take to prevent or minimize its credit losses. Urge clients to call you early to assess the situation and be prepared to act quickly on their behalf.

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