ASSOCIATION OF BUSINESS TRIAL LAWYERS

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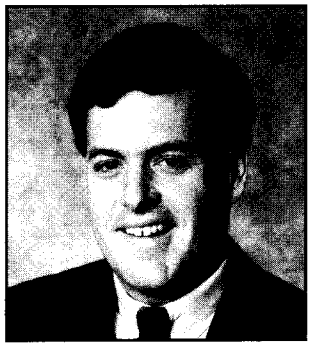
Effective Use of Computer Graphics and Animations

WE all know the statistics: Jurors retain about 20% of the content of evidence presented from oral testimony alone. But when oral testimony is combined with illustrative demonstrative evidence, such as graphs, pictures or blow-ups of documents, jurors can retain up to 80% of the evidence being offered. Hunt, *Litigation News*, Use of Videotape in Opening Statement (May 1997); Bernstein, *Lawyers Alert*, Presenting Time Lines (June 1992). In other words, at every opportunity we trial lawyers must use overheads, charts, pictures and graphics to enhance, explain and summarize our witnesses' testimony as well as our argument.



Benjamin K. Riley

Computer-generated graphics, displayed over large television-like screens, provide one of the best opportunities to present demonstrative evidence. There is no better way to reach a jury than with accurate, well thought out computer graphics and animations that focus on the core issues, persuade the jury and dominate the opponent's evidence. Computer graphics can take virtually any form – from simple charts to lengthy, multi-level animations –

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Settler's Remorse: My Lawyer Made Me Do It

LAWYERS, always a popular target of claims, have yet another issue of concern. In recent years, those of us defending legal malpractice suits have seen innovative pleadings in which plaintiff, a former client, sues counsel for legal malpractice resulting from a settlement to which the former client had agreed. These claims may take the guise of an unhappy former plaintiff whose counsel allegedly encouraged him or her to settle for "too little," or an unhappy former defendant who allegedly, at counsel's urging, paid "too much."

Michele K. Trausch

There has been little case authority to guide in the defense of such claims, but three strategies have been identified for defending against such a suit.

Judgmental Immunity

This defense is based on the rationale that the practice of law is not an exact science; in matters of judgment, there is no uniform skill level to which all lawyers in the community will agree. *Davis v. Damrell* (1981) 119 Cal.App.3d 883. The immunity granted to lawyers for tactical decisions has been acknowledged and confirmed by California courts. *See Kirsch v. Duryea* (1978) 21 Cal.3d 303.

A decision to recommend or pursue settlement is perhaps one of the most difficult judgment calls an attorney makes during the course of representation.

> Public policy concerns about the solemnity of the settlement process have been considered in evaluating legal malpractice claims. The hindsight vulnerability of lawyers has been a factor. Whether a case would have or should have achieved a better settlement in absence of documented settlement authority, is speculative concerning how the parties would have negotiated. Thus, courts have said that policy considerations require judi-

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Computer Graphics and Animations

with the trial lawyer acting as producer and director. They force the opposing party to react and attempt to rebut your evidence, instead of focusing on their own case. Strong demonstrative evidence enables you to "control the middle of the court" with your client and your case being the focus of the jury's attention.

Despite these benefits, computer graphics are not always extensively used, due primarily to the time pressures of trial preparation and the cost. We suggest using your law firm's own resources – desktop publishing and MIS – to produce computer graphics in-house. Not only will it cost much less than using an outside vendor, the results will be better,because of the trial lawyer's central role in the development process. And with the myriad of sophisticated software publishing programs now on the market, you can achieve amazing results in-house.

The Do-It-Yourself Process

Since 1991, we have produced 6 in-house computer animations that have been presented in trade secret and patent jury trials, and an arbitration involving airbags. Most recently, in a trade secret trial in March 1996, we presented three simple but powerful animations illustrating key testimony of the inventor-client. Through the use of diagrams supported by multiple levels of admissible information accessed through clicking on the screen, we orderly and logically presented stacks of documentary information in 20 to 30 minutes of the client's testimony.

Our most challenging animation came in a patent trial involving our client's hearing aid design. Ultimately, we presented an interactive animation with five different segments, with each segment having five to ten interactive screens. Different segments were used first with the inventor and then with the expert, and brought together during closing argument. The animation illustrated why hearing aids are needed, how they work, development of digital hearing aids, our client's design, the defendants' design, and finally a comparison section depicting our theory of infringement.

The development process for this animation took approximately two months. First, the trial lawyer mapped out her themes for the animation. Next, several meetings were held with the trial lawyer, the inventor and two in-house graphic artists who had produced other animations. These planning meetings are essential to a successful final product, since once programming begins it is very difficult to redo basic approaches. The graphic artists then began to produce "story boards," drawings that depict each variation in the animation. After approximately 5 weeks and almost 80 revisions of the story board, the trial team, inventor and expert were satisfied by the 50 proposed screens – all before any programming was commenced.

Programming took the next three weeks, with a free lance artist and an audio expert assisting the two in-house graphic artists. The trial lawyer consulted on a daily basis, reacting to each of the key design decisions and constantly trying to achieve greater accuracy. Weekly meetings were held with the inventor and the expert.

The final result was a distilled "movie" of the key themes in the case – the themes the jury needed to accept in order to find infringement. The animation became a centerpiece of the trial, illustrating the witnesses' testimony and summarizing the case during closing argument. The jury agreed with the premise of the animation and found wilful infringement by the defendant.

The animation cost the client approximately $75,000 and took 400 hours of work by the graphic artists and 80 hours of the trial lawyer's time. The same animation produced by an outside vendor would have cost two to three times as much. More importantly, an animation by an outside vendor would not have been nearly as effective since the trial lawyer and the client could not have directed every step of the process.

The Possibilities Are Endless

Computer graphics provide the trial lawyer with the opportunity to *create* the best medium for his or her evidence. Brainstorming with a talented graphics artist skilled in computer art will yield many different options.

At their simplest, computer graphics can be used to create relatively simple charts and graphs. Complicated information that is authenticated and presented by a key witness can be visually incorporated into a colorful chart. In one case, an oversized multi-color chart summarized crop damage incurred by nursery trees, using different sized trees to depict the actual percentage of saleable trees in comparison to the expected saleable percentage shaded behind. In another matter, voluminous medical records from 12 doctors were summarized by identifying the key symptoms on a series of human figures. In each situation, the trial lawyer can work with the graphic artist "down the hall" to assure the most admissible and most persuasive presentation of the evidence.

Beyond charts and graphs, computers allow organization and logical presentation of information that would become tedious if presented through a witness by discussing and displaying one document at a time. The "old fashioned way" lacks the visible *building* of the evidence toward the conclusion you are presenting. For example, suppose your client is accused of stealing trade secrets instead of performing its own painstaking and time-consuming development work. With the guidance of your client, you design a computer-driven development time line. As you click on each development period, the computer can reveal each key document or product component produced during the period, the number of employees or development hours devoted to the project, and the amount of money spent on development. As you gradually fill in the computer screen from the start of the business through trial, jurors will see and better remember the client's development effort and thus be more willing to accept your theme that the company's intellectual property derived from hard work, not theft.

Finally, computer graphics can evolve into sophisticated animations with interactive responses depending upon variations selected by the operator. In the hearing

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aid patent case, the animation demonstrated the digital flow of information and its ultimate storage in a EEPROM. This fundamental similarity between the patented design and the defendants' product, as demonstrated by the circuitry flow in the animation, established the foundation for infringement. The most sophisticated animations can model an explosion depending upon assumed variables, or depict in three dimensions the delivery of digital telecommunications signals. In essence, computer graphic evidence can take whatever form the trial lawyer deems most accurate and persuasive. The key is not to attempt to transform the jury into experts on the technical or business issues of your case, but to hammer-home – with testimony and supporting visual graphics – the key themes required for a verdict for your client.

The most sophisticated computer animations, incorporating three-dimensional video or sophisticated audio files, for now are probably beyond the reach of most law firm computer resources. However, as discussed in the next section, the components required for most trial graphics and animations already are available from off-the-shelf software graphics packages and medium-priced graphics computers.

Getting Started

You will need a desktop multimedia computer: either Macintosh or Intel/Win 95 with a big, fast hardrive and at least 32 megabytes of RAM. Graphics files can become quite large so the more RAM the better. You'll also need a color flatbed scanner for scanning graphics and source material and a Zip or other drive to back-up and transport your files. Most in-house graphics departments will already be equipped with this type of hardware.

For software, you will need graphics programs for storyboarding, animating, programming interactivity and creating the art. The storyboards can be created in a page layout program such as PageMaker or a drawing program such as Adobe Illustrator. Using these types of programs, the artist can create small "key frame" depictions of the proposed screens with text descriptions next to each frame. When it's time to create the actual animated exhibit, the software you should use depends on the scope of the exhibit. For minimal interactivity, Microsoft Powerpoint works fine. For more involved presentations, we like to use Macromedia Director which creates fairly sophisticated two-dimensional animations. Although Director has a module for painting images, most computer artists will want to create the art in a program like Adobe Photoshop and then place this art back into the Director file to be used as a background or an element to be animated.

Who do you hire to create these interactive exhibits? Computer graphic artists with a background in multimedia production such as interactive CD ROM titles are your best bet. If you already have an in-house graphics department and they don't know how to use Director, you might think about signing them up for a course. If you have in-house staffers that do programming, they should be able to help with the Director's programming.

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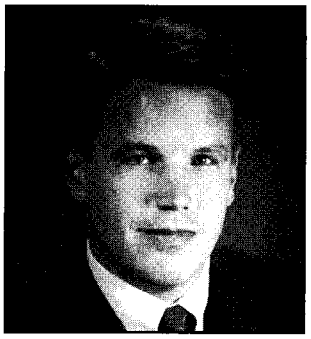
A Parent Corporation's Insurance Coverage: Watch Out!

HAS your corporation (or a corporation you represent) ever acquired other assets, businesses, or property? Is your corporation considering doing so? As you know, when your company acquires other assets, it may also assume certain obligations for future liability relating to that company or property. Are you also assuming, however, that your pre-acquisition insurance policies will cover your company in the event that it gets sued for the pre-acquisition acts, conduct, products, or property of the acquired assets? If so, watch out. According to recent California appellate decisions, you may be left with no insurance coverage whatsoever.



John S. Worden

Let us assume that since 1960, Parent Corporation has always been fully insured by Insurance Company. Like most thriving corporations, Parent Corporation from time to time purchases parcels of real property and even purchases entire companies that become its wholly-owned subsidiaries. Tomorrow, Parent Corporation plans to go through with the purchase of all the assets and property owned by New Subsidiary. Next year, if Parent Corporation gets sued for the environmental contamination of the property formerly owned by New Subsidiary, contamination that was caused by New Subsidiary's business activities in the mid-1960s, will Parent Corporation's Comprehensive General Liability ("CGL") policies issued by Insurance Company in the 1960s provide coverage? When it gets sued next year by a personal injury plaintiff exposed to asbestos-containing products manufactured by New Subsidiary in the mid-1960s, will Parent Corporation's CGL policies provide coverage? As a result of a recent trilogy of pro-insurer decisions, without careful planning and negotiation Parent Company may *not* have any coverage to protect it against these potential liabilities.

Cooper

The first case in the pro-insurer trilogy in this area was *Cooper Companies, Inc. v. Transcontinental Insurance Company*, 31 Cal. App. 4th 1094, 37 Cal. Rptr. 2d 508 (1995). Cooper Laboratories and its wholly-owned subsidiary, CooperVision, were insured by Transcontinental from July 1, 1982, to August 1, 1985. In 1987, Cooper purchased two other companies and acquired their liabilities. After being sued for bodily injury claims alleged to have been caused by breast implants previously manufactured and distributed by the acquired companies, Cooper sought coverage under the Transcontinental policies for damages caused during the policy period. The insureds relied upon an endorsement that read that "[t]he named

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A Parent Corporation's Insurance Coverage

insured of the declaration shall read: Cooper Laboratories, Inc., and any organization or business entity *now existing or hereafter acquired*.... " 31 Cal. App. 4th at 1098. The trial court entered a declaratory judgment in favor of the insurer, and the First District Court of Appeal affirmed. The Court found that "the record in this case establishes that the intended purpose of the 'hereafter acquired' language was to avoid gaps in Cooper's coverage arising from failure to promptly report an acquisition to its insurer by ensuring coverage for acquisitions until specific insurance arrangements could be made for the new acquisitions." *Id.* at 1106-07. The Court found that this provision was not intended to provide coverage for entities acquired after the expiration of the policy.

In *dicta*, the Cooper court offered policy reasons why a parent's pre-acquisition policy should not cover the pre-acquisition acts of the acquired subsidiary, such as the following:

- Policy premiums are usually assessed at the inception of the policy based on the estimated gross sales or assets of the named insureds, and commonly liability policies are based upon the audit of the gross sales of a named insured. *Id.* at 1108. Obviously, assets acquired after the expiration of the policy period could not have been considered at the time when the premium calculations were being made.
- "Occurrence" policies define a finite policy period, and thus "reasonable insureds" would not interpret a policy to "provide coverage in perpetuity...." *Id.* at 1107-08. "Unless coverage has been triggered under these occurrence policies within the policy period, there is no coverage once the policy period has ended.... [I]t logically follows that a named insured cannot be added once a policy period has ended. A corporate acquisition occurring after the policy period can have no retroactive effect on the identity of the named insured." *Id.* at 1107.

Armstrong

In April of 1996, the First District Court of Appeal decided the second case in this area, *Armstrong World Industries, Inc. v. Aetna Casualty & Ins. Co.*, 45 Cal. App. 4th 1, 52 Cal. Rptr. 2d 690 (1996). The court had before it "a number of complex questions concerning insurance coverage for claims of asbestos-related bodily injuries and property damage." 45 Cal. App. 4th at 34.

In *Armstrong*, from May 1, 1961, to May 1, 1967, Continental Casualty and Commercial Union provided excess insurance coverage to GAF Corporation under three separate policies. The premiums were based on GAF's gross sales and were adjusted annually to reflect changes in GAF's operations, including corporate acquisitions, during the policy period. During the 1961-67 policy periods, GAF did not manufacture asbestos products. *Id.* at 77.

On May 26, 1967, three weeks after the expiration of the policies, GAF merged with Ruberoid Company, which had previously manufactured asbestos products. After the merger, Ruberoid ceased to exist and all of its assets were transferred to GAF, which took over Ruberoid's asbestos-manufacturing operations. In 1969, the first asbestos-related bodily injury claim was brought against GAF arising out of Ruberoid's pre-acquisition manufacture of asbestos products.

The trial court was asked to decide whether Continental and Commercial Union provided coverage for asbestos-related injuries attributable to the Ruberoid products. The trial court concluded that the insurers did provide such coverage.

The First District California Court of Appeal reversed. 45 Cal. App. 4th at 81. The Court of Appeal focused on the "named insured" provision of the policies and held that Ruberoid did not qualify as a named insured since the policies limited coverage to products manufactured by the "named insured or by others trading under his name." *Id.* at 79. The policies named only GAF and its "subsidiary, associated, and affiliated companies or owned or controlled companies as now existing or hereafter constituted." *Id.* at 79. GAF argued that the purpose of this language was to extend coverage to corporations acquired by GAF. The Court of Appeal disagreed, doubting that the phrase "or hereafter constituted" would extend coverage to a company acquired after the policy period ended. The Court concluded that the word "hereafter" could not "reasonably be read as referring to any time in the indefinite future":

> A liability policy has a finite duration...unless coverage has been triggered during the policy period, there is no coverage once the policy period has ended. Logically then, neither is there a named insured once the policy period has ended. Thus, a corporate acquisition taking place after the policy is expired can have no retroactive effect on the identity of a named insured during the policy period.... In the present case, Ruberoid had no relationship with GAF during the 1961-1967 policy periods. The merger of Ruberoid and GAF took place after the Continental and Commercial Union policies had expired. The fact that the companies became affiliated later is not enough to give Ruberoid the status of a named insured under the premerger policies.

Id. at 80-81.

A. C. Label

The third and perhaps the most explicit decision in this trilogy was last year's Sixth Circuit California Court of Appeal decision in *A. C. Label Co., Inc. v. Transamerica Ins. Co.*, 48 Cal. App. 4th 1188, 56 Cal. Rptr. 207 (1996). In *A. C. Label*, the plaintiffs purchased insurance from Transamerica with a policy period of May 1981 to May 1982. The plaintiffs purchased a parcel of real property in 1984. A clean-up and abatement action was brought against the plaintiffs in 1987 for groundwater contamination to the real property that began in 1967. The plaintiffs sought coverage under the Transamerica policy. The trial court granted Transamerica's demurrer without leave to amend, and the Court of Appeal affirmed, holding as follows:

> Liability insurance coverage cannot be created after the fact. The coverage provided by plaintiffs' CGL policy was not triggered during the policy period because plaintiffs had no connection to or nexus with the damage caused by contamination that occurred on the subsequently acquired property during the policy period.... No reasonable policyholder could have believed that a CGL policy issued for a policy period in 1981 and 1982

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> would provide coverage for a loss which was not a liability of the policyholder at any time prior to 1984....

Id. at 1194. The court held that the contamination did not trigger coverage under plaintiffs' CGL policy because, "although the *damage* allegedly occurred during the policy period, plaintiffs, the insureds, were not, and had not been, associated with the property or the groundwater contamination in any way at the time this damage occurred, and therefore plaintiffs were not *liable* for and could not have been held *liable* for this damage at the time that this damage occurred." *Id.* at 1192. Plaintiffs became connected to the damage only through their 1984 acquisition of the property. Because a CGL occurrence policy only covers the insured's *liability* for damage caused by an occurrence, the fact that the plaintiffs were not liable for the damage when it occurred results in the absence of coverage for that damage. *Id.* at 1193.

The court distinguished *Montrose Chemical Corporation v. Admiral Insurance Company*, 10 Cal. 4th 645, 42 Cal. Rptr.2d 324 (1995) ("*Montrose II*"), on the ground that in *Montrose II* "the issue was whether a third party CGL occurrence policy in effect at the time that damage occurred covered a claim based on that damage even if the damage-producing act occurred prior to the commencement of the policy period." 48 Cal. App. 4th at 1193. The court said that *Montrose II* "did not involve an insured's post-policy period acquisition of liability for damage which had occurred during the policy period." *Id.*

Finally, the court reasoned that "[i]f coverage could be created by after-the-fact transfer of liability to an insured, an insured could contrive to make an insurer responsible for the liability of a *third party* by simply acquiring that liability long after damage attributable to the third party had already occurred simply because of the happenstance that the *insured*, as opposed to the third party, had been covered by a CGL policy at the time of the damage." 48 Cal. App. 4th at 1194.

The dissent in *A. C. Label* accused the majority of making "new law in pronouncing that, for CGL coverage to be triggered, an insured must be theoretically liable during the policy period." *Id.* at 1195. The dissent stated that "CGL policies insure people, not property. Thus, the focus in a CGL coverage case is on the insured, not the insured's property." *Id.* The dissent stated that "since there was no question under *Montrose II* that "there was an occurrence during the policy period in this case, the policy affords plaintiff coverage." *Id.* at 1196.

The dissent reasoned that because the policy was an occurrence policy, it "insures for unknown liabilities that may occur even after the expiration of the policy," and that this "open-ended coverage is paid for by the higher premiums that go with occurrence-based coverage as distinguished from the limited coverage and lower cost of a CGL 'claims made' policy." *Id.* (*citing Montrose II*, 10 Cal. 4th at 689). The dissent concluded that the plaintiff must have paid a higher premium for the security of the "open-ended" occurrence coverage, and therefore Transamerica accepted this risk. *Id.* at 1196.

The dissent also questioned the majority's attempt to distinguish *Montrose II*. The dissent observed that *Montrose II's* "multiple-trigger-of-coverage" holds that "bodily injuries and property damage that are continuous and progressively deteriorating throughout successive policy periods are covered by all policies in effect during those periods." *Id.* at 1196 (*quoting Montrose II*, 10 Cal. 4th at 675). Finally, the dissent observed that since courts will "generally apply equitable considerations to spread the cost among the several policies and insurers," the insurer is in a better position than the plaintiff "to minimize the impact of the unusual facts." *Id.* at 1196.

What Now?

Now, many companies face potential exposure for the pre-acquisition acts of their subsidiaries and affiliated entities and may be "bare" from an insurance standpoint. Therefore, it is important for risk managers to understand that the parent's insurance may not apply to cover the pre-acquisition acts of the subsidiary companies and to sufficiently analyze a number of relevant issues to ensure that coverage is adequate.

For example, does the subsidiary have insurance coverage for all relevant time periods in amounts sufficient to protect the parent? If the parent acquired the subsidiary's assets the parent also presumably acquired the subsidiary's older insurance policies covering those assets. The decisions above do not affect the ability to rely upon the *subsidiary's* pre-acquisition policies to cover the subsidiary's pre-acquisition acts. *See, e.g., Northern Ins. Co. v. Allied Mut. Ins. Co.*, 955 F.2d 1353 (9th Cir. 1992)

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Computer Graphics and Animations

Case Law

Introduction of demonstrative evidence at trial lies within the discretion of the trial judge under Evidence Code section 352 and Rule 403 of the Federal Rules of Evidence. The California Supreme Court, in upholding the admissibility of a videotape reenactment of a crime, found that the trial court must weigh whether the demonstrative evidence is a "reasonable representation of that which it is alleged to portray" and whether it "would assist the jurors in their determination of the facts." *People v. Rodrigues*, 8 Cal.4th 1060, 1114 (1994).

Recent case law has approved the use of computer graphics and animations at trial. In *People v. Hood*, 53 Cal.App.4th 965 (1997), the court rejected the argument that illustrative animations must be tested by the scientific evidence standard of *People v. Kelly*, 17 Cal.3d 24 (1976). The court found that the "animations were tantamount to drawings by the experts from both sides to illustrate their testimony. We view them as a mechanized version of what a human animator does when he or she draws each frame of activity, based upon information supplied by experts, then moving through the frames, making the characters appear to be moving." As long as the "reasonable representation" test is met and the judge admonishes the jury that the animation is merely illustrative of an expert's opinion and not an exact recreation, the animation should be fully admissible.

The Tenth Circuit, in *Robinson v. Missouri Pacific R. Co.*, 16 F.3d 1083 (10th Cir. 1994), upheld the trial court's admission of a videotape animation of a train crash, finding that it adequately represented the events and the expert's opinion. The appellate court added that, since animations are a new and powerful tool, courts should closely exercise their "gatekeeper" function under Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to ensure "the evidentiary relevance and reliability of the principles that underlie the submission."

Where a sophisticated computer animation purports to recreate an event and then yields results on which the expert relies, the evidence arguably is transformed from mere illustrative demonstrative evidence into scientific evidence. In this scenario, the expert's underlying assumptions and methodology may have to meet the more stringent tests of *People v. Kelly* or *Daubert*.

Will the Judge Let You Use It?

Given all of the work and expense that you will go through to create the most persuasive form of computer evidence, you need to be sure that the jury and judge will see your graphic or animation.

First, identify the witness who will present the animation and outline the testimony to be reinforced by the computer evidence. Discuss the issues with the witness. Make sure the witness is included in each step of the development process and that he or she participates in each fundamental decision about the presentation. In this way, your witness will lay the foundation for admissibility: demonstrating the relevance of the computer graphic and addressing why the evidence is a "reasonable representation" of the events at issue.

Next, rely only on evidence that you know will be admissible at trial. Plan how you will have each piece of supporting evidence introduced and admitted before any use is made of the animation. If you rely on questionable evidence, your entire computer presentation is at risk.

The trial lawyer must stay involved in each step affecting the content of the presentation. The most effective demonstrative evidence persuades through factual presentation, not argument. Get rid of any argumentative headings or risky presentations, and stick to the documents, testimony and other admissible evidence. Lead the jury to your conclusion through the strength of the facts presented.

Put together an evidentiary brief explaining how the animation was prepared and why it is fully admissible. If a strong objection is raised, the brief will be waiting in your trial notebook. Also, just in case, have your in-house computer technician available to testify as to data entry and programming. (*But see Hood, supra*, indicating that no testimony by the programmer should be required.)

Finally, develop a plan as to when the animation will be disclosed to the other side. If an expert will testify to the animation, he or she should probably discuss it in the expert report and be prepared to demonstrate the animation at deposition. If the computer evidence is more in the nature of an illustrative graphic, make sure you have written agreement with opposing counsel as to the timing for disclosing demonstrative evidence and meet those requirements.

Different judges will treat computer evidence differently. Some judges refuse to admit demonstrative exhibits into evidence although witnesses and attorneys can make full use of them during testimony and even in closing argument. Also, the timing of pretrial disclosure of exhibits may preclude you from offering a graphic as an exhibit. At trial, the only real distinction between having your computer evidence admitted into evidence or simply marked for demonstrative purposes is that unadmitted evidence will not be permitted in the jury room. Given that most jury rooms won't have a computer, this may not be a big drawback. If you do succeed in having a computer animation admitted into evidence, remember that it must be offered as part of the record, perhaps loaded on a back-up cartridge. Finally, if your computer graphic is carefully crafted and avoids argument, you may be able to use it in opening statement. In this way, you can use the graphic as a visual aid during your opening as well as a preview of the blockbuster animation that you will present during the testimony.

Computer-generated evidence offers a new arena for presenting evidence at trial in the most persuasive manner. By developing the capability to produce computer graphics and animations in-house, trial lawyers can provide their clients with the most effective demonstrative exhibits at a greatly reduced cost.

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CHARLES R. RICE

On SECURITIES

CONGRESS passed the Private Securities Litigation Reform Act in December 1995 to discourage federal class actions by, among other things, imposing stringent new pleading requirements and staying all discovery until such requirements are met. Plaintiff firms have responded by filing class actions in state court instead of – or in addition to – federal court. Defendants have usually moved to stay such state court actions when parallel federal actions are pending, but the California Court of Appeal, in *Oak Technology v. Superior Court*, recently upheld the *denial* of such stay motions in three Santa Clara cases.

The State Court Strategy

The Reform Act has slightly decreased securities complaints in federal court, but state cases increased in 1996 to twice the annual average for the previous 5 years. More than half of these state complaints allege essentially the same facts as a parallel federal complaint, usually filed by the same law firm. This "shift to state court," according to a recent SEC report, "may be the most significant development in securities litigation post-Reform Act."

California has been the venue of choice for these state class actions, partly because of its concentration of high-tech companies with volatile stock prices. Plaintiffs have been allowed to bring "fraud on the market" class actions under the California Corporations Code without proof of individual reliance on particular misrepresentations.

Defendants complain that plaintiffs, by using these state actions to initiate discovery immediately, are thwarting Congress' intent to prevent the threat of expensive and burdensome discovery from coercing companies into settling meritless suits. Plaintiffs' counsel stress that the Reform Act does not expressly pre-empt state remedies. They also claim that the California courts are now the best forum for their clients' claims due to various provisions of state law – including easier pleading standards, non-unanimous jury verdicts, aider and abettor liability, punitive damages, and joint and several liability (as contrasted to the proportionate liability mandated by the Reform Act under certain circumstances).

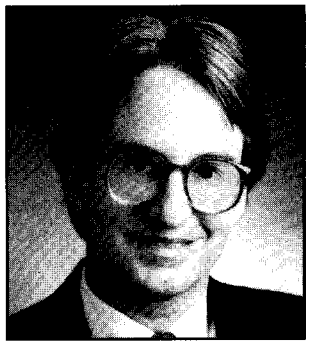
Defendants counter that any substantive advantages of California law can be obtained by including state law claims in a complaint filed in the federal courts, which have exclusive jurisdiction over 10b-5 claims. Defendants argue that the federal courts should be the primary forums because they are the only ones that can resolve all the available claims.

The *Oak Technology* Decision

The Court of Appeal's unanimous, unpublished decision upheld denials of three stay motions. Defendants had argued that a stay pending resolution of a parallel federal case was necessary to (1) conserve the resources of the courts and the litigants; (2) avoid the risk of inconsistent rulings and results in the federal and state courts; and (3) prevent the plaintiffs from circumventing the federal Reform Act. The Court of Appeals rejected the latter argument as "irrelevant" because "the current state of the law permits securities fraud plaintiffs to maintain [a] dual-track litigation strategy." The Court concluded that "the legislative forum is clearly the best arena to work out such public policy questions."

Noting that state courts have "the discretion but not the obligation" to stay proceedings in deference to a pending federal action, the Court of Appeal concluded that petitioners had failed to carry the "heavy burden" of showing an "abuse of discretion" by the lower courts.

> The bottom line is simply that it is rational to believe that...the state actions will proceed to judgment in any event. Stated another way, respondent court could have reasonably concluded that real-parties-in-interest's main thrusts are the state actions and the 10b-5 actions are secondary, filed to cover all bases given that federal courts have exclusive jurisdiction of 10b-5 actions."



Charles R. Rice

The court noted, however, that granting a stay under these circumstances might also be "rational" and therefore would have been within the trial court's discretion.

What's Next?

The state court strategy may soon be blocked by Congress. Although the SEC has indicated that new federal legislation would be "premature," two bi-partisan bills that would pre-empt state law claims for securities fraud have been introduced in the House. More limited pre-emption legislation, which would carve out certain corporate governance cases traditionally handled by Delaware and other state courts, will be introduced in the Senate. Even President Clinton, who vetoed the Reform Act, has gotten religion and will probably support some form of preemption legislation.

Developments in the California courts may also discourage state securities cases. The California Supreme Court, which should be more receptive to policy arguments about circumventing the Reform Act and burdening the state courts, may well overturn the decision. In addition, in the *Diamond Multimedia* case, the California Supreme Court will soon decide whether out-of-state plaintiffs may bring Corporations Code claims against corporations based in this state. If plaintiffs lose, state class actions will be limited to California residents, substantially reducing the recoverable damages and the overall attractiveness of the state court strategy.

In short, *Oak Technology* represents only one battle in a continuing war. Stay tuned.

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

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Settler's Remorse

> cial reluctance to relitigate as legal malpractice suits those cases that have been settled or litigated.

3 Mallen & Smith, *Legal Malpractice* (1996 4th ed.) § 29.38, p. 738.

These arguments tie in nicely with the extensive line of cases discussing the public policy of encouraging settlements and favoring compromise of disputed claims. *McClure v. McClure* (1893) 100 Cal. 339; *La Borde v. McKesson & Robbins, Inc.* (1968) 264 Cal.App.2d 363.

There are no reported California cases on point, but of interest is the case of *Glenna v. Sullivan* (Minn. 1976) 245 N.W.2d 869, wherein an attorney recommended that a settlement be accepted and the client, suffering remorse some time later, sued for legal malpractice. As with California cases on the issue of judgmental immunity, the *Glenna* court held: "In such a situation it is well established that an attorney '...is not liable for an error or mistake in judgment as long as he acts in the honest belief that his [advice is] well-founded and in the best interests of the client.'" *Id.* at 872, 873. That court also stated:

> Indeed, it is not even clear that the decision to accept the $21,110 settlement was a mistake in judgment. While it is possible that a jury could have awarded plaintiffs a sum larger than $21,110, it is also possible that the jury could have rendered a verdict substantially less than $21,110...To allow a client who becomes dissatisfied with a settlement to recover against an attorney solely on the ground that the jury might have awarded them more than the settlement is unprecedented.

Id. at 873.

> Besides the speculative nature of the contentions, hindsight challenges to recommended settlements often have been protected as judgment calls. In evaluating and recommending a settlement, the attorney has broad discretion and is not liable for a mere error of judgment. The standard should be whether the settlement is within the realm of reasonable conclusions, not whether the client could have received more or paid less. No lawyer has the ability to obtain for each client the best possible compromise but only a reasonable one.

3 Mallen & Smith, *supra*, pp. 747-748.

Before an attorney can be held liable for an exercise of judgment in evaluating a case, the attorney's judgment "must be shown to be so manifestly erroneous that no prudent attorney would have done so." *Kirsch v. Duryea*, 21 Cal.3d at 309-310. The question of whether a judgmental decision falls outside of these broad parameters is an issue of law for the court. *Id.*; *Lucas v. Hamm* (1961) 56 Cal.2d 583.

Speculative Harm

To succeed in a claim for legal malpractice arising from the handling of litigation, a client must establish that, but for the attorney's negligence, the litigation would have ended in a result more favorable to the client. Mallen & Smith, *supra*, § 29.5, pp. 633-634. *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327. In other words, the alleged wrongful conduct of the attorney must be the cause of the plaintiff's injury. *John B. Gunn Law*

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A Parent Corporation's Insurance Coverage

(California law)(successor company may rely on policies of acquired company for claims dealing with liability flowing from acquired company's acts); *cf. Quemetco, Inc. v. Pacific Automobile Ins. Co.*, 24 Cal. App. 4th 494, 29 Cal. Rptr. 2d 627 (1994) (successor only purchased assets but not insurance coverage because coverage under the relevant policy could not be transferred without insurer's approval).

If the subsidiary does not have adequate coverage to satisfy any liability for pre-acquisition acts, can the parent acquire "claims made" or other coverage now that will cover the parent for liability for the past acts of the subsidiary? If not, one must re-evaluate the financial risks of consummating the transaction.

If the subsidiary's prior coverage is lacking and the parent cannot now acquire sufficient "claims made" coverage to protect the parent should it be sued tomorrow for the prior acts of the subsidiary, can the parent be compensated for those risks via a reduction in the purchase price of the subsidiary or the property? In other words, can the parent negotiate a lower price for the assets to offset the risks that the parent will now be accepting by purchasing a "bare" asset?

Finally, can the sellers of the subsidiary or the property agree to indemnify and defend the parent should the parent be sued for the subsidiary's actions and not have applicable insurance coverage?

Not only should one perform this analysis for future asset purchases, but to the extent possible one should perform this analysis for previously-made acquisitions where the parent's coverage may not apply in light of the decisions discussed above. For example, can the parent now purchase claims-made coverage for property it purchased last year which may be the genesis of liability for acts that took place long before the acquisition?

Insurance is a way of life and a matter of necessity for most businesses these days. In light of these new decisions, attorneys, risk managers and corporate officers must reevaluate whether the coverage they have is still sufficient, and whether it will be sufficient to cover future acquisitions.

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MARY E. MCCUTCHEON

On INSURANCE

THE initial headlines describing *Buss v. Superior Court*, 16 Cal. 4th 35 (1997), characterized the Supreme Court's decision as a stunning victory for insurers. They read "Supreme Court Grants Insurers' Right to Reimbursement" or "Insurers Win Allocation Fight." Insurance companies cheered. Policyholders sang the blues. But then, everybody sat down and read the opinion. Insurance companies' cheers turned to shivers of trepidation, and policyholders' groans turned to murmurs of excited anticipation. The text belies the headlines.

True, *Buss* holds that an insurer who is called upon to defend a "mixed" action (one involving both potentially covered and clearly noncovered claims) ultimately need not defend the noncovered claims. Policyholders had argued that, because an insurance policy obligates the insurer to defend any "suit" seeking potentially covered damages, the insurer must defend a "mixed" action in its entirety – even if doing so meant paying defense costs clearly allocable only to noncovered claims. While Justice Kennard adopted this reasoning in her dissent, the majority disagreed, finding that an insurance company has no duty to defend claims in a mixed action which have no potential for coverage. (In other words, the insurer can "allocate" defense costs between covered and noncovered claims.) Policyholders had also argued that, if an insurer has a right to allocate defense costs between covered and noncovered claims, it can do so only if the allocation is supported by "undeniable evidence." The Court rejected this argument as well, finding that while the insurer bears the burden of proof in establishing its right to allocation, it need do so only by a preponderance of the evidence.

But the good news for insurers ends there. The Court reaffirmed and expanded several basic principles concerning the duty to defend. The duty to defend extends to claims that are "merely potentially" covered, not just claims that are "actually covered," even if such claims are intermixed with clearly noncovered claims. The insurer can seek reimbursement only for defense costs "solely" attributable to claims "that are not even potentially covered." If the duty to defend is extinguished, "it is extinguished only prospectively, and not retroactively: before, the insurer had a duty to defend; after, it does not have a duty to defend further." And, an insurer cannot reserve a right to reimbursement for defense costs as to claims that are "at least potentially covered."

The Court also took a lot of the sting out of its pro-insurer holdings by clarifying *when* an insurer can attempt to allocate fees. If an insurer is called upon to defend a "mixed" action, it must pay for all defense costs as incurred. It can only seek reimbursement of defense costs allocable to noncovered claims at the end of the case. As the Court stated:

> To defend meaningfully, the insurer must defend immediately. [Citation omitted] To defend immediately, it must defend entirely. It cannot parse the claims, dividing those that are at least potentially covered from those that are not.

These few sentences confer an enormous advantage upon policyholders. Previously, insurers often unilaterally allocated defense costs in "mixed" actions as bills were submitted, arbitrarily determining which defense costs benefited noncovered claims. Now, according to *Buss*, a insurer must pay all defense costs for a "mixed" action as they are incurred. It can only resolve issues of allocation, and thus reimbursement, at the end of the case.

While the right to reimbursement may loom like a dark cloud on the horizon for an insured embroiled in the defense of a "mixed" action, the *Buss* opinion renders that threat more potential than real. As a practical matter, many reimbursement issues may be negotiated out at the time the "mixed" action is settled. Indeed, the Court's decision assumes that the right to reimbursement will be very difficult to establish, and that insurers will pursue it only "in apparently exceptional cases," where defense costs "are clear and substantial," and where the insured has assets to satisfy a reimbursement claim. If defense counsel has developed the appropriate defense strategy, it may be extremely difficult for an insurer to satisfy its burden of proof on the issue of reimbursement, even under a preponderance of the evidence standard.

Mary E. McCutcheon

Furthermore, *Buss* raises as many questions as it answers: (1) what, if any, reservation of rights is necessary to preserve an insurer's right to reimbursement; (2) what guidelines can an insurer impose on defense counsel in an effort to maximize the chances for reimbursement; and (3) what burden of proof must be met by an insurer who has breached its duty to defend a "mixed" action. But clues to these answers lie within the opinion, and point favorably towards insureds. The Court points out in footnote 27 that "Through reservation, the insurer avoids waiver." Its statement that an insurer cannot "parse the claims" supports an argument that an insurer cannot impose billing guidelines which force defense counsel to pave the way for the insurer's reimbursement action. And on the whole, the Court views favorably the Court of Appeal decision, which held that a breaching insurer should be held to a higher standard of proof than an insurer which has conscientiously discharged its obligations, suggesting it would agree with the Court of Appeal on that point as well.

Policyholders should take heart, study the *Buss* decision carefully, and remain calm in the face of insurers' demands for reimbursement for defense costs in "mixed" actions.

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Corp. v. Maynard (1987) 189 Cal.App.3d 1565. *Williams v. Wraxal* (1995) 33 Cal.App.4th 120, 130 ("If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort.")

A legal malpractice plaintiff cannot establish negligence by speculating that some other attorney could have obtained a settlement or a verdict larger than the settlement that plaintiff accepted. "[T]he mere probability that a certain event would have happened, upon which a claim for damages is predicated, will not support the claim or furnish the foundation of an action for such damages." *Camel v. Magana* (1960) 184 Cal.App.2d 751, 758.

In *Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, the defendant law firm undertook representation of a plaintiff in a medical malpractice case. Although the firm filed a complaint and responded to discovery, it did not fully investigate the case, consult with experts, conduct a site inspection, or have the matter set for trial. Nearly two years later, plaintiff substituted in another law firm, which negotiated a settlement on plaintiff's behalf. Following the settlement, plaintiff filed the malpractice action alleging that defendant's failure to act with reasonable care in prosecuting the case resulted in a loss of value of the claim against the hospital. The Court of Appeals affirmed the defendant attorney's successful motion for summary judgment on the grounds that plaintiff had failed to establish "evidence of damage resulting from the delay in prosecuting the action." *Id.* at 661. The court further stated:

> None of this evidence does more than suggest speculative harm, because it does not demonstrate that but for respondents' delay, appellant's underlying case would have settled at all, let alone at an earlier date, for the same amount, or with the same structure. "Damage to be subject to a proper award must be such as follows the act complained of as a *legal certainty*..." [Citations]...Absent evidence that [the hospital] would have settled with respondents under exactly the same circumstances it settled with [the successor] firm, actual harm from respondents' conduct is only a subject of surmise, given the myriad of variables that affect settlements of medical malpractice actions.

Id. at 663.

Similarly, in *Sprigg v. Garcin* (1980) 105 Cal.App.3d 869, the court vacated a judgment in favor of a plaintiff which was based on the speculative probability that the attorney defendants' misconduct caused damages in the form of a reduced settlement. There, plaintiffs filed suit against their former attorneys after successor counsel negotiated a settlement of the underlying case. The appellate court found that plaintiffs had failed to show any evidence demonstrating that the settlement negotiated was less than it would have been due to the attorney defendants' activities.

More recently, in *Sisco v. Cosgrove, et al.* (1996) 51 Cal.App.4th 1302, the court held that a plaintiff could not state a cause of action for legal malpractice based on "sheer speculation" regarding how an underlying settlement would have been handled differently had the attorney defendants not been negligent. *See also Budd v. Nixen* (1971) 6 Cal.3d 195, 200 ("The mere breach of a professional duty causing only...speculative harm...does not suffice to create a cause of action for negligence.")

Estoppel By Ratification

This article has assumed that the client has agreed to the settlement, presumably by signing a settlement agreement or by agreeing in open court or in front of a mediator to the terms and conditions of a negotiated compromise. In the event of a claim against the attorney despite such facts, the concept of estoppel by ratification may assist in defense.

While an attorney may not, without specific authorization, bind a client to a compromised settlement without the client's actual consent, the attorney's acts may be binding on the client if he or she ratifies them and accepts the benefit of the attorney's acts. *Fidelity & Casualty Co. of New York v. Abraham* (1945) 70 Cal.App.2d 776, 783; *Moving Picture Machine Operators Union Local 162 v. Glasgow Theatres* (1976) 6 Cal.App.3d 395, 403. Ratification may be implied from negligence or inattention or apparent acquiescence, as it is the client's duty, having knowledge of a settlement, to express disapproval within a reasonable time under the equitable doctrine of laches. The client may ratify or make the attorney's compromise its own if it does not disallow or repudiate the agreement promptly upon receiving knowledge if the client takes the position that the attorney has transcended his or her authority. Similarly, a client who accepts the benefit of a settlement may be found to have ratified it and be estopped from later asserting that the attorney acted improperly. *Alvarado Community Hospital v. Superior Court (Pegg)* (1985) 173 Cal.App.3d 476, 480; Vapnek, et al., *California Practice Guide: Professional Responsibility* (1997) § 3:142 *et seq.*

This line of cases is generally asserted by a settling party where the opposing party claims his or her attorney acted beyond the scope of the authority granted. However, the equitable doctrines of ratification, estoppel, and laches should also be available to an attorney being sued for malpractice when the attorney has, in fact, obtained the client's consent to settle, when the client fails to timely object, and when the client accepts the benefits of a settlement.

This argument would not be expected to result in a defense verdict or a grant of summary judgment if brought on its own, but when combined with the concepts of judicial immunity and speculative harm discussed above, may present compelling equitable arguments in favor of the attorney.

Generally, these cases are not simple to defend as the facts rarely present themselves in the form of a complaint susceptible to demurrer. If the facts are properly developed, however, a motion for summary judgment can be fashioned based on some or all of the above analyses.

The strongest argument to defeat these claims lies with the judgmental immunity defense. Although the California courts have not been as forceful in advancing this doctrine as has the *Glenna* decision out of Minnesota, some combination of the above three defenses has generally proven successful in defending, if not defeating, claims of "settler's remorse."

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BARRY P. GOODE

On ENVIRONMENTAL LAW

The Rehnquist Court

As the Supreme Court re-convenes for its twelfth term under the leadership of Chief Justice Rehnquist, the question arises: what has the Rehnquist Court said about environmental law?

Although the Court has decided forty-five "environmental law" cases, there is less than would appear. Many "environmental" law cases are primarily vehicles by which the Court addresses other issues, such as sovereign immunity (*e.g., U.S. Dep't of Energy v Ohio*, 503 U.S. 607 (1992)), preemption (*e.g., International Paper v. Ouellette*, 479 U.S. 481 (1987)), the Commerce Clause (*e.g., Fort Gratiot Sanitary Landfill v. Michigan*, 504 U.S. 353 (1992)) and other matters touching federal-state relations (*e.g., New York v. United States*, 505 U.S. 144 (1992)).

Some "environmental law" cases are essentially constitutional law cases. For example, *Tull v. United States*, 481 U.S. 412 (1987), brought under the Clean Water Act, is essentially a Seventh Amendment case. *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), brought under NEPA and the Clean Water Act, is primarily a First Amendment free exercise of religion case.

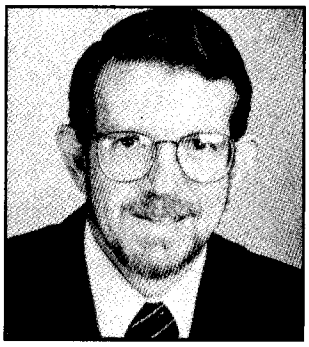
That leaves only a relative handful of cases. Among them, we find:

- one area to which the Court has devoted continuous, sustained attention – takings.
- two closely related areas – standing and attorneys fees – in which the Court has shown an inclination to take environmental cases
- a small number of "pure" environmental law decisions, including a couple of NEPA cases, an Endangered Species Act case, a Clean Air Act Case, two Clean Water Act cases, and three RCRA cases.

Clearly the Rehnquist Court has devoted significant attention to the law of "takings." *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *First English Evangelical Church v. Los Angeles County*, 482 U.S. 304 (1987), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and *Suitum v. Tahoe Regional Planning Agency*, 117 S.Ct. 1659 (1997). The Court has elevated private property rights to new heights relative to local government regulation. If there is one area of environmental law in which a conservative bent is clearly visible, this is it.

In *Lucas* the Court established a rule of "categorical" takings. In *Nollan* and *Dolan* the Court required a substantial "nexus" before a local government may impose an exaction upon a property development. In *First English* the Court expanded the remedy for a "temporary" taking, beyond merely invalidating the taking, to providing compensation to the property owner. In *Suitum* the Court permitted review of a claim of lost property rights that earlier courts might not have found "ripe." These decisions – and the underlying concern about private property that they reflect – can have serious effects on the ability of government to regulate in the area of environmental law.

Standing cases are traditional grist for the justices' mill. The Rehnquist Court has tended to be fairly conservative in this area. *See Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (both denying standing to environmental groups). However in *Bennett v. Spear*, 117 S.Ct. 1155 (1997) a unanimous court granted standing to private water rights holders to challenge an Endangered Species Act decision; proclivities on standing giving way to that preference for private property rights.



Barry P. Goode

The Rehnquist Court discouraged environmental litigation by reducing the prospect of sizable awards of attorneys fees. In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) and *City of Burlington v. Dague*, 505 U.S. 557 (1992) the Court refused to permit enhancement of a fee award above the lodestar amount. Likewise in *Key Tronic Corp. v. United States*, 114 S.Ct. 1960 (1994) the Court refused to permit an award of attorneys' fees to a private party under CERCLA.

But apart from takings, it is hard to find an area of environmental law to which the Court has paid sustained attention. The Court has not devoted a series of cases to resolving difficult questions under, say, CERCLA or RCRA. Few individual justices have shown much interest in the area. Justices O'Connor and Stevens have written the most majority opinions for the Rehnquist Court; eight each. No other justice (save Justice Scalia; seven opinions) has written more than half that number. There appears to be no "champion" of this field of law on the Court.

No doubt practitioners in most fields believe their area of law deserves more attention from the Supreme Court. But there can be no doubt that the Rehnquist Court has let the Circuits grapple with difficult statutory questions which Congress has created–leaving conflicts unresolved, and key issues open.

So on we toil, lacking ultimate guidance in many areas; simply providing the best judgment we can, without the judgment of the Justices empowered to give it.

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

Letter from the President

I don't watch a lot of television. Surprisingly, that can be a problem for a trial lawyer. Often, in attempting to build rapport with a jury, it is helpful to refer to some facet of common experience. Similarly, for an analogy to be helpful, it must be based on a comparison that is significant to the listener. The skilled advocate seeks to calls on common experience to make her points. Problems arise when advocates do not share a body of common experience with their audience.

Harold J. McElhinny

I once argued a motion concerning the limitations on small claims jurisdiction before a packed house in the "ceremonial" courtroom in Redwood City. In the middle of the proceeding, the presiding judge joked that Judge Wapner would not be particularly receptive to my arguments. The audience roared with laughter. I laughed too, but I did not have a clue what I was laughing about, or about how to respond, since I had never heard of, much less watched, "The People's Court."

Young lawyers learn the same lesson when they inevitably try to "talk like lawyers," using multi-syllable words, Latin phrases and complex sentence structure in their opening statements and closing arguments. Over and over they are reminded that if they want to communicate with a jury, they have to speak the jury's language naturally. For similar reasons, seasoned lawyers who try cases in communities far from their homes read local newspapers, and work on learning local place names, to avoid branding themselves as outsiders.

This skill of communicating with juries becomes more complicated as our society becomes more stratified. To the extent attorneys, as a profession, become wealthier, and stay ethnically homogeneous, they have less and less in common with the citizens who are drafted to serve on our juries. In some of our larger urban communities, the issue is no longer limited to a preference for print over television. Often the attorney finds himself speaking a different language than a majority of his jurors. As this gulf becomes larger, drawing on common experience to communicate and to win trust becomes impossible.

Thus, the subject of diversity is a topical one both in the microview of improving a trial lawyer's skills, and in the macroview of the future of our profession. The theme of this year's annual program in Palm Springs was "Selecting and Persuading Juries in a Diverse Society." In order to pick juries, trial lawyers have always had to develop an appreciation for the experience that individual jurors were likely to bring with them to the deliberation process. One of the purposes of *voir dire* was to provide the basic socio-economic information from which the attorney could generalize to determine the juror's likely background of experience and to use that generalization both to predict the juror's likely reaction to themes or facts and to develop a strategy of emphasizing the evidence that would be particularly meaningful to an individual with that particular background.

But the ability to make valid generalizations and predictions depends on the ability to fill out the information about a particular jury from one's own appreciation of what the life experience of others is likely to have been. A skilled trial lawyer tries to put herself "in the shoes" of a potential or actual juror in order to see the case through that juror's eyes.

Of course, all of this is impossible if the attorney does not speak the juror's language, does not know the true meaning of the words she does understand, and has no means accurately to anticipate the reactions of a juror whose life she, literally, cannot even imagine.

Most current trial lawyers are pretty well fixed in their race, their gender and in their lifestyle. The best that people like me can do to hone our skills is to attend programs like ours, and learn from experts how to accommodate the diversity we find in jury boxes.

The future, however, is another matter. I believe that one can safely predict that the best trial lawyers of the next century will be attorneys who clearly mirror the ethnic, gender and cultural makeup of our increasingly diverse society. Attorneys who have common experiences and can communicate with and in the trust of juries will be greatly in demand. Just ask Johnnie Cochran.

In the face of this predictable new demand, sophisticated clients must be concerned that law firms continue to hire young attorneys who look and act just like the senior partners, rather than hiring young lawyers who more accurately reflect the State's population. These clients should be aghast at the political actions that have been taken to reduce the number of Black and Latino law students who have access to our public law schools. It's one thing to campaign on "equal access" to our schools. It's another to recognize that we are not graduating and hiring sufficient attorneys of color to meet the obvious demand.

The legal profession was particularly slow to recognize that growing feminist consciousness in this country demanded that clients hire women advocates to represent them in court. The market has and continues to reward those firms that moved quickly to hire women trial attorneys. Today it is safe to say that any client who shows up with a homogeneous trial team of "suits" is at a disadvantage when facing a trial team that is diverse. One would think that people who see this so clearly with respect to gender would recognize the identical need and market for attorneys of diverse cultures.

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