ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

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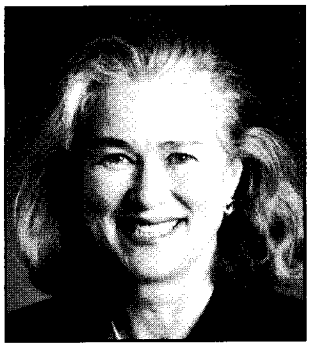
Letter from the President

TWENTY-FIVE years of creating discussion and education about the toughest issues we face trying business cases is ABTL in 1998.

We are an unusual group – business trial lawyers and judges who want to examine any problem and offer the best possible solutions to any hurdles facing the trial of business cases.



Barbara A. Caulfield

Last year was a banner year for programs and projects with Harold Mc Elhinney of Morrison & Foerster leading as President. Programs on the trial of patent and intellectual property cases, cross-examination, scientific evidence and jury selection marked the year with excellent results. This year with Rob Fram of Heller, Ehrman, White & McAuliffe as Program Chair, the programs have equal star quality. The year started with Mega Trials – how to keep them understandable. Please contact Rob with program ideas and suggestions.

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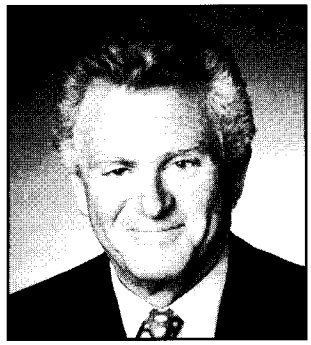
Also in this Issue

Successful Preparation Leads to Success at Mediation

I have been serving as a mediator since the early 1980's and for the last three years, it has been my occupation. I continue to be impressed with how well some lawyers and parties use the process, while others seem to stumble through. The differences often have little to do with the skill of counsel or even the persuasiveness of their clients' cases. In many instances, the ability to achieve a client's ends at mediation (as opposed to simply achieving a settlement) is directly related to the effectiveness of counsel's preparation.



Michael B. Shane

Fact-Finding

I suspect that everyone reading this article knows that mediation is negotiation assisted by a neutral third party. Fact-finding certainly is not at the heart of the process. Nevertheless, what a client may realistically achieve out of a mediation is the result of the bottom up analysis of the facts and law applying to the situation. While legal analysis is usually a straightforward process once the factual issues are determined, the fact-finding itself can present more difficult problems.

The amount of detail necessary for the process will, of course, be determined by the complexity of the transaction or transactions giving rise to the dispute underlying the proposed mediation. In addition, particularly in commercial situations, time may be of the essence to the client and, therefore, the fact-finding process must be abbreviated. One thing is certain however: the kind of fact-finding that results from a formal discovery process leading to trial is not necessary to preparation for mediation. What is necessary is the ascertainment of basic or necessary facts sufficient to allow counsel and client to

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Successful Preparation for Mediation

make a rational risk benefit analysis of their position so that realistic and appropriate solutions to the dispute may be considered.

If the parties to the dispute are mutually agreed on mediation, then a mutually agreeable exchange of information might be worked out, with or without the assistance of the mediator. The same is true when the parties have undertaken to litigate prior to mediation. The fundamental questions ought to be whether or not certain facts are fundamental to an understanding of the situation, and whether or not those facts are within the grasp of either the client, the other party or parties to the mediation or a third party. Where vital elements are missing and are in the possession of third parties, the only way to get at the facts may be to file suit and subpoena records or testimony. In my experience, however, this is not the usual case, and normally, the parties will voluntarily engage in some reasonable exchange of information.

Engage Peripheral but Necessary Parties in the Process

Often the focus is on the client and information to be derived from its records and personnel. To put a fine point on it, the focus of the pre-mediation investigation might simply be those individuals or business divisions of the client having the most immediate involvement in the transaction giving rise to the dispute. There are clearly others, however, who may need to be brought into the process.

In this category, the most obvious entities that need to be brought in early are insurers. If insurance is to play a role in the solution to the problem, then insurers must be brought on board at the beginning, must be given adequate information to understand the nature of the dispute and, where there are coverage issues, the applicable law. If possible, communication simply through letter writing should be avoided and the insurers or their representatives should be meaningfully engaged in the process so that they become a part of it. Obviously, if they refuse to participate, there may not be much that can be done about it. The amount of effort devoted to the process of dealing with insurers will, of course, depend upon the importance of the role they realistically are expected to play in the ultimate solution.

The refusal of the insurer to participate in the mediation, or even to acknowledge coverage, may make the decision to proceed to mediation a difficult one. Again, a realistic evaluation needs to be made about whether the matter can be settled without insurance funds, or without the position of the insurer in the matter having been first clarified definitively. What is important here is, if this crossroads is reached, it should not be ignored. This issue needs to be addressed before proceeding further with the mediation.

Don't let the mediation get caught in corporate politics. This applies whether the client is a large company, a small company, or a governmental entity. Be certain that senior corporate or government officials having an interest in the outcome of the dispute are kept advised. Most lawyers representing companies large enough to have a general counsel deal with that individual or a member of the company's legal staff. Less frequently, there is involvement with the chief financial officer or others in the finance department. Yet, depending on the size of the dispute or its materiality to the company, other individuals may ultimately play a key role in the decision making process, though they may not be at the table.

Finally, what is on the books? Has the client put on a reserve or booked a receivable that may be totally unrealistic in view of the facts and law as they are developed? More often than not, outside counsel aren't told and don't ask about such matters. Inaccurate bookings can be a disaster and will virtually predetermine the failure of the mediation. So make certain that the client's books accurately reflect the value of the dispute, at least within a range of reasonableness.

Ascertain the Interests of the Parties

A party's "interests" are what it needs by way of a solution. Its "position" is what it wants. Normally, clients will be quick to state their position. Probing and patience may be required to determine their interests. Most often, this is because clients or parties to a dispute are focused on the narrow confines of the dispute and their own perception of the facts and law. But the dispute itself might have broader implications, particularly in a commercial situation, for the enterprise. The needs of a client, for example, may be something other than "top dollar." Is there a cash flow squeeze? Is less cash today worth more than a greater sum next year or in two or three years time? Is a proprietary interest in intellectual property more important than an immediate cash payment?

The analysis of interests, of course, doesn't stop with the client. What are the interests of the other parties? If these can be determined in advance of the mediation and the clients' interests can be harmonized with them, success is practically assured.

Assembling the Team

The word "team" has two senses here. Most obvious in the context of this article is the selection of the negotiating team. That is, who comes to the mediation and sits at the table? But in a broader sense, it also refers to the individuals involved in the preparation process. They might not be the same. For purposes of preparation, the team may involve client representatives who can assist in gathering information or who were actually involved in the transaction giving rise to the dispute. It also obviously might involve decision makers who might not be involved in the actual mediation process. For example, officials of governmental entities, such as boards of supervisors, trustees of public agencies, and the like, seldom attend mediation sessions as a group. But their involvement at various stages in the preparation is vital in order that appropriate authority for settlement be obtained on behalf of those doing the actual negotiating.

Insofar as the negotiating team itself is concerned, ideally its leader should be an individual who was not directly involved in the transaction itself. The individual should have sufficient authority to settle the matter. This can mean a specific dollar authority or limit which can be

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paid or accepted or a range of other preapproved solutions. More important from a mediator's point of view, authority should mean sufficient stature in the client organization either to be able to render an independent, binding decision at the mediation on a settlement or to issue a recommendation which in all likelihood will be followed by the client organization.

Selecting a Mediator

Much has been written on this subject, so I will not dwell at length on it. The major debate in mediation selection seems to be whether or not mediators need to possess subject matter skills or whether mediation process skills are more important. All of the subject matter expertise in the world will not necessarily bring people to a resolution of the problem. In addition, subject matter skills are more likely aimed at a fact-finding and quasi-adjudicative process than a negotiation process. While certainly subject matter knowledge is useful and can help speed the mediation process, at the end of the day it is experience and success with the process that should be the most important attribute of a mediator.

Having said this, counsel should be mindful of the needs of the client. Does the client need someone with subject-matter expertise? Is the client more likely to listen to a former judge, acting as a mediator? The significant issue is what are the characteristics the mediator needs to possess for the benefit of the client (and for the client on the other side).

Management of Expectations

When the analysis and evaluation of the facts and law are nearly complete and client interests have been fairly well ascertained, it is time for the management of expectations. These are not only client expectations, but the expectations of the other parties to the mediation. Obviously, clients must be made to understand what they may reasonably expect as the outcome of the mediation process. What is sometimes forgotten is that the expectations of the other parties to the dispute should also be managed. The best way is through the direct flow of information and ideas: that is, face to face meetings, letters, and other communications indicating proposed solutions from the clients' side and the rationale for those solutions. One of the most difficult jobs for a mediator is to bring to settlement a dispute where the parties' expectations, not only for themselves but often what they can expect from the other parties to the dispute, are wildly divergent. To be effective, the process needs to start in advance of the mediation.

Pre-Mediation Conferences

In cases involving multiple parties especially, a pre-mediation conference with the mediator can be very helpful in insuring the smooth functioning of the mediation itself. This can also be true where there are a number of claims or where the claims are complex. While lawyers may by training or inclination have the ability to sit through long and sometimes tedious and disjointed meetings, clients may not. Setting the stage for the medi-

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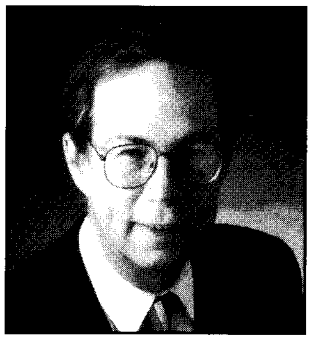
Slipping on Appeal: How to Win But Not 'Prevail'

THERE is an old saying that, "Sometimes you can't win for losin'." But a recent decision by the Court of Appeal in San Francisco also makes it clear that, "Sometimes you can't win for winnin'." Or, more precisely, that a party to a contract with an attorneys' fees clause can win every issue on appeal – and even be adjudicated the "prevailing party" on appeal – and still not be awarded its attorneys' fees on appeal.

Suppose, for example, a buyer sues a real estate broker and recovers a judgment for compensatory damages, punitive damages, and attorneys' fees under a standard "prevailing party" fees provision. The broker appeals only the punitive damages award and not only wins on that issue, but also on every issue on the buyer's cross-appeal. Broker is also awarded costs as the prevailing party on the appeal.



Robert J. Stumpf

Question: Is the broker also entitled to an award of the attorneys' fees it incurred in prevailing on the appeal? Or at least an offset against the fees the buyer incurred at trial?

The answer should be yes, right? After all, the fact that the Court of Appeal awarded "costs" is proof positive that the broker prevailed on the appeal. And a "no" answer would create an anomalous situation where the buyer would recover its fees if it won the appeal but not have to pay the broker's appellate fees if it lost. Giving the buyer what amounts to a free ride on appeal would also defeat the whole point of a fees clause: to discourage parties from taking unmeritorious positions in litigation. It also runs counter to what the parties must have intended in agreeing to a truly "reciprocal" fees agreement in the first place.

So the answer is "yes," right? Wrong. So held the First District Court of Appeal in *Snyder v. Marcus & Millichap*, 46 Cal.App.4th 1099 (1996). There, though the Court of Appeal awarded the broker its "costs" on the first appeal, after remand it later affirmed the trial court's decision not to offset the broker's appellate fees against the fees the buyer incurred in winning at trial. So, even though the buyer lost every issue on the first appeal and had its net judgment reduced by two-thirds as a result, it did not have to pay one penny of the broker's appellate attorneys' fees. Noting this anomaly, one commentator observed that, "This approach penalizes the party who properly and successfully obtains a reversal on appeal...[because] the successful party on the appeal should recover its fees for that endeavor even though the net result after the appeal still favors the other party." *California Real Estate Reporter* (Nov. '96).

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Slipping on Appeal

Much of the *Snyder* court's analysis was based upon its interpretation of section 1717 of the Civil Code, which generally transforms a unilateral or "one-way" fees provision into a two-way (reciprocal) provision as a matter of law. But section 1717 only applies to actions "on a contract"; and in *Snyder*, the buyer did not even assert a contract claim. Compounding the problem, the court analogized to other section 1717 cases where an award of fees to plaintiffs who recovered a "net monetary judgment" was not reduced just because they lost on numerous individual issues. None of these other cases involved a situation where, as in *Snyder*, one side clearly won at trial but the other side just as clearly prevailed on every issue on appeal.

Mistakenly viewing the case through the prism of section 1717 also allowed the court to give short shrift to the Second District's reasoning in *Bank of Idaho v. Pine Avenue Associates*, 137 Cal.App.3d 5, 17-18 (1982). There, the court saw "no serious difficulty" in offsetting one party's attorneys' fees in prevailing on an appeal against the other party's fees for other aspects of the case. Although the Fourth District disapproved of *Bank of Idaho's* "offset" analysis in *Presley of Southern California v. Whelan*, 146 Cal.App.3d 959 (1983), it also opined that an apportionment of contractual attorneys' fees would be "surely correct" where the final result was a substantive victory for both sides rather than (as in *Bank of Idaho*) an interim procedural victory.

In addition, the *Snyder* court went on to expand its holding beyond section 1717 in a way that may have even broader significance for future cases. Specifically, the court held that unless there was express language in the fee agreement that provided for an award (or offset) of fees on appeal, it would not interpret the standard "prevailing party" fees agreement to require a fee award to the appellant in this type of "successful partial appeal" case. As a final irony, the court also awarded the buyer its attorneys' fees on the second appeal (that denied the broker's request for fees on the first appeal). This, then, was the result: the buyer prevailed on issues worth less than $90,000 in the second appeal and recovered its appellate fees; but the broker who prevailed on $2.7 million of issues on the first appeal, did not. To paraphrase another old saying, the law works in mysterious ways!

For additional guidance on which party can recover what in a "win some, lose some" situation, interested readers may consult the Second District's decision in *Mustachio v. Great Western Bank*, 48 Cal.App.4th 1145 (1996) (plaintiff who lost punitive damage award on appeal nonetheless entitled to at least some fees on appeal, even though court of appeal ruled that all parties were to bear their own "costs" on appeal), as well as the First District's opinion in *Michell v. Olick*, 49 Cal.App.4th 1194 (1996) (successful cross-complainant entitled to full award of statutory costs, without offset, even though it lost on all but one claim in her cross-complaint).

Is Artful Drafting the Answer?

Ultimately, or at least until the California Supreme Court goes a different way, the solution to this dilemma may lie in drafting a more detailed fee provision. Indeed, the *Snyder* court suggested as much. Likewise, the Third District upheld a fees award to a successful defendant even though the plaintiff had voluntarily dismissed the case prior to trial (and hence, fees were arguably barred under section 1717) because the fee agreement specifically provided that the "successful party" in an action would be entitled to fees "whether or not such action is prosecuted to judgment." *Honeybaked Hams, Inc. v. Dickens*, 37 Cal.App.4th 421 (1982). In reaching this conclusion, the court took the position that section 1717 merely reflected a general legislative judgment not to provide for fees in the pretrial dismissal context, which "parties are free to override in their contractual relations." 37 Cal.App.3d at 428 n. 5.

In an even more provocative acknowledgment of the right of private parties to shape judicial remedies to their liking, the Ninth Circuit recently held that parties are free to draft an arbitration provision to provide for much more extensive appellate review than would otherwise be available under the Federal Arbitration Act. *See Lapine Technology Corp. v. Kyocera Corp.*, 130 F.2d 884 (9th Cir. 1997) ("Federal courts can expand their review of an arbitration award beyond the FAA's grounds, when [but only to the extent that] the parties agree."). The California Supreme Court is expected to weigh in on this "freedom of contract vs. statutory limits" issue in *Santisas v. Goodin* (No. S050326) (argued on December 4, 1997), where the Court will likely decide the extent to which litigants may override the limits on awarding fees under section 1717 by private agreement. And the thorny question of who is the "prevailing party" continues to generate lengthy and sometimes rather arcane decisions (and dissenting opinions) in the courts of appeal – most recently in *Sears v. Baccaglio*, 98 C.D.O.S. 463 (Jan. 15, 1998).

Bottom line: in due course, the California Supreme Court or, more likely, the Legislature, may well impose some order out of the present chaos. In the meantime, the best approach may be to spend more time thinking about the fees issue and drafting more carefully tailored fees provisions.

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COMING EVENTS

April 21, 1998	MCLE Dinner
June 16, 1998	MCLE Dinner
September 15, 1998	MCLE Dinner
October 9-12, 1998	Annual Seminar Four Seasons Hotel Maui, Hawaii

For further information, please call
Deborah F. Williams at (415) 773-5461

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Successful Preparation for Mediation

ator, in advance, and working up an agenda or schedule that makes sense in view of the dispute can help focus the actual mediation meetings on the important issues. For example, if it is a case involving experts or accountants, does it make sense for them to meet, with or without the mediator, but without the parties or counsel? Results of the meeting can be delivered at the "formal" mediation session. These and similar issues can and should be worked out in advance.

Preparation of a Position Paper

Most mediators require a written statement of position from each party. The purpose of these position papers is to inform the mediator about the subject matter of the dispute and each party's position concerning a solution. An equally (if not more) important function of such position papers is to provide information to all parties to the dispute. This is a key step in the management of the other party's expectations. In some respects, the mediation statement should be the most important single item of direct communication by a party in the entire mediation process. It is an opportunity to tell the other parties why they should do what they have not been willing to do.

The mediation statements should not only be read by the mediator and the attorneys for the parties, but an understanding should be reached that they will be shared with each client decision maker. After all, at the end of the day, it is the client's case and it is the client who will make the ultimate decision about the resolution to the dispute. For this reason, position papers should be exchanged well in advance of the mediation, so that each side has sufficient time to review the documents and, if necessary, act upon them.

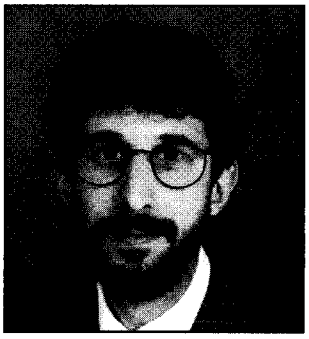
In most cases, the position papers should be relatively brief and a page limit should be agreed upon with the mediator's assistance. They should be written in a way that will not only inform the mediator, but client decision makers on the other side, as well. This means they need to be persuasive, clear, and not full of legalese. If there are important documents, they should be attached or submitted as exhibits. The mediator should not be expected to read hundreds of pages of documents, nor certainly should client decision makers. Important sections of contracts, correspondence and other documents should be highlighted. In other words, make it easy for the other side to understand what you are saying and why your client should have what it is asking for.

The foregoing are some observations which apply to a greater or lesser extent, depending upon the nature and magnitude of the case and the nature of the client. A sole proprietorship may be handled differently than a large corporation. Whatever the case, the message ought to be clear that thorough preparation is the sine qua non of an effective outcome to mediation.

Michael B. Shane is a mediator with the American Arbitration Association.

Interpreting Written Instruments at Trial

DISPUTES involving the interpretation of written instruments, whether involving commercial contracts, license agreements, leases, deeds, or other transactional documents, are a serious concern to business trial lawyers and their clients. A recurring issue in this area is the propriety (and difficulty) of having juries construe the meaning of complex legal documents. Because this issue affects the mode of trial, it must be adequately addressed in trial briefing and at chambers conference. Understanding the substantive and procedural rules applicable to such trials is therefore critically important to effecting the advocate's strategy, whether that be to obtain or avoid trial by jury.



David E. Russo

The trial of cases involving the construction of written instruments does not follow the typical pattern. Two significant differences from the trial of other civil actions arise from the substantive rules of construction: (1) an inherent multi-step approach; and (2) a more limited role for juries. With regard to the latter, the oft-heard talisman that the California Constitution "guarantees the right to jury trial" in civil cases is an overstatement. It is more accurate to say that our State's constitutional guarantee extends only to those matters which were triable to a jury at common law when the Constitution was enacted. *See Arciero Ranches v. Meza* (1993) 17 Cal.App.4th 114, 123. "The interpretation of a written instrument...is essentially *a judicial function* to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect." *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 (emphasis added). *Accord, American President Lines Ltd. v. Zolin* (1995) 38 Cal.App.4th 910, 923. *See also City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232, 238. This principle was embodied in California's earliest statutory law. *See* CCP §§ 1858-1859.

When a party offers evidence extrinsic to the language of the written instrument in order to prove its meaning, a "two-step process" is required in order to interpret and enforce the instrument. *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165. The "threshold determination of 'ambiguity' (*i.e.*, whether the proffered evidence is relevant to prove a meaning to which the language is reasonably susceptible) is a question of law, not of fact." *Id.* at 1165. *Accord, WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1710; *Curry v. Moody* (1995) 40 Cal.App.4th 1547, 1552. Therefore, the "ambiguity" question must be answered by the trial judge and it is "always subject to de novo review". *Winet, supra*, at 1166. *Accord, Titan Corp. v. Aetna Casualty & Surety Co.* (1994) 22 Cal.App.4th 457, 469.

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Interpreting Written Instruments at Trial

In determining this "threshold" question of law, "the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions..." *Winet, supra*, at 1165; *General Motors Corp. v. Superior Court* (1993) 12 Cal.App.4th 435, 441. The difficulty of this task lies in its mutual regard for competing principles. On the one hand, the written instrument which memorializes the parties' agreement is of paramount importance. *See Machado v. Southern Pacific Transportation Co.* (1991) 233 Cal.App.3d 347, 352 ("The cardinal requirement in the construction of deeds and other contracts is that the intention of the parties as gathered from the four corners of the instrument must govern."). *Accord, Manhattan Beach, supra*, at 238. Interpretation of the instrument is "for the purpose of ascertaining the meaning of the *words used* therein." *Stevenson v. Oceanic Bank* (1990) 223 Cal.App.3d 306, 316 [emphasis in original]. Therefore, "evidence cannot be admitted to show intention independent of the instrument". *Id.*

On the other hand, however, the goal of interpretation is to give effect to the mutual intent of the parties. *Ibid.* Thus, relevant extrinsic evidence must be considered when the instrument is "susceptible to more than one *reasonable* interpretation". *Titan, supra*, at 469 (emphasis added) (noting that insurance policy ambiguities are typically construed in favor of finding coverage). The trial court may not determine the matter simply on the basis that "the language [of the instrument] appears...unambiguous," *Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 379, but neither is its task to "indulge in tortured constructions [of the instrument's language] to divine some theoretical ambiguity," *Titan, supra*, at 469.

Assuming a determination of "ambiguity" is made by the trial judge, the second step of the process is interpreting the instrument's "ambiguous language". *Winet, supra*, at 1165. This phase might present a question of law or an issue of fact, depending on the nature of the admissible extrinsic evidence bearing upon interpretation. A factual issue is raised, and its adjudication is accorded substantial deference on appeal, *only if* competent extrinsic evidence is in conflict. *Winet, supra*, at 1166. However, in the absence of evidence extrinsic to the written instrument, or in the absence of a *conflict* in such evidence, interpretation remains purely a question of law. *WYDA, supra; Curry, supra*. Moreover, in these instances and where the lower court's determination was "made upon incompetent evidence," interpretation is a question which the appellate tribunal has a "duty" to decide independently in reviewing the judgment. *See Stevenson, supra*, 223 Cal.App.3d at 315. *Accord, Winet, supra*, at 1166; *Milazo v. Gulf Insurance Co.* (1990) 224 Cal.App.3d 1528, 1534 (also upholding independent review where the conflicting extrinsic evidence "is of a written nature only").

The foregoing rules require some elucidation. First, the existence of conflicting *inferences* about the meaning of ambiguous language does not by itself create an issue of fact. Where conflicting inferences arise from uncontradicted "evidentiary facts," a question of law still exists, and *de novo* interpretation is the operative standard of review on appeal. *See, Parsons, supra*, at 866, n. 2 ("The very possibility of...conflicting inferences, actually conflicting interpretations, far from relieving the appellate court of the responsibility of interpretation, signalizes the necessity of its assuming that responsibility."). *Accord, Manhattan Beach, supra*, at 238, n.3; *Winet, supra*, at 1166, n. 3; *Medical Operations Management, Inc. v. National Health Laboratories* (1986) 176 Cal.App.3d 886, 891-892, 895. Second, a pertinent factual conflict does not arise from extrinsic evidence that does not directly "concern[..] the meaning of the writing". *Machado, supra*, at 352 and n. 3 (testimony and documents admitted for purposes other than assisting interpretation). Third, a cognizable conflict does not exist where the proffered extrinsic evidence is inadmissible to prove the offered interpretation. *Winet, supra*, at 1166, n.3; *Stevenson, supra*, at 315-316. Examples of such incompetent evidence abound. *See, e.g., Winet, supra*, at 1166, n.3 (a party's "undisclosed subjective intent" with regard to contract terms is irrelevant); *Cooper Companies v. Transcontinental Ins. Co.* (1995) 31 Cal.App.4th 1094, 1100 ("inappropriate" expert testimony concerning the scope of an insurance policy provision raises no factual issue); *Zolin, supra*, at 923-924 (contract negotiators' testimony concerning "their interpretations" of a provision did not produce a relevant factual conflict where not offered to show that words had a "particular...trade usage"). *See also New Haven Unified School District v. Taco Bell Corp.* (1994) 24 Cal.App.4th 1473, 1483 (testimony "of marginal relevance" does not give rise to a factual conflict precluding *de novo* review).

The jury's role will remain non-existent unless competent extrinsic evidence raises a factual conflict "and thus requires resolution of credibility issues" which are foundational to interpretation. *Winet, supra*, at 1166. This approach is consistent with the notion of "[m]ixed questions of law and fact" where "[i]f the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual," but if "the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal." *Twentieth Century Insurance Co. v. Garamendi* (1994) 8 Cal.4th 216, 271. In the event of a true factual conflict, the jury should make a special finding on that issue of fact, which the trial court then accepts for the purpose of construing the instrument's meaning. *Medical Operations, supra*, at 892, n. 4 (opining that this procedure is "more in keeping with the rationale of *Parsons*").

The multi-step approach to interpreting written instruments thus operates to regulate jury participation in the trial. It ensures that the jury is not tainted by exposure to extrinsic evidence that is provisionally received during the first phase of trial but which, ultimately, is not admitted. Achievement of this goal might require that a jury not be impaneled until it is determined that a factual conflict for its adjudication exists. If counsel is concerned about the trial judge's willingness to fully implement this "two-step process," it might be wise to raise the issue by motion *in limine* (to regulate the order of proof), rather than merely addressing it in an omnibus trial brief.

David Russo is senior associate at Baughman & Wang in San Francisco.

ZELA G. CLAIBORNE

On MEDIATION

IN October 1997, the American Institute of Architects ("AIA") introduced new versions of some of its standard construction contracts (A201 and B141). One significant change to the documents is the addition of a mediation requirement. Before proceeding to arbitration or litigation, disputes arising under these contracts must be mediated under the Construction Industry Mediation Rules of the American Arbitration Association ("AAA"). Since the AIA documents are widely acknowledged to set the standard for the construction industry and were developed in cooperation with the Associated General Contractors of America ("AGC") and other respected industry organizations, the addition of mandatory mediation suggests that an ever-growing number of disputes will be mediated in an industry which already has distinguished itself by leading the way in ADR.

For a number of reasons, mediation has grown in popularity to become the most widely accepted method of resolving complex disputes:

Voluntary – Mediation is never "binding" but is a process that can be used to reach a voluntary settlement. The mediation process encourages the participation of the parties and allows them to craft their own resolution, rather than having one imposed by an arbitrator, a judge, or a jury. After a successful mediation, parties have the satisfaction of knowing that they retained control of the settlement of their dispute. Mediation allows participants to work together to reach creative solutions, perhaps involving more than simply the payment of money. Moreover, parties which have worked together in the past may be able to salvage their business relationships.

Straightforward – Mediation procedure is simple and straightforward. Usually, short briefs are exchanged outlining the factual background of the dispute, the key issues, and the applicable law (AAA rule M-9). At the mediation, after opening statements by counsel, there may be presentations by experts or by one or two key percipient witnesses, usually followed by some group discussion of important issues. Thereafter, the mediator caucuses with each party individually to discuss the strengths and weaknesses of its position and to explore settlement options.

Low Risk – Mediation is a low risk procedure because it allows for a speedy resolution, often in a day or two, and involves a relatively low cost when compared to arbitration or trial. If a mediation can be scheduled before significant discovery takes place, the savings to the parties can be substantial.

One caveat: mediation will be successful only if the parties prepare adequately. Claimants in a large dispute will have to pay consultants to draft at least a preliminary claim document if they expect to receive a substantial settlement. In complex disputes, some discovery may have to take place if mediation is to lead to resolution. Money spent to prepare for mediation is easily justified if it leads to prompt settlement.

Successful – Most of the current literature claims a success rate for mediation somewhere above 90%. Selecting an appropriate mediator is, of course, extremely important to success. See the guidelines for selection which were provided in this column in July 1997.

Equally important to success, though, is the selection of party participants. A mediation will only succeed if each party is represented by a decision-maker with full settlement authority. The mediation process depends upon decision-makers from one party hearing the opposing party's case and evaluating it with an open mind. For this reason, a person heavily involved in the events leading to the dispute, even though he or she may be a useful source of information, may be too biased or too eager to justify earlier behavior to make an effective party representative and decision-maker for purposes of settlement.

Zela G. Claiborne

Responsible – When mediation was first used, many attorneys were concerned that suggesting it might appear to be a sign of weakness. Fortunately, since mediation is proposed routinely by counsel these days, this concern has become insignificant. In any case, pursuant to AAA rule M-2, the AAA will assist in persuading an opposing party to mediate, if requested.

Given the success rate of mediation, counsel should not hesitate to suggest it. In fact, they arguably have a professional responsibility to propose mediation in an effort to reach a prompt settlement and cut costs for their clients.

Confidential – Parties are willing to exchange information freely in mediation because the procedure is confidential. AAA rule M-12 provides that information disclosed to a mediator in confidence shall not be divulged by the mediator. Further, views expressed and information shared, including admissions, are to be kept confidential and cannot be introduced as evidence in any future proceeding. California Evidence Code § 1152.5.

Enforceable – Finally, settlements reached in mediation are enforceable if the key terms are reduced to writing. The settlement agreement prepared at the mediation may be handwritten and should be executed before the proceeding closes. A more formal agreement should be prepared by counsel within the period of time agreed upon at the mediation. Attention to this issue will assure that a successful mediation really results in a prompt settlement and avoids the costs of protracted litigation.

Ms. Claiborne is a partner in the firm of Bronson Bronson & McKinnon LLP and a mediator with the American Arbitration Association.

Binding Arbitration Agreements with Clients

MANY lawyers act like lay persons in drafting fee agreements. They do not pay the kind of attention that they routinely employ when representing a client. This is a serious mistake. A properly drafted engagement letter can reduce the incidence and impact of disputes with clients. Unfortunately, ambiguities in engagement letters are typically construed against the lawyer as the draftsman. Such ambiguities can affect all aspects of the attorney-client relationship, including collecting fees, conflict issues, the scope of representation and malpractice claims.

Alan Jay Weil

This article discusses arbitration clauses in engagement letters. You may prefer to resolve a client fee dispute through binding arbitration to save time and expense. You may also prefer a binding arbitration forum over a jury trial in a professional malpractice action.

However, both the Business & Professions Code and the courts have circumscribed counsel's ability to have clients agree in advance to binding arbitration. Indeed, you may be surprised to learn that a binding arbitration clause in a fee agreement is unenforceable as to any subsequent dispute over counsel's fees or costs. Counsel should be familiar with the law governing engagement letters because it may substantially affect how counsel fashion their retainer agreements to shape the mechanism for dispute resolution with clients.

Amended Business & Professions Code Section 6204 Permits Counsel to Have Clients Agree to Binding Arbitration of Disputes Over Counsel's Fees or Costs Only After Such A Dispute Arises.

Effective January 1, 1997, Business & Professions Code Section 6204 was amended to provide that an attorney and client may agree in writing to be bound by an arbitration award in connection with a dispute over fees, costs, or both only *after* such a dispute has arisen. Amended Section 6204 now provides in pertinent part:

> The parties may agree in writing to be bound by the award of the arbitrators *at any time after the dispute over fees, costs, or both, has arisen*. In the absence of such an agreement, either party shall be entitled to a trial after arbitration if sought within 30 days....

Under amended Section 6204, an agreement for binding arbitration of a fee or cost dispute made at any time before the dispute arises – typically at the inception of the attorney-client relationship – cannot be enforced. Although the issue has not been litigated, if a motion to compel arbitration based on a pre-dispute agreement were presented to a court, two results are possible. First, a court could conclude that the provision is void, that as a matter of law the parties had not agreed on the subject of arbitration at all. Alternatively, a court could save the arbitration clause by eliminating the binding nature of the arbitration and hold that the parties had agreed to *nonbinding* arbitration.

Before the 1997 amendment to Section 6204, the lawyer could compel binding arbitration of a fee dispute as long as his engagement agreement clearly provided for it. The client could refuse binding arbitration of a fee dispute in any other situation. *See* former Business and Professions Code Section 6204(a).

The 1997 amendment was apparently enacted so that clients were not forced to sign engagement letters providing for binding arbitration of fee disputes. This client benevolence appears very short-sighted and counterproductive. First, only fee disputes are covered. The parties are free to agree to binding arbitration of all other disputes, including claims of malpractice, breach of fiduciary duty, and fraud. As a matter of common sense and public policy, it is hard to justify excluding only fee disputes from binding arbitration clauses.

Second, the notion that clients cannot intelligently decide for themselves whether they want binding arbitration of fee disputes is patronizing. If a client does not desire an arbitration clause, he can refuse to sign an engagement letter containing such a clause. As long as the agreement is clear and the client is not deceived, lawyers and clients should be free to make such agreements.

Third, amended Section 6204 may play havoc even with carefully crafted agreements for binding arbitration of non-fee disputes. If a client truly desired to avoid binding arbitration of a malpractice claim even though he had agreed to it in the engagement agreement, it would not take much imagination to construct a malpractice claim that also involves a fee dispute. If the fee issues are inextricably intertwined with the malpractice issues, will the client succeed in convincing a court that binding arbitration of the malpractice claim is not permitted? No one can be sure what the result would be.

What is clear under amended Section 6204 is that you can no longer have your client agree in your fee agreement to resolve through binding arbitration disputes over your fees or costs. At best (or worst), including such a clause in your fee agreement may obligate you to participate in *nonbinding* arbitration of a fee dispute.

Fee Agreements Which Unambiguously Require Binding Arbitration of Non-Fee Disputes Should Still Be Enforced.

As noted above, the attorney fee statute places no restriction on agreements providing for binding arbitration of claims which do not concern a fee or cost dispute. California courts have upheld such provisions. However, despite the courts' oft-repeated mantra that arbitration agreements are to be liberally construed in favor of finding a dispute arbitrable, the courts have employed several ancient rules of construction to deny a lawyer's motion to compel arbitration of a client dispute.

California has a long history of liberally favoring resolution of disputes through binding arbitration where the parties have agreed in writing to do so. In *United Transportation Union, AFL/CIO v. Southern California Rapid Transit District*, 7 Cal.App. 4th 804 (1992), the Court of Appeal reversed the trial court's denial of an arbitration petition, holding that California's strong public policy

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PETER J. BENVENUTTI

On CREDITORS' RIGHTS

YOUR client owes a manufacturer a balance of $2.5 million, but contends the equipment it bought was defective. Negotiations break down; the manufacturer files suit in Superior Court; and your client cross-complains for prior payments, plus consequential damages. Now you learn the manufacturer has filed a chapter 11 case.

This scenario is hardly uncommon, yet many civil litigators feel they've been transported to an inhospitable land with bizarre customs and an unintelligible language. Here's a brief travel guide.

How to Get There

The Automatic Stay. A bankruptcy petition (including an *involuntary* petition) automatically enjoins most proceedings *against the debtor* based on *prepetition* claims, contracts or conduct, and virtually all proceedings of any sort directed *against the debtor's property*; it also bars activity in support of the stayed proceeding, such as discovery or motion practice. The automatic stay does not enjoin proceedings on claims asserted *by the debtor*, so in our scenario your client's cross-complaint is automatically stayed, but the manufacturer's complaint is not. The bankruptcy court can lift or modify the stay "for cause" – a highly flexible standard.

One important word of caution – when it comes to the automatic stay, look carefully before you leap. Violations of the automatic stay can lead to substantial damages. *See, e.g., In re Computer Communications, Inc.*, 824 F.2d 725 (9th Cir. 1987) (non-debtor party's otherwise proper termination of contract without stay relief resulted in *$5 million* damage award to debtor).

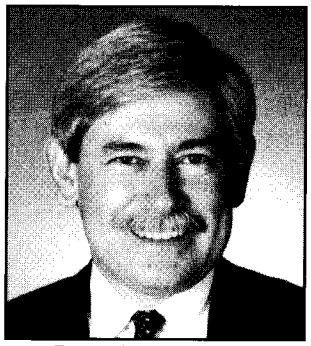
Removal and Remand. The litigation can be removed to the bankruptcy court by *any party* (not just the debtor), if the bankruptcy court has jurisdiction under 28 U.S.C. §1334. Among other things, §1334(b) confers jurisdiction over "civil proceedings...related to" a bankruptcy case, which encompasses virtually any civil litigation in which a chapter 11 debtor is a party.

A party can move to remand "on any equitable ground." That motion is addressed to the court's discretion, although where mandatory abstention applies (see below), denial of a timely remand motion would probably be an abuse of discretion. *See In re Tucson Estates, Inc.*, 912 F.2d 1162 (9th Cir. 1990). The bankruptcy court's decision to remand (or not) may be appealed to the district court, but no further. *See In re Conejo Enterprises, Inc.*, 96 F.3d 346 (9th Cir. 1996).

Abstention. Section 1334 authorizes discretionary abstention. It also provides for *mandatory* abstention of State law claims when bankruptcy court jurisdiction is solely of the "related-to" variety, if an action "is commenced, and can be timely adjudicated," in State court. In the Ninth Circuit, mandatory abstention can even apply a prebankruptcy claim against the debtor for money – something most bankruptcy lawyers believed was within the bankruptcy court's "core" (not "related to") jurisdiction. *In re Conejo Enterprises, Inc.*, 96 F.3d at 349-350.

Withdrawal of the Reference. Although the statute explicitly vests bankruptcy jurisdiction in the district courts, all bankruptcy proceedings are routinely and automatically "referred" to the bankruptcy courts. There are, however, situations in which a bankruptcy dispute will be litigated in the first instance in the district court. For example, jury trials in bankruptcy court require the consent of all parties. Bankruptcy Rule 9015; N.D. Calif. Local Bankruptcy Rule 9015-2(c). Thus, a single nonconsenting party may require the district court to withdraw the reference. *In re Cinematronics, Inc.*, 916 F.2d 1444 (9th Cir. 1990).

Where to Stay



Peter J. Benvenutti

Because a commercial dispute filed in state court could ultimately be tried in any of the three different forums (superior, district and bankruptcy courts), bankruptcy presents an opportunity to select a different – and perhaps better – forum.

A non-bankruptcy lawyer may reflexively dismiss the notion that she and her client would want to litigate in bankruptcy court, but that court offers many potential advantages, combining attractive features of ADR (including speed and economy) with trial in a court of record. Trial may occur in as little as five or six months. Almost all provisions of the FRCP apply, sometimes with streamlining variations. Discovery is freely available, but (at least in the Northern District) without the mandatory disclosure rules of FRCP 26 and Local Rule 26-1(b). Motion and trial practice are governed by the same rules as in district court, though formal pretrial practice is often truncated significantly. Perhaps most important, most bankruptcy judges like to try commercial cases, and often have broader knowledge of commercial settings and law than state court judges.

Non-bankruptcy practitioners may fear that the bankruptcy judge will favor the debtor, or the reorganization process, or the bankruptcy "regular" on the other side. While this phenomenon may occur occasionally, in my experience it is rare. Most bankruptcy judges strive to assure both the appearance and the reality of impartiality. Because most bankruptcy lawyers rarely try cases, an experienced litigator will likely find his trial skills and command of the rules of evidence afford a marked advantage.

A civil trial lawyer who actually tries a case in bankruptcy court is likely to find that the experience compares favorably with other bench trials. When next transported to this foreign land, consider its advantages. You may be doing your client a big favor.

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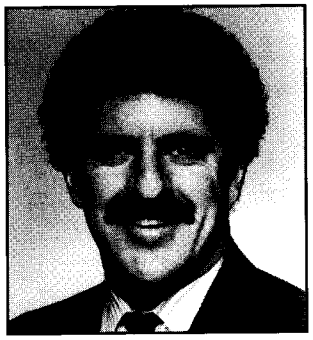
Binding Arbitration Agreements

favoring arbitration of disputes required that any doubt had to be resolved in favor of arbitration unless it is *clear* that the agreement could not be interpreted to cover the dispute:

> "Doubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration. The court should order them to arbitrate unless it is clear that the arbitration clause cannot be interpreted to cover the dispute." *Id.* at 808-09.

Accord, Hayes Children Leasing Co. v. NCR Corp., 37 Cal.App.4th 775, 787-88 (1995) ("Any ambiguity in the scope of the arbitration, however, will be resolved in favor of arbitration."); *Vianna v. Doctors' Management Company*, 27 Cal.App. 4th 1186, 1189 (1994) ("arbitration should be ordered unless the agreement clearly does not apply to the dispute in question."); *Powers v. Dickson, Carlson & Campillo*, 54 Cal. App. 4th 1102, 1106-07 (1997) (ordering arbitration of malpractice claim based on provision requiring arbitration of "any other dispute (other than attorney's fees) between the parties hereto arising out of or relating to this contract or attorney's professional services rendered to or for client").



Steven S. Davis

However, counsel runs the risk that binding arbitration of a non-fee dispute will not be compelled unless a retainer agreement's binding arbitration clause is specific and clear that it covers such a non-fee or cost dispute. California's strong public policy favoring arbitration may give way to other doctrines which may lead the court to construe a binding arbitration agreement narrowly against the attorney - under the theory that any contractual ambiguity should be construed against the party responsible for the drafting, particularly where that party is a lawyer.

For example, in *Lawrence v. Walzer & Gabrielson*, 207 Cal. App. 3d 1501 (1989), the law firm had included an arbitration clause in its retainer agreement which appeared to be as broad as possible: "In the event of a dispute between us regarding fees, costs, *or any other aspect of our attorney-client relationship*, the dispute shall be resolved by binding arbitration." *Id.* at 1504. (Emphasis added). The Court of Appeal concluded that the clause did not cover a malpractice claim, holding that the phrase "any other aspect of our attorney-client relationship" was limited by the words which preceded it ("a dispute... regarding fees, costs....") and should be narrowly construed to cover only disputes involving fees or costs. *Id.* at 1506. The *Lawrence* court emphasized the Supreme Court's admonition that "All dealings between an attorney and his client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for any unfairness." *Id.* at 1507. It also stressed that counsel had drafted the retainer agreement and that, under Civil Code § 1654, "[T]he language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." *Id.*

The *Lawrence* court's determination runs afoul of numerous rules of contract interpretation, including (1) that any ambiguity in the scope of an arbitration agreement be resolved in *favor* of arbitration unless it is clear that the arbitration clause *cannot* be interpreted to cover the dispute [*Vianna, supra*, at 1189]; (2) that the words used in an agreement should be given their ordinary meaning [*Powers, supra*, at 1112]; (3) that an agreement should not be construed so as to render a portion meaningless [*Manufacturers Life Insurance Co. v. Superior Court*, 10 Cal.App. 4th 257, 274 (1995)]; and (4) that the cannon that any ambiguity in a contract should be construed against the party who prepared it "applies only as a tie breaker, when other cannons fail to dispel uncertainty." [*Powers, supra*, at 1112]

If the *Lawrence* court had attributed the ordinary meaning to the expansive words used in the arbitration agreement involved there – "any other aspect of our attorney-client relationship" – the *Lawrence* court could not have concluded that the plaintiff client's malpractice claims were not arbitrable. Instead, the *Lawrence* court all but rendered these words meaningless by concluding that only disputes concerning "financial" matters, such as "fees" and "costs," are covered by the arbitration agreement.

In *Mayhew v. Benninghoff*, 53 Cal.App. 4th 1365 (1997), a broad agreement to arbitrate was also held insufficient to require the client to arbitrate a claim against counsel for conversion of the client's funds. The retainer agreement included a seemingly expansive – but generalized – binding arbitration provision:

> [A]ll disputes between attorney and client... arising directly, or indirectly, against attorney on account of attorney's representation of client, shall be resolved pursuant to binding arbitration before the American Arbitration Association....

Id. at 1368, n. 1. The Court of Appeal, following *Lawrence v. Walzer, supra*, held that binding arbitration was not required:

> If anything, Benninghoff had a greater responsibilities [*sic*] to ensure clarity in his written agreements with Mayhew than did the family law attorney in Lawrence because he chose to enmesh himself in suspect financial dealings with his client Mayhew. As in Lawrence, there is nothing to indicate Mayhew was advised by Benninghoff that his assent to arbitration of fee disputes in conjunction with the dissolution proceeding also impliedly included an assent to arbitrate Benninghoff's alleged conversion of sums entrusted to him for investment.

Id. at 1370. The *Mayhew* decision may be distinguishable because the lawyer there had also entered into a business transaction with the client, which raises a presumption of undue influence. Nevertheless, the lesson is clear: If you want maximum assurance that your fee agreement will require binding arbitration of malpractice disputes – or other non-fee disputes – your agreement should expressly specify the disputes to be covered and demonstrate a clear intent to employ binding arbitration to the maximum extent permitted by law. Additionally, your agreement should expressly state that, if any provision is found to be ambiguous, it will not be construed against the draftsman but will be construed to effectuate the expressed intentions of the parties.

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RACHEL KREVANS

On PATENTS

CAN machines create patentable inventions? Once upon a time, this question would have been a clever abstraction to be debated by academics teaching intellectual property law. Now, it is a concrete issue facing practitioners in the intellectual property bar every day. In the past two decades, technology has been constantly threatening to outstrip the law, as researchers advance traditional fields of science into new areas that simply were not contemplated when the framework of patent law was written and then developed by the case law.

Many interesting questions and problems have arisen in the attempt to apply "traditional" patent law to new technologies and new kinds of inventions. A patentable invention is defined in 35 U.S.C. § 101 as follows:

> Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Can one "invent" a naturally occurring substance such as a virus, or a hormone? If so, is the inventor the person who first understands and describes its function even if he cannot describe its structure? Is it the person who first physically isolates the substance and describes its structure even if she does not understand its function? If the naturally occurring substance is already known, can one "invent" the man-made version of the same substance by being the first to reproduce it through modern genetic engineering techniques? Can one "invent" an animal, for example by selectively breeding strains of mice to produce a breed that is superior for some purpose? Would the answer be any different if the superior mouse were produced not by the "natural" process of selective breeding but by the "technical" process of alteration of the gene structure of a mouse embryo in a test tube?

Many of these questions have now been answered, but none of them were answered until many years, sometimes decades, after the scientists involved had done their work. In the meantime, the patent lawyers working with those scientists had to make decisions about whether their scientific advances were patentable and, if so, what information about the proposed invention had to be disclosed in the patent application to adequately describe the invention. Thus, unlike many other areas of the law, where practitioners can be confident in their advice so long as they keep current on the latest developments in the law, in the patent area practitioners must predict how the law will develop in the future to apply to current scientific advances. And today, new advances in science pose new challenges for patent lawyers and for clients attempting to assess the value of their intellectual property.

One of these challenges is, in fact, the formerly abstract question of whether a machine can make an invention. For example, scientists are continually discovering new uses for man-made pieces of DNA of varying structures. While the usefulness of each possible piece has not yet been established, this has led to efforts to create many different possible pieces and patent them in order to gain rights to substances that may in the future prove useful. A similar effort has been ongoing for some time now with the "invention" (by DNA sequencing) of the DNA that forms the basic human genetic structure.

We now have the technology to build and program a machine to create pieces of DNA of varying sizes and of whatever structure the machine's programmer inputs. If such a machine is programmed to spit out 100 pieces of DNA every day, who invented those pieces? Is it the person who invented the machine? Probably not, although the design of the machine itself would be a separately patentable invention. Is it the programmer who wrote the computer code which directed the machine to make those particular pieces of DNA? Perhaps, but probably not if she was simply a person skilled at writing code who took directions from another person about the desired results of the program. She did not "conceive" the desired DNA, she simply followed instructions to obtain the desired DNA. Is it the person who told the programmer what the desired results were? Perhaps, because that person's thinking about what pieces of DNA to program the machine to create could be "conception" of that DNA.

Rachel Krevans

This may at first seem strange, but it is not all that different from the long-established notion that a scientist who directs a laboratory full of technicians, designs the experiments they perform, and supervises them as they carry out the experiments, is the inventor of the results. The only difference is that the machine has replaced the technicians, which increasingly will be the case in many technologies.

But what if the person directing the programmer, rather than directing her to program the machine to make 100 specific pieces of DNA each day, directed her to program the machine to make 100 random pieces of DNA each day and to keep repeating the process each day without duplicating any of the previous work? What did the person directing the programmer "conceive"? Not the structure of the DNA – that is random and generated by the machine. Not the function of each piece of DNA – as that has yet to be proven. What if the person directing the programmer were not a scientist at all, but a businessperson who understood the opportunities, purchased the machine, and hired the programmer?

These questions will not be answered definitively for many years. One possible answer, of course, which would please some and disappoint others, is that the reason an inventor is hard to find in some of my hypotheticals is that there is simply no patentable invention. No doubt these questions will arise again and again in the future as machines are invented which replace more and more of the laboratory functions currently performed by technicians and even Ph.D.'s. The only question to which we know the answer with certainty now is that the machine is not the inventor: Under 35 U.S.C. § 102, only "[a] person shall be entitled to a patent."

Ms. Krevans is a partner in the firm of Morrison & Foerster.

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Letter from the President

Currently on the drawing board are programs about witness examination and new developments, how jury profiles are changing in the Bay Area and the effect on business trials, and how to present scientific testimony more effectively.

The lifeblood of any organization are the members. Remember to renew your individual or firm membership with Sarah Flanagan of Pillsbury, Madison & Sutro, who is our Membership Chair this year. The membership insures that we can continue to offer excellent programs, and of course, the newsletter. Chip Rice of Shartsis, Friese & Ginsburg is the Editor-In-Chief of the ABTL newsletter and welcomes articles regarding case developments or other matters of interest.

Steve Brick of Orrick, Herrington & Sutcliffe, is Vice-President, Doug Young of Farella, Braun & Martell is Secretary and Steve Taylor of Taylor & Company is Treasurer. With these active trial lawyers as officers and a Board of Directors that includes both trial lawyers and trial judges, we have a very strong organization. If you are interested in being more active in ABTL, please let me know – just write, call or e-mail me at barbaraa caulfield@orrick.com.

New Developments

This month the new courthouse opens for the Superior and Municipal Courts in San Francisco. The courtrooms are technology and trial friendly. Under the leadership of Judge Kay, Judge Cahill and the Courthouse Committee, the courthouse opened on time and by early reviews of trial counsel, is excellent for trying cases.

Judge Patel is Chief Judge of the Federal Court for the Northern District of California, succeeding Judge Henderson. ABTL marked this occasion in December with a dinner honoring both Judge Patel and Judge Henderson. Judge Martin Jenkins and Judge Charles Breyer recently joined the Federal Bench and preside in the San Francisco courthouse.

What issues face the Business Trial Community in 1998? The list is long and complex, but often making the list adds light to the discussion of the issues.

Jury comprehension in long and complex trials is vital to our membership. The fact-finding expected of jurors in business cases is complex. More helpful ways to assist jurors in comprehension are being discussed, explored and used in trials. Many of the suggestions are not new, but the combination of approaches may be helpful to jurors. This year, through the newsletter and dinner programs, we hope to discuss new developments in trial efficiency and jury comprehension. Among the issues for discussion are: 1) interim commentary or summation throughout the trial, 2) time limits for trial, 3) tutorials for jurors before opening statement, 4) improved use of technology to display documentary evidence, 5) mandatory pre-trial conferences to settle evidentiary issues before motions-in-limine are filed, 6) review tutorials for jurors before closing arguments, and 7) computerized access to evidence by jurors during deliberation.

We have examined trial technology in a number of programs, but there are new issues concerning admissibility of documents, simulations, summaries and records created or amplified by technology which we will discuss. So our list of issues in business litigation must include the use of technology 1) to communicate with experts and clients, 2) to take depositions or monitor depositions on-line, and 3) to produce documents.

The use of the internet, intranets and extra nets will dramatically alter how litigators practice law, prepare for trial and try cases. Support to remote deposition or trial sites, and management of litigation are key issues where developments occur daily in efficiency, accuracy and speed of communication. The business litigator is in the forefront of lawyers who utilize these new developments and ABTL would like very much to hear from our members who have ideas for programs or project development in the area of technology and business litigation.

I hope you will make a special effort to attend our programs and also to assist with ideas, program development and participation in ABTL.

Ms. Caulfield is a partner in the firm of Orrick, Herrington & Sutcliffe LLP.