ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

ORANGE COUNTY

Volume V No. 2 Summer 2003

Q&A with the Hon. James V. Selna
by Lester J. Savit

On March 27, 2003, James V. Selna's nomination for United States District Judge, Central District of California, Santa Ana Division, was confirmed by the United States Senate. Prior to joining the federal judiciary, Judge Selna had been a judge on the Orange County Superior Court (Complex Division). Prior to his appointment to the state court in 1998, he was a member of O'Melveny & Myers in Orange County. Jones Day partner Lester J. Savit interviewed Judge Selna in his new chambers on August 18, 2003.

Savit: How do the lawyers appearing before you now in the federal courthouse compare to those appearing in Superior Court?

Selna: Well, I spent my last year in Complex. Very skilled lawyers by in large appeared in front of me in Complex. I think in some ways the district court is parallel in that you have a number of specialty bars: the

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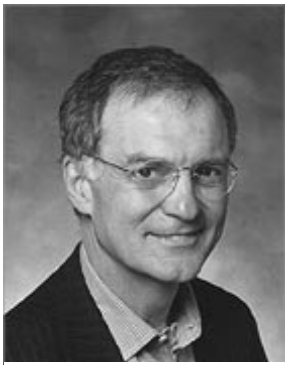
Practical Lessons from a Complex Patent and Trade Secret Trial
by Frederick Brown and Sean Lincoln

Imagine how quickly you age when you wait for the jury for nine long days to reach its verdict in a case that could cost your client over $1 billion. On February 19, 2003, after seemingly interminable deliberations, the jury in Mentor Graphics Corporation v. Quickturn Design Systems, Inc. and Cadence Design Systems, Inc. returned a verdict in favor of our clients, the defendants, on all submitted issues. The jury found no trade secret misappropriation, no common law misappropriation, and no patent infringement, and found clear and convincing evidence that each asserted patent claim was invalid. The fourteen-day trial, held before Judge Susan Illston in the Northern District of California Federal Court, was actually a consolidation of four separate actions filed by the plaintiffs over the course of three years.



Fred Brown

The importance of the trial to the parties was obvious: over $270 million in claimed damages on the trade secret claim and over $60 million sought on the patent claims, along with a request for treble damages. Waiting for the jury during those nine long days was especially nerve wracking because there were two findings of infringement on summary judgment against defendants before the trial began. As plaintiffs pointed out at every turn, defendants were already found to be "infringers" and the jury should focus on the amount of damages, not on defendants' "excuses" for why the patents were invalid. During those nine

Sean Lincoln

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President's Message: WE MAY NOT BE UNDER A MICROSCOPE, YET . . . .
by Michael G. Yoder

Two recent events have left me thinking about microscopes, not the kind in a science lab (of which I know very little), but that used by the public to scrutinize the professional and public lives of celebrities (of which I know some, but not much more). One event, as you might have guessed, is the sorry saga of Kobe Bryant (yes, I am a Lakers fan). The other will probably surprise you – the swearing in ceremony for our two newest United States District Court Judges for the Central District of California, current ABTL – OC board member James Selna, and Cormac Carney. What do these two events have in common? Nothing, of course, but they offer some valuable contrasts and comparisons, especially for those of us, like trial lawyers, who do find themselves under a public microscope from time to time.

As for Kobe Bryant, let me first admit that I was one of many who chose to put Kobe on a pedestal. Kobe's remarkable athletic ability had something to do with it, but I was more impressed by Kobe's apparent (should we now say self-professed) values – a family man who did not frequent the strip joints with his teammates, a superstar who diligently worked on his game both during the season and in the off season, a multimillionaire who still had time to sign autographs and visit dying kids in hospitals. Kobe seemed to walk the talk. Here was someone my kids could look up to, right?

Whether Kobe is found guilty or innocent, I now must admit that Kobe's personal life falls far short of his professional skills. Of course, this does not distinguish Kobe from many others. Unfortunately for celebrities like Kobe Bryant, we put their private lives under a microscope, and often we do not like what we see, although we are very willing to keep looking.

The personal lives of lawyers, even trial lawyers, rarely see the light of day, unless we venture into a public arena like politics (an entirely different subject that I will make no effort to address given the current circus, aka recall election, we Californians have offered up to the rest of the country for their enjoyment). Most people do not care about the personal lives of trial lawyers. However, many people do care about how we conduct ourselves professionally. Unfortunately, the public has

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ABTL June Program/PLC Fundraiser

"Brock" Gowdy Tells ABTL Members How to "Get The Jury to Show You the Money"

by Marilyn Martin Culver

At the ABTL's 4th Annual Wine Tasting Fundraiser and Dinner Program to support Orange County's Public Law Center on June 4, 2003, leading trial attorney, Franklin "Brock" Gowdy, shared experiences from what has been called "the real life Jerry Maguire case" and showed ABTL members how he got a Central District jury "to show him the money."

Gowdy, a litigation partner at Morgan, Lewis & Bockius in San Francisco, represented Leigh Steinberg, long hailed as one of the most powerful agents in football, and Steinberg, Moorad & Dunn, Inc. ("SMD"), in a lawsuit against certain former SMD business associates, including David Dunn and Brian Murphy. Steinberg and SMD, who successfully represented some of the NFL's most famous players, filed the action after Dunn and Murphy left SMD in 2001 to start a new sports agency, Athletes First, taking more than half of SMD's football clients and more than one third of SMD's staff with them. In the action, filed in the Central District of the United States District Court, SMD accused Dunn and Murphy of unfair competition and breach of contract. Dunn and Murphy denied the allegations, and made various accusations against Steinberg involving alleged incompetence and erratic behavior.

In his June 4, 2003 ABTL presentation, Gowdy discussed the high-tech experts and discovery tools he utilized to obtain -- and in some instances, to recover -- emails and other significant computer-generated documents created by Dunn, Murphy, and others that contradicted Dunn and Murphy's denials. Among some of the more dramatic emails and memoranda Gowdy uncovered and presented to the jury was a memorandum authored by Murphy after he and Dunn had decided to break away from SMD that enumerated particular "Items We Need From the Office," which specifically listed "Incriminating Evidence Against SMD." Gowdy also described how, through persistence in discovery and exhaustive forensic analysis, he and his computer expert were able not only to recover documents that had been deleted, but were able to show who had attempted to get rid of them and when.

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Learn Everything You Need to Know About Punitive Damages – In One Weekend

by Martha K. Gooding

Anyone reading the legal headlines in recent months knows that punitive damages are very much on business trial lawyers' minds – both because the courts have recently decided several important punitive damages cases and because punitive damages continue to play a significant role in high-stakes, complex business trials. The ABTL's 30th Annual Seminar tackles the issue of punitive damages in high-stakes business litigation with a two-day program entitled "Trying the Punitive Damages Case." The seminar will be held at the Hyatt Regency Tayama Resort & Spa along the Rio Grande in Santa Ana Pueblo, New Mexico on October 17-19, 2003. The Seminar will feature analysis of recent developments in punitive damages law, pre-trial and trial tips and strategies, and demonstrations by a distinguished faculty of lawyers, judges, professors, and jury consultants. The Seminar also will feature a mock jury to deliberate on the punitive damages arguments presented.

The Seminar will address the full range of issues that confront trial lawyers seeking – or defending a claim for – punitive damages. For example, the Saturday panels will explore policy issues affecting punitive damages and grapple with strategic pre-trial and trial decisions that punitive damages claims pose. The Sunday morning panels will focus on jury selection and opening statements and will feature demonstrations of both, as well as closing arguments, post-trial motions, and a debriefing of the mock jury panel.

The Seminar traditionally attracts top judges and attorneys throughout the state, and this year's 30th Anniversary program is no exception. Attorney faculty members will include Orange County's own Gary Waldron , Wylie Aitken, Nency Zeltzer, and Richard Marshack.. They will be joined by, among others, Raoul Kennedy, Deborah Pitts, Morgan Chu, and Joe Cotchett . Among the many judges participating on the panels will be Hon. Sheila B. Fell from the Orange County Superior Court, Hon. Susan Illston from the U.S. District Court for the Northern District of California, and Hon. Alex Kozinski from the 9th Circuit Court of Appeals. Hon Carolyn

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A WORD FROM OUR SPONSOR

Court Reporting in Today's Environment

By Cary Sarnoff

Transcripts are no longer just words on a piece of paper: Technology is advancing in the court reporting industry and it is allowing reporters to provide an ever-increasing number of services that can help attorneys manage and analyze the massive amount of material that they have to deal with in lawsuits today. Accessing ongoing depositions from remote locations via the Internet is just one example of what our office is providing to our clients today. A virtual repository for Internet access to pleadings and documentary evidence in exhibit-heavy cases is another service that is available and widely used.

Today's technology can really help: While most court reporting agencies have some very capable reporters, not all of those agencies can supply the technologies and support services necessary to provide attorneys with the most beneficial product. If the agency doesn't provide the tools, services and support needed in today's legal environment, then neither the attorney nor his/her client is getting the most value for money spent.

In seeking to bring the best technology available to attorneys and reporters, a standard service our office provides is scanning exhibits introduced at a deposition and putting those files on a CD-ROM along with the transcript. These files can be provided in a variety of formats, including TIFF and PDF, or they can be hyperlinked to the transcripts if the user is using either LiveNote™ or RealLegal™. There is great value and strategic advantage in such accessibility. Here are some of the services and technology advances you should be looking for:

- **Scanned images of exhibits and or Pleadings on CD-ROM**
- **On-Line (Virtual) Document Repositories**
- **Full time Information Technology Director and staff**
- **Certified LiveNote™ Trainers**
- **Realtime streamed over the Internet**

A little insight into interactive realtime reporting: Attorneys that understand the advantage of and use realtime reporting regularly, may think that providing the

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patent bar, the trademark bar, the criminal bar. I have found on the bench and in private practice when you are dealing with relatively small bars, people generally have a higher skill level and generally they get along better. I have noticed more similarities between the lawyers who appear in front of me in Complex and the lawyers here.

Savit: How does the size of the docket compare?

Selna: Complex, I had about 225 cases, I think I have about 330 now. Plus a criminal case load. The numbers really don't compare in terms of management; the dockets are much different. In the federal docket you have everything from the most Complex anti-trust case to the fender bender at the Post Office. You see a greater range within the federal docket than you would in Complex. I am not sure that there is that much of a difference.

Savit: How was it determined which cases were placed on your docket initially? Is that done by a transfer from other judges or is there some kind of random method?

Selna: There is a random method. There is a case management committee that is responsible for making sure dockets are evenly generated. One of that committee's functions is to put together an initial docket for each judge. They have a program that identifies cases randomly from every active judge's docket. The goal of the program is to give you a docket that pretty much mirrors the aggregate in terms of distribution of substance areas of law and maturity of the cases. The program generates a list for each active judge of somewhere between 14-16 cases and that judge, according to some set criteria, can retain a case because he or she has a large investment in it or it's related to another group of cases. There are a number of factors. But, a judge can retain a case and if a judge does that, then the computer generates another case to come off that judge's docket.

Savit: So, a judge can't pick a particular case to send away, but he or she can pick a case to maintain if it would be appropriate for the administration of justice?

Selna: The folklore is that the new federal district judge gets the dogs off every other judge's calendar. There are some difficult cases, there are some problem cases, but I am sure it is no more than what appears on any judge's docket.

Savit: Do you have any new strategies since coming over to the federal bench for dealing with a large num-

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ber of cases?

Selna: No, the case management practices that I learned doing Complex really are quite translatable. It is important to have a meaningful initial scheduling conference. If a case has any Complexity to it, I will schedule an interim status conference and get together with the lawyers. With Complex, I saw the lawyers on average of every three months in every case. I found that invaluable in terms of making sure that the cases progressed and that I knew what was going on. Status conferences often gave me an informal opportunity to help them sort through problems without the necessity of a motion. It's a chance to visit with the lawyers, learn where they are, and also get to know the cases.

Savit: Do you typically get involved in settlement procedures or have any particular method of trying to get the parties to talk settlement?

Selna: One of the things we take into the scheduling conference is the selection of one of the ADR methods. So, I'll make sure that I've got a selection there, and then I'll ask the lawyers if this is a case that could benefit from an early settlement conference or is this a case where we need some discovery first. I ask them for a date by which they will have conducted their settlement conference. As far as my participation, I leave it to the parties. A lot of times, the counsel find it helpful if the trial judge presides over the settlement conference. …. But I don't concern myself with the settlement process unless all the parties want me to.

Savit: How do you feel about managing discovery? Are you going to make use of the magistrate judges or do you have some ideas about, perhaps at least initially, trying to handle discovery in some cases?

Selna: No, I'm going to delegate all discovery matters to the magistrates. We've got some very able magistrates, and I think it's a good allocation of work. If the parties have some critical issues they can always bring it to the court as an objection to the magistrate judge's recommendation.

Savit: Do you issue tentative rulings on motions?

Selna: Right. I post to the Internet, and so does Judge Carney. We're the only two over here doing it. It's a practice I've gotten used to from Superior Court. We have the technology over there to do it, and when Judge Carney and I indicated we wanted to post, they just put in place the macros for us. The tentatives are listed on my page on the home page for the court.

Savit: That'll be very helpful.

Selna: I find it very useful if I have something down on paper to begin with, it gives me a framework for argument. I tell people "tentatives are tentatives." But, please don't be disappointed if I change my mind. It's an initial framework so that I can grasp the issues and formulate questions. Unfortunately, some people get very irate when they learn that the tentative, which may have been a very close call in my mind, is not going to be the ultimate ruling. (laughs) … It's also useful, I think, for counsel to get a tentative ruling. I generally have them posted by mid-afternoon on Friday. So, when counsel come in here Monday, they know where I'm coming from and they can argue to the tentative ruling. It avoids canned presentations. People get right down to it. They talk about the issues that I'm interested in, that I'm concerned about.

Savit: It is great to be able to obtain the tentative from the Internet. My own personal practice now is to get to court an hour early to review the tentative and then figure out how to argue in favor or against the tentative ruling.

Selna: I don't do this to discourage lawyers from coming in. I enjoy oral argument and I'll generally have questions for both sides on every motion, because I like to tee things up as sharply as possible so I can understand exactly what the position is.

Savit: How has your use of law clerks changed since you've come over to federal court?

Selna: Well, I have two law clerks, In my practice I generally read every motion cold. The law clerks will work them up and then we talk about them, depending on what the motion is, I'll do more or less writing of the actual decision. Generally, we sit down early in the preceding and I share my tentative thoughts.

Savit: You came over in the middle of a law clerk hiring cycle. Did you bring your law clerks over from the state court?

Selna: No, no, I was very lucky and found two people in the class of 2002, who for various reasons did not seek a clerkship. One was spending an extra year to seek his Ph.D. in Economics. And the other, who was

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from Georgetown, for personal reasons had not looked for a clerkship.

Savit: Are these clerks going to be with you for a year and a half?

Selna: Yes, through September 2004.

Savit: In the state court, you were known for issuing a short memo indicating that your No. 1 requirement for everyone was to be civil and courteous. Do you still hand out this memo in the beginning of the cases?

Selna: Generally I hand that out for every trial. It's what I call my protocol. I didn't have courtroom rules, but I had my protocol, which answers some very straightforward questions for lawyers as to how I like to do things. The first point was that everybody is going to be treated with courtesy and respect.

Savit: How do you feel about lawyers using cutting-edge technology in your courtroom? You have a reputation for expecting a high level of efficiency in your courtroom, particularly during jury trials. Have you had any bad experiences with lawyers using high-tech presentation methods that ended up delaying the proceedings and distracting from the presentation?

Selna: Any type of equipment will generate a glitch from time-to-time, but, by in large, I've found that lawyers who are into high tech present their case more quickly, more efficiently and in a more understandable fashion for the jury.

Savit: What has been the biggest surprise since making the transition from the state bar to the federal bench?
Selna: I think that federal judges have more time to devote to dealing law and motions.

Savit: More reliance on the written presentations?

Selna: I think more things get resolved in motions than in state court.

Savit: According to one published profile you were inspired at a young age to become a lawyer by watching Perry Mason on T.V. If you were growing up today is there a particular law-related T.V. show that you think would provide similar inspiration?

Selna: Perry Mason is still pretty valid. He is one of the best T.V. trial lawyers of all time. I enjoy watching Law & Order - I watch the reruns.

Savit: Speaking of T.V. do you have any experience in having T.V. cameras in your courtroom?

Selna: No.

Savit: Do you have any feelings one way or another about balancing the competing interests?

Selna: Well, it presently is not an option in federal court. There are some bills in Congress that would provide the possibility of T.V. coverage. I think in some types of cases and some proceedings it would be highly desirable to have the public appreciate how the government runs. I am thinking, for example, the Supreme Court argument over the Bush/Gore lawsuit. The Supreme Court made available tapes within the hour after the argument. It seems to me that there are certain parts of the judiciary that ought to be open to public T.V. coverage. I am not sure that is true for trial courts. If I had my way, I would televise the Supreme Court. I can sit down today and watch the Senate from gavel-to-gavel. I am sure that CSPAN does the House from gavel to gavel.

Savit: Since Court TV has come on the air have you seen any changes in terms of sophistication of juror deliberations, sophistication of juror questions?

Selna: I really haven't seen any affect. Although, probably one humorous affect, was that the jury advised the bailiff that they had reached a verdict. So, the jury comes in, and the foreperson asked the jury if they reached a verdict. "Yes, we have your honor." And she stood up and started to read it. Then I said, "No, no. I get to read it first." I am sure it was a direct by-product of watching TV.

Savit: Is there one thing that courtroom lawyers would stop doing if they could see themselves from behind the bench?

Selna: It doesn't occur very often but some lawyers really lack a poker face and constantly generate facial expressions. I really discourage it. It looks juvenile to me, I don't know what it looks like to the jury. I can recall a case where a lawyer slapped his chair because he didn't like what the bench was saying or didn't believe it or threw his head up or what not. I really discourage that.

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Savit: Thank you for taking the time to meet with me.

▪ ***Lester J. Savitt is a partner with Jones Day, in their Irvine, CA office.***

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Kuhl -- who is Supervising Judge of the Los Angeles Superior Court, a member of the Judicial Council Task Force developing new standard jury instructions, and specifically a member of the Task Force subgroup addressing the punitive damages jury instructions -- is also on the faculty. Non-lawyer participants will include a representative from Deloitte & Touche to discuss tax implications of punitive damages awards; Professor David Schkade, from the University of Texas, co-author of *Punitive Damages: How Juries Decide;* and members of the National Jury Project.

In keeping with tradition, the Seminar will feature a keynote speaker on Saturday evening. The ABTL is proud that California Supreme Court Associate Justice Ming Chin has agreed to provide the keynote address. Other notable speakers will include Congresswomen Linda and Loretta Sanchez – from California's 39th and 47th Congressional Districts, respectively – who are the first sisters ever to sit concurrently in Congress. Congresswoman Linda Sanchez serves on the Judiciary Committee and Congresswoman Loretta Sanchez is both the ranking woman on the House Armed Services Committee and the third-ranking Democrat on the Select Committee for Homeland Security. Together, the Congresswomen will give the opening presentation preceding the Friday evening welcome reception. On Saturday morning, the Seminar's Opening Address will be given by William Richardson, the current Governor of New Mexico and the former United States Ambassador to the United States, former Secretary of Energy, and four-time Nobel Peace Prize nominee.

As part of the Orange County Chapter's commitment to fostering and increasing participation in the ABTL by younger lawyers, the Orange County chapter has awarded a scholarship to the Seminar to a lawyer in practice ten or fewer years. The lucky winner of the scholarship was announced at the June ABTL dinner meeting.

In addition to the CLE programs and thought-provoking speakers, the seminar will provide ample time for individual and family recreation. The Tamaya Resort is set on more than 500 acres of protected land along the Rio Grande. It offers spectacular hiking in the nearby Sandia Mountains or along the Rio Grande, as well as golf, tennis, horseback riding, swimming (with a two-story waterslide), and a full spa. All of this, of course, is set against the backdrop of the rich Pueblo culture and history. The resort showcases Pueblo cultural treasures and artwork.

Brochures and registration materials are available on the ABTL website, www.abtl.org, or from Orange County ABTL Administrator, Rebecca Cien, at 323/939-1999. Discounted registrations are available for ABTL members in practice ten or fewer years, in-house counsel and counsel to public entities.

▪ ***Martha K. Gooding is a partner with Howrey, Simon, Arnold & White, in their Irvine, CA office.***

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In the end, Gowdy's diligence in discovery and expert analysis paid off: The jury "showed SMC the money" with a verdict of more than $44 million in damages in the case. For his part, Gowdy was honored as one of California Lawyer's Attorneys of The Year for 2002.

▪ ***Marilyn Martin Culver is a partner at Morrison & Foerster, in their Irvine, CA office.***

DO YOU HAVE SOMETHING TO SAY?

If you are interested in submitting material for publication in any upcoming issues of the ABTL Orange County Report, please contact the ABTL's Report Editor or submit your material directly to abtl@attbi.com.

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days, we had plenty of time to reflect on how we and our opponents conducted the trial and the lessons learned from presenting enormously complex facts and concepts to a jury. Some of the most valuable lessons we learned are described below.

Technology in the Courtroom

Technology, properly used, can be a powerful tool to help jurors understand the facts. The trick, of course, is to employ the right technology in the right way so the technology enhances the message being delivered. Despite (or, perhaps, because of) the fact that each side had identified dozens of potential witnesses and designated thousands of exhibits, Judge Illston limited each side to 30 hours for direct and cross-examinations, including rebuttal. Thus the trial, including opening statements and closing arguments, consumed "only" fourteen trial days. This "chess-clock" format placed pressures on both sides to present their cases efficiently. Inordinate time spent presenting hundreds of exhibits could have led to disaster.

Disaster was averted for both sides by a nearly seamless integration of multi-media presentations. Before trial, the parties decided upon one company to manage all the technology in the courtroom, which included everything from the basics (microphones, Elmo projectors, etc.) to the more complex (flat panel and projection screens for video deposition testimony, scanned documents and animated graphics). Plaintiff's counsel went a step further and quite effectively used touch-screen monitors from which they could control scanned documents and demonstratives. The multi-media technology allowed the jurors to read the exhibits simultaneously with the witnesses and to focus on highlighted sections pointed out and enhanced on screen by the lawyers.

Compared with the old method of publishing exhibits by passing them to the jury, this technology enabled the lawyers to present more exhibits to the jurors and enhance the jurors' understanding of those exhibits.With few exceptions, the technology worked very well and enhanced, rather than detracted from, the message of the presentations. One exception was a large flat panel monitor placed between counsel table and the jury, for lack of a better location. In addition to partially blocking the view of the jury from the counsel tables, the monitor also frequently distracted some jurors, who had to turn away from the witness or counsel in order to see what was on the screen. The large projection screen across the courtroom allowed witnesses and counsel to interact with the video presentations more effectively when the monitor was turned off. Our strong recommendation is to avoid multiple screens for the jurors. One large well-placed projection screen for the jurors is sufficient.

Though the technology generally worked very well, the parties' desire to have a backup plan in case the technology failed meant that both sides had many binders of exhibits packed into the courtroom. Perhaps the day is close at hand when the document scanning and retrieval technology is reliable enough that counsel will feel comfortable coming to trial without multiple backup paper copies at the ready. Until then, forests will continue to suffer. Also, the parties generally provided paper copies of exhibits in organized notebooks for each witness. This allowed witnesses to see the documents in the original form and to flip through the pages when necessary to answer a tough question.

One unusual use of multi-media technology came during plaintiff's examination of a former executive of one of the defendants. After cross-examining the witness on the stand, plaintiff's counsel excused him and the next day played excerpts from his video deposition testimony taken when he was still employed by defendant. This procedure allowed plaintiff to juxtapose the witness' live testimony against his deposition without having to ask the witness the same questions and "impeach" him with previous sworn answers. Plaintiff saved this technique for some "juicy" examination at deposition used for impeachment. Because counsel were required to notify us in advance about excerpts they would play and when they would use those excerpts, we asked the Court to allow the witness to return to Court and watch his testimony. With leave of the Court, the witness remained in the courtroom, then got back on the stand for redirect testimony by defendant.

The Court too made use of technology by playing for the jury, as part of the Court's pre-instructions, the video produced by the Federal Judicial Center, "An Introduction to the Patent System." This video was quite helpful to the jurors to understand some of the terms used later in the trial such as "PTO" and "invalidity." As one might expect, the jurors had virtually no previous knowledge of the patent system, so the video provided some common patent vocabulary that counsel then used during opening statements and throughout the trial. The video also made the jurors

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comfortable at an early stage of the case. In the context of this case, the video was balanced and fair and should be considered by all trial lawyers in patent trials.

The Importance of the Pretrial Statements

At various points during the trial, the Court used the pretrial statements as a touchstone for resolving issues that arose in the proceedings. For example, during the defense opening statement, plaintiff objected and announced for the first time that two key witnesses, who were also named plaintiffs, might not be coming from their homes in France to testify. Plaintiff's counsel argued that since the defense had not designated any deposition testimony from these witnesses and they could not be compelled to come into this jurisdiction, any reference to their deposition testimony during the opening was improper. The Court overruled the objection and noted that plaintiff's pretrial statement had included a witness list that stated these witnesses "will testify" about certain subjects while the same list disclosed that some other witnesses "may testify" about other subjects. In light of the pretrial statement, the Court allowed defendants to quote the witnesses' deposition testimony during the opening and to supplement our deposition designations to include testimony from these missing witnesses. The Court also used the pretrial statements to limit the opinions that could be presented to the jury by the experts.

"Will This Help the Jury Understand the Case?"

With multiple patent claims from multiple patents and multiple asserted grounds for invalidity for each claim, all presented at warp speed under the chess clock limitation, the parties were at risk of losing the jury in the complex factual and legal details of the case. Throughout the trial, Judge Illston repeatedly stressed the importance of helping the jury understand the issues in the case. One tactic she used to help the jury was to permit the parties to introduce into evidence certain summary charts and graphics used by the testifying experts. Relying on United States v. Bray, 139 F.3d 1104 (6th Cir. 1998), the Court found that allowing these summaries into evidence (and thus into the jury room) would assist the jury in its deliberations. See also United States v. Wood, 943 F.2d 1048, 1053-54 (9th Cir. 1991); United States v. Winn, 948 F.2d 145, 157-59 (5th Cir. 1991).

Two other suggestions from the Court also turned out to be very helpful to the jury. Since each side was represented by several counsel, each handling different witnesses and different parts of the case, the Court suggested that each attorney introduce himself or herself and explain who he or she represented each time the attorney stepped forward for a new examination. Though counsel introducing themselves for the fifth or sixth time might have felt repetitive, jurors greatly appreciated the re-introductions because they always were certain which side was asking the questions despite the changing faces of the questioners. While we all think we have a special bond with jurors, we often look like just another lawyer in a dark suit, with few distinguishing features for the jurors to remember us. These repeated introductions were very helpful to the jurors and should be considered in other cases.

The Court's other very helpful suggestion was to have the clerk take a Polaroid snapshot of each witness just before he or she was sworn in. The first witness was taken by surprise (we were too), and must have found it a bit odd that he was being photographed as in a "lineup." The idea was to provide the photographs to the jurors during their deliberations to help remind the jurors about which testimony went with which witness. This wonderfully simple but effective technique should be considered for all long trials with many witnesses. One suggestion we would make is to have the pictures taken digitally with a high resolution camera, to allow the parties to import these pictures into their summary graphics for closing arguments.

The Model Patent Jury Instructions for the Northern District of California

In crafting the jury instructions, the Court elected to use, in large part, the Model Patent Jury Instructions for the Northern District of California. We understand that this may be the first time these model instructions have been used. Though, at the time of this writing, the case has not yet completed the post-trial motions or appeal, a few observations about the model instructions may assist others using them.

First, while the jury was able to follow the instructions to dive into the complex legal and technical issues, the instructions did not address what turned out to be an important question asked by the jurors near the end of deliberations: "If the jury finds a claim to be invalid on one ground, does it need to decide the other possible grounds for invalidity?" At the plaintiffs' request, the Court answered that the jury did need to rule on all asserted grounds for invalidity. Clearly, the jury would have preferred to know that answer up front through the instructions or the verdict form. The jury was very attentive and studied every instruction in detail.

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Second, the jury also questioned the meaning of the model instruction regarding "statutory bars" (Model Patent Jury Instruction B.4.3a2). "Statutory bar" does not refer, as some have surmised, to drinking establishments set up by acts of Congress. Instead, the term refers to the fact that a patent claim is invalid if the patent application was not filed within the time required by law. For example, a patent is invalid if a device or method using the claimed invention was sold or offered for sale in the United States, and that claimed invention was ready for patenting, more than one year before the patent application was filed. The jury asked whether the statutory bars were part of the other grounds for invalidity such as obviousness or anticipation, or were separate grounds for invalidity. The question highlighted a potential ambiguity in the instructions, which was resolved through the inclusion of several additional questions on the jury verdict form. Besides highlighting the ambiguity, the question demonstrated that the jury could and did sort through the complexities of the patent jury instructions.

Third, jurors might have benefited greatly from having at least some of the patent instructions provided at the beginning of the case. Of course, this is a common comment from jurors in cases involving complex legal issues and is not always appropriate in light of the frequency with which legal issues change or are decided by the Court prior to the jury deliberations. Perhaps the Model Patent Jury Instructions could be expanded to include model pre-instructions on certain issues to be used in cases where there is no real doubt that those issues will ultimately be decided by the jury.

Since few complex patent cases are actually tried, we were pleased to have the opportunity. The trial taught us that with the help of technology, jurors can understand and adjudicate the complex issues presented by technology cases.

▪ ***Frederick Brown and Sean Lincoln are partners in the San Francisco office of Orrick, Herrington & Sutcliffe, LLC. Mr. Brown is also a member of the Board of Governors for the Northern California Chapter of ABTL. Also leading the defense trial team were James Brooks of Orrick's Los Angeles office, and James Geriak and Lisa Ward of Orrick's Orange County office. fbrown@orrick.com; slincoln@orrick.com."***

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for some time now been of the view that many of us do not conduct ourselves very well.

One certainly may argue that the ambiguity of the law, and the inherent nature of our adversarial system, makes public criticism of trial lawyers unavoidable. Indeed, one might argue that if trial lawyers were never criticized, that would likely mean that trial lawyers were no longer taking on unpopular but worthy causes. So some criticism is surely a good thing. But there is nothing good about some of things lawyers are criticized for: greed, arrogance, dishonesty and lack of ethics, to name a few.

Which brings me to District Court Judges Selna and Carney. I was fortunate to have been a partner of both, to have worked with both, and to have witnessed first-hand both their personal and professional lives. Now before anyone accuses me of attempting to curry favor with the bench, let me point out that I never expect to be able to appear before either given that they are my former partners. Let me also point out that what I have to say about District Court Judges Selna and Carney can be confirmed by just about anyone who has worked with or against them. So I speak the truth, which as we all know is an absolute defense.

The point of all this: Jim Selna and Cormac Carney were able to maintain the highest level of integrity and ethics while practicing in the pressure cooker of business litigation, even as the profession of law turned into a business. They zealously represented their clients, but always consistent with the rules; they vigorously argued the law, but never distorted or concealed it; they passionately advocated their client's case, but never overstated it; and they stood up to aggressive adversaries, but always with respect. It is no coincidence that Jim Selna and Cormac Carney were both appointed to the federal bench. They are at the top of the scale when it comes to qualities like honesty, integrity and ethics, and I am confident that the FBI, with all of its digging, found no lapses in either their professional or personal lives.

Unlike District Court Judges Selna and Carney, and needless to say, unlike Kobe Bryant, our personal lives have not been put under a microscope. The FBI will have no reason to question our former neighbors or (thank goodness) our college roommates. The press will not set up camp outside our house. We will be able to continue to live our lives in private.

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But our professional lives are closely examined every day, by everyone we come in contact with. We are scrutinized when we appear in court, when we meet with a client, when we interview a witness, when we take a deposition, yes even when we draft answers to interrogatories. Fortunately for us, we do not have to perform like Kobe Bryant to be successful in our practice. We all have different skill sets, and for those who are honest about it, there are very few if any "superstar" lawyers – rather, there are many, many fine lawyers, including most of the membership of this organization. But we all should aspire to perform like District Court Judges Selna and Carney when it comes to honesty, integrity, ethics, grace and humility. Hopefully, by bringing judges and lawyers together on a regular basis, by addressing difficult ethical issues from time to time, and by giving some of what we have back to the community, ABTL can play some role in this effort. And maybe someday, lawyers, and not pro athletes, will once again be held out as the role models for our children. Perhaps we should all go out and buy a microscope to put on our desks – it would be a good reminder.

▪ ***Michael Yoder is a partner with O'Melveny & Myers, in their Irvine, CA office.***

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interactive hook-up is standard practice without realizing what realtime reporting involves. At a realtime deposition, the court reporter is providing a raw, unedited viewing of the transcript as it is being produced. Many times reporters will write themselves notes one or two sentences after they have written something on their machine that corrects a mis-stroke or not hearing the word properly. However, parties participating in the deposition are seeing this on their computer screen before the reporter has had an opportunity to edit any errors that may have occurred in the initial reporting phase. As an analogy, it is similar to an attorney dictating a brief or motion and having all parties or a judge view that unedited first draft. The process puts tremendous pressure on the reporter to have as flawless a transcript as possible because somebody is reading his or her every word as it is written.

While all reporters in California are required to pass a stringent exam to become certified, the exam allows them to edit their notes in preparation of the transcript. No such opportunity exists in a realtime environment. Some reporters adapt better than others to this type of pressure (and yes, enjoy the challenge) but consequently, not every reporter is a trained realtime reporter. Those who have made the commitment to become realtime reporters have rigorously trained to do what they do. Throughout the United States it is industry standard to charge for this service. Southern California is, typically, more competitive than most areas of the United States in pricing this service.

The bottom line: deposition costs. The large national court reporting firms may seek to attract business claiming greater convenience or perhaps better pricing for the law firm. While it may seem that one court reporting agency is offering you a great deal for the page rate, the bottom line is that across the board, deposition costs vary by less than 4% when you look at the total bill. Remember, the page rate is not the only thing that determines billing. Other variables such as realtime costs, exhibits, per diems, and other ancillary charges are factors in determining your costs. Additionally, all court reporting agencies must stay competitive as to what they pay reporters in order to attract and retain the most skilled professionals. As anything else, this is a variable determined by the market.

I have seen many instances when an attorney at a law firm has spent countless hours gathering information from various reporting agencies regarding the pricing for a particular matter only to discover at the end of that process that the amount of time spent gathering that information cost the client more than the savings achieved. It is important to have a relationship with your court reporting agency that is based on trust, knowing that you are getting the best possible service at a competitive price.

Be there even if you can't go there: try a videoconference. Videoconferencing has proven to be a great benefit when time and costs of travel are prohibitive or inconvenient. During the course of litigation, face-to-face interaction and evaluation is very important, however, there are a number of events that would be well served by a videoconference such as an initial expert interview, expert testimony, peripheral witness testimony, or collaboration with a colleague.

With the use of high-speed fiber optic networks and upgraded ISDN technology, the days of "jerky" movements by participants are gone, at least in the United States. Of course, there are areas in the world where telephone lines are not up to the task of a 384KB speed, but having provided hundreds of videoconferences to

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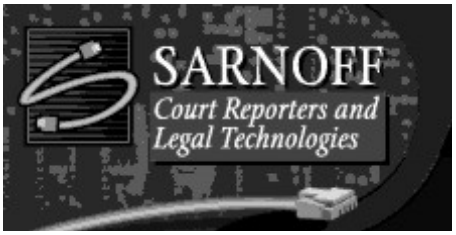
date, some in remote areas of the world, I can assure you that the technology has vastly improved in the last five years.

What it all means to you: Court reporters and the agencies they work with provide attorneys with a broad spectrum of technologies, services, and support. All of these services require a highly skilled reporter and an agency with a highly trained technology support staff. Sarnoff Court Reporters and Legal Technologies prides itself in being a leader in providing our clients with whatever level of technology they need. The court reporters who represent our agency are the finest skilled professionals. The men and women who work in our offices understand the needs of our clients, and more importantly our attitude is and has always been: "The answer is Yes. Now what's the question?" In other words, if you need something to be done, we can make it happen. We work for you.

Cary Sarnoff is the President and Owner of Sarnoff Court Reporters and Legal Technologies and He can be contacted at 949-955-3855 or by email at csarnoff@attysweb.com. You can also visit the website at www.attysweb.com.



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