

Q&A with the Hon. Dave T. McEachen
by Linda A. Sampson



Editor's Note: We caught up with Judge David T. McEachen for this judicial interview. Judge McEachen is in his third year as a member of the ABTL Board of Governors -- one of many organizations to which he meaningfully contributes. At the same time, Judge McEachen has been quite busy at the Orange County Superior Court, with stints as Supervising Judge of the Civil Panel and Assistant Presiding Judge.

Q: How did you decide to become a judge?

A: I did not think about becoming a judge until the late '80s. I was encouraged by friends who were current or retired judges and friends who knew the governor.

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Extraordinary Injunctions in Copyright Cases

by Paul A. Stewart

Section 502 of the Copyright Act authorizes each District Court in the United States to issue injunctions "on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. § 502. In the typical case, the copyright owner will seek an injunction restraining the defendant from copying or distributing copies of the specific work that the defendant is accused of copying. If the copyright owner succeeds in proving infringement, injunctions of this type are routinely granted. See 2 Paul Goldstein, *Copyright* § 11.2.1.1 (2d ed. 2003).

However, a much broader, more powerful form of injunctive relief is available in appropriate cases. In a small but growing number of decisions, the courts have issued injunctions restraining the defendant from copying *any* of the plaintiff's works. The scope of these injunctions cannot be overstated. They reach works which were never litigated, works which the defendant has not yet copied, works which may not be copyrightable, and even works which do not yet exist.

One of the first such decisions was *Southern Bell Telephone & Telegraph Co. v. Donnelly*, 35 F. Supp. 425 (S.D. Fla. 1940). There, the plaintiff filed suit against the defendant, Fred F. Donnelly, for copying its Jacksonville, Florida telephone directory. That same defendant had previously copied many other telephone directories of the plaintiff in several different states, resulting in the issuance of three earlier injunctions against the defendant. *Id.* at 428. In light of this history, the court



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President's Message

by Dean J. Zipser



My father has been a business litigator for over 50 years. The nature of business litigation and trial practice has changed dramatically over that period of time. That is no surprise. Unfortunately, one of those changes is in the way lawyers deal with and treat each other. Collegiality has been replaced by acrimony,

and cooperation by resistance -- not in all, but in far too many, instances. While perhaps not surprising, this change, at least in large part, should not have been inevitable.

Yes, there are many more of us practicing law now. Our disputes are larger and more complicated. But does that mean that common and professional courtesy must vanish as well?

In the "old days," adversaries could, and would, remain friends, even socialize, outside of the courtroom. While that is not completely foreign today, certainly it is not as common.

One of the greatest benefits that ABTL has to offer is to promote and facilitate collegiality among all those in the profession. It provides an opportunity to meet and get to know lawyers on the other side of the table in a neutral, sociable setting. Those forums help to break down the barriers that naturally tend to develop between adversaries in high stakes litigation. Suddenly, your opposing counsel is not quite the "monster" you had imagined.

In addition to our regular dinner programs and our annual meeting, ABTL is constantly looking for other ways to further its goal of fostering and promoting collegiality. For example, representatives from our various chapters have begun efforts to formalize a set of "discovery rules" that, we hope, will be followed by others, and help curb discovery abuses. On our own part, our chapter has just initiated a "brown bag" lunch program with our judicial officers. We hope that this new program, designed for lawyers in practice 10 years or less, will help further the already ex-

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Mock Trials - One of the Most Powerful Tools for Case Evaluation and Trial Preparation

by Mark B. Wilson

The part of the trial many attorneys dislike the most is waiting for a verdict. We wonder if the jurors liked our client. Did we pick the right jurors? Did they understand the closing argument? Do they know how to complete the jury verdict form? Did we ask for too much money? Are we going to win? When attorneys have the luxury of conducting a mock trial, most of these questions (and more) get answered before the real trial ever starts. This article explores the modern approach to mock trials and how many law firms are using them to great advantage, not only to assist with case evaluation and trial preparation, but sometimes even to settle cases.

Why Conduct a Mock Trial?

For many years, the advertising industry has used focus groups to determine how a marketing program would be received before launching an expensive sales campaign. Mock trials provide attorneys an opportunity to “test the market” before taking a case to trial. For the overwhelming majority of trial lawyers, the first time they have substantial insight into how a jury will view the case is when the verdict is read. At that point, it is too late to “fix what is broken.” Mock trials provide trial attorneys with critical information about how potential jurors view their case.

Several years ago, a law firm conducted four mock trials in an insurance bad faith case where the insurance company refused to pay benefits on the ground the doctor made misrepresentations on his application. The insurance company’s broker advised the doctor how to complete the application and knew the information the doctor provided was not accurate. The broker explained that if the doctor did not misrepresent certain facts, the insurance company would reject the application; the insurance company knew applicants were not always accu-



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A Brown Bag Feast By Christopher A. Bauer

A resounding “Thank you!” goes out to the Orange County ABTL and Judge Arthur Nakazato for coordinating and putting on May’s Bench/Bar Brown Bag Lunch. As one of several young attorneys attending the event, I appreciate the ABTL’s interest in the rising generation of trial lawyers and Judge Nakazato’s willingness to participate.



Our lunch event began shortly after the group had gathered in the beautifully appointed federal courtroom 6B of the Ronald Reagan Federal Building and U.S. Courthouse in Santa Ana. Judge Nakazato individually greeted each attorney and then invited us to join him in a “behind the scenes” tour of the modern federal courthouse, a truly impressive facility.

Judge Nakazato first led us to the prisoner holding cells adjacent to his courtroom. The tiled walls, bars, and hard floors of the cells stood in stark contrast to the exquisite wood paneling and plush blue carpeting of the spacious courtroom where we had first gathered. These cells were a reminder of the judge’s need to hear many non-civil matters. At any given time, Judge Nakazato later pointed out, a Central District judge is handling over 300 cases, many of which are criminal.

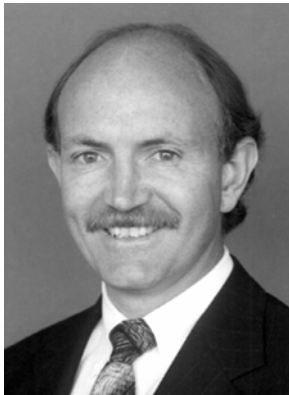
Judge Nakazato next favored us with the rare privilege of standing at the bench—on his side. In addition to serving as a desk from which the judge addresses his courtroom and upon which he reviews laws and exhibits, the modernly equipped bench functions as a “control center” for the cameras, monitors, and microphones located throughout the courtroom.

The tour continued with a visit to the judge’s own spacious chambers, furnished comfortably and serviced by its own restroom and shower facility. Then it was down to the third floor—via the judges’ private elevator—where we saw the judges’ council

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A Primer on Insurance Issues for Business Litigators

By Peter Wilson and Randy Gerchick



Peter J. Wilson



Randy G. Gerchick

Introduction

You may be asking yourself right now, “Why in the world should I spend part of my busy day reading an article about insurance issues? I’m not an insurance lawyer. I’m a business litigator.” The simple answer is that as a business litigator, in many respects you *are* an insurance lawyer, like it or not. Insurance issues permeate most, if not all, business litigation and failure to consider insurance issues may have serious consequences for you and your clients, whether they are plaintiffs or defendants.

It is critical to address insurance issues with your client as soon as you take on a new matter. If your client will be defending against a lawsuit or responding to a pre-litigation

claim or a government investigation, insurance benefits may be available to pay for defense fees and costs, settlements or judgments, but it takes some work to secure those benefits. Insurers assert that they are not required to pay for any fees, costs or settlements that are incurred without their knowledge, and in many circumstances they will be right. Therefore, it is vital to talk to your client and arrive at a clear understanding of who will be responsible for handling insurance-related issues such as finding and analyzing the policies, putting the insurers on notice, and seeking the insurers’ consent to a settlement. The same applies if your client has suffered a direct loss, such as property damage or lost profits due to business interruption. If you are plaintiff’s counsel, regardless of the stage of the litigation, you should take care when entering into settlements with tortfeasors that such settlements do not impair the subrogation rights of your client’s insurers.

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HOW WELL DO YOU KNOW YOUR ORANGE COUNTY JUDGES?

The first one to correctly match the columns will receive honorable mention at the next ABTL meeting. Send your guesses to abtl@abtl.org.

Name the Orange County judge who:

1. Was captain of the Amateur Athletic Union's (AAU) wrestling team sent to Japan in 1964?
2. Was once a student of France's current President Jacques Chirac?
3. Worked in the office of United States Senator John McClellan of Arkansas in 1960?
4. Lectured on the American Justice System in Portuguese at Judicial and Attorney seminars in Brazil for each of the last four years?
5. Has run the New York City Marathon five times and is an active ice hockey goalie for the past 15 years?
6. Once ran the wrong direction at a cross country meet and was given the nickname of “Wrong Way _____?”
7. Lived in England for two years while working at a nursery school?
8. Had a close encounter with a Masai warrior in Tanzania in 1993?
9. Drives an 815 pound, 39 inches wide, 7 feet long, Honda Goldwing motorcycle with red and green lights to court?
10. Was a college classmate and dorm-mate of the Unabomber.
 - a. Superior Court Judge Derek Hunt
 - b. Superior Court Judge Randell Wilkinson
 - c. Superior Court Commissioner Ellie Palk
 - d. Superior Court Commissioner James Waltz
 - e. Superior Court Judge John Conley
 - f. Superior Court Judge Ronald Bauer
 - g. Federal District Judge David Carter
 - h. Superior Court Judge Dennis Choate
 - i. Superior Court Judge Mary Erickson
 - j. Superior Court Judge Gary Paer

A WORD FROM OUR SPONSOR

MOSS-ADAMS LLP

Reflections on High Profile Scandals

Every day that we pick up the newspaper there is another front page story about an individual or a corporation committing some form of financial wrongdoing. A significant number of these cases involve the pressure of meeting Wall Street expectations, the need for management to exceed revenue or income targets to obtain bonuses or capitalize on stock options, or what I like to call "the above the law" syndrome.

Currently we have a plethora of cases to reflect on our existing business and social culture. The question we must ponder is whether these cases are any different than the cases of the last one hundred years. We all know about the cases of the past because we have been taught about them as part of our education. Whether we were in school to become lawyers, accountants, business executives, doctors, etc., we have heard or read about the Teapot Dome Scandal, the Savings and Loan Crisis of the 1990's and more recently, the bursting of the Dot Com Bubble of 2000.

Let's take a look at some of the current cases we have all heard about:

John Rigas the founder of Adelphia Communications, his two sons and the former treasurer Michael Mulchahey, are on trial in federal court. They are accused of stealing many millions of dollars from the cable television company's investors to support their lavish lifestyle. Currently the judge has adjourned the trial indefinitely because one of the defendants is ill.

Bernard Ebbers, the former CEO of WorldCom, Inc. has pleaded innocent to federal charges for allegedly running a massive accounting fraud currently estimated to be in excess of \$11 billion. The former CFO, Scott Sullivan has pleaded guilty to conspiracy and securities fraud charges and has agreed to testify against Ebbers.

Dennis L. Kozlowski, former CEO and Mark Swartz, former CFO of Tyco International, Ltd. were accused of misappropriating \$600 million from the

company. A state Supreme Court justice declared a mistrial in the case. Whether the case is going to be retried has not yet been decided.

Andrew Fastow, former CFO of Enron has pleaded guilty of two counts of conspiracy and has agreed to cooperate with prosecutors. Former CEO Jeffrey Skilling has been indicted and plead not guilty to a 36 count indictment comprised of 10 counts of insider trading; 15 counts of securities fraud; four counts of wire fraud; six counts of making false statements to auditors, and one count of conspiracy to commit wire and securities fraud.

Richard Scrushy, former CEO of HealthSouth was charged in an 85-count indictment stemming from a multibillion dollar wide-ranging scheme to defraud investors, the public and the U.S. Government by making it appear that the company was meeting Wall Street forecasts. Trial is scheduled for August of this year.

Martha Stewart, former officer and director of Martha Stewart Omnimedia, was convicted of conspiracy, obstruction of justice and making false statements. The charges related to a personal sale of ImClone Systems stock.

Samuel D. Waksal, former President and CEO of ImClone Systems pleaded guilty to 6 of 13 counts of a federal indictment. He pled guilty to two securities fraud charges related to insider trading, obstruction of justice, perjury and bank fraud charges. Mr. Waksal was sentenced to 87 months, a \$3 million fine and restitution of \$1.2 million to the state of New York.

Most recently, Frank P. Quattrone, a senior investment banker and former head of Credit Suisse First Boston's technology group, was convicted of two counts of obstruction of justice and one count of witness tampering. The jury concluded that Quattrone tried to block investigations by regulators and a grand jury when he forwarded an e-mail message in late 2000 urging colleagues to clean up their files.

There are some very interesting things of note in each of these cases. The fallout from each situation is widespread. It is not a simple issue that an executive individually or on behalf of a company has committed an impropriety or that there is a difference of

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concluded that a routine injunction against copying the work in suit would be “ineffective” to prevent future infringement by the defendant and the irreparable harm caused by that infringement. *Id.* Moreover, the court explained that requiring separate suits for each new infringement would place an undue burden on the courts:

[T]he institution of a separate suit for each infringement upon and violation of copyrights held by the plaintiff results in a multiplicity of suits and an undue and unwarranted burden upon the courts, and does not prevent the harm and injury complained of and the wrongful appropriation of copyrighted material by the defendant.

Id.

Based on these concerns, the court issued an injunction of perhaps unprecedented breadth, enjoining the defendant from:

infringing upon plaintiff’s copyrights in and to any and all directories published by plaintiff in the course of its business, for which it holds or may hereafter hold a copyright, whether said directories have been heretofore published or shall, in the future, be published, and whether the copyright hereto has been heretofore granted, or shall, in the future be granted

Id. at 429.

The issue apparently was not discussed again at any length by the courts until the Southern District of New York’s decision in *Orth-O-Vision, Inc. v. Home Box Office*, 474 F. Supp. 672 (S.D.N.Y. 1979). There, Home Box Office (HBO) filed a copyright counterclaim against *Orth-O-Vision* for the unauthorized retransmission of 12 of HBO’s movies. *Id.* at 684-85. As a remedy, HBO sought an injunction that “would extend not only to future infringements of those twelve works but also to any future infringement of HBO’s shows not yet published or copyrighted.” *Id.* at 685. The court agreed with HBO that it had “equitable discretion” to issue an injunction of this broad scope, and that it should issue such an injunction. *Id.* As the court explained:

Where, as here, liability has been determined adversely to the infringer, there has been a history of continuing infringement and a

significant threat of future infringement remains, it would be inequitable to grant the copyright owner . . . judgment on the issue of liability without enjoining the infringement of future registered works. Otherwise, HBO would be required to bring a separate infringement action every time it registers a new copyrighted work to be included in its subscription service Under these circumstances, the court determines that it is well within its equitable powers to enjoin infringement of future registered works.

Id. at 686.

The District Court for the Southern District of New York followed its *Orth-O-Vision* ruling in *Basic Books, Inc. v. Kinko’s*, 758 F. Supp. 1522, 1542 (S.D. N.Y. 1991). In *Basic Books*, the plaintiffs, described by the court as “all major publishing houses in New York City,” filed suit against Kinko’s, a photocopying service, which had been rampantly infringing the plaintiffs’ copyrighted works through its business of making educational packets tailored to specific college courses. *Id.* at 1526. Relying in part upon the defendant’s “historic willful blindness to the copyright law,” and the nature of its business as a large-volume photocopying shop, the court issued an injunction that extended to “future copyrighted works.” *Id.* at 1542. The court explicitly recognized that its injunction extended to “works which may not now be copyrighted or even in existence.” *Id.* See also *National Football League v. Primetime 24 Joint Venture*, 52 U.S.P.Q.2d 1615, 1620 (S.D.N.Y. 1999) (extending a copyright injunction to “any other works presently owned by plaintiff”); *Imagineering, Inc. v. Van Klassens, Inc.*, 851 F. Supp. 532, 542 (S.D.N.Y. 1994) (extending the holdings of *Orth-O-Vision* and *Basic Books* to a trade dress case).

The issue of enjoining the copying of works not in suit was first addressed at the appellate level in *Pacific and Southern Co. v. Duncan*, 744 F.2d 1490 (11th Cir. 1984) (*Pacific and Southern I*). There, the defendant was in the business of recording television news broadcasts and selling the recordings to the individuals featured in the news stories. *Id.* at 1493. The plaintiff, the owner of a television station, learned that the defendant had copied its March 11, 1981 news broadcast and brought suit for copyright infringement based upon that act of copying. *Id.* at

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1494. In preparation for filing the suit, the plaintiff registered its copyright in the broadcast, something it did not ordinarily do. *Id.* at 1494 n.4.

The district court found infringement, but declined to enter any injunctive relief. *Id.* at 1494. On appeal, the Eleventh Circuit held that the district court abused its discretion in failing to grant an injunction. *Id.* at 1499-1500. Moreover, in a footnote, the Eleventh Circuit rejected the defendant's argument that the injunction should be limited to a prohibition against copying and distributing the March 11, 1981 broadcast – the only copyrighted work in suit. *Id.* at 1499 n.17. The court recognized that a more general injunction against copying any of the plaintiff's news broadcasts would extend to "unregistered works" and even "works that have not been created (future newscasts)." *Id.* Nevertheless, the Eleventh Circuit, like the *Southern Bell* and *Orth-O-Vision* courts, held that "[t]he district court in this case had the power to issue such an injunction." *Id.* The court also noted that the failure to enter an injunction of this broad scope "would be especially unjust in a case such as this one in which the registered work and the future works are so closely related, part of a series of original works created with predictable regularity and similar format and function." *Id.* Following a remand to the district court, the Eleventh Circuit reaffirmed this decision in *Pacific and Southern Co. v. Duncan*, 792 F.2d 1013, 1014 (11th Cir. 1986) (*Pacific and Southern II*).

The District of Columbia Circuit was the next appellate court to address the propriety of injunctive relief for works not-in-suit. In *Walt Disney Co. v. Powell*, 897 F.2d 565 (D.C. Cir. 1990), the defendant, a wholesale T-shirt distributor, infringed the Walt Disney Company's copyrights in six depictions of Mickey Mouse and Minnie Mouse. *Id.* at 566-67. As one remedy for the infringement, the district court enjoined the defendant "from infringing Disney's copyrights on the characters in suit – Mickey Mouse and Minnie Mouse – **and all other Disney cartoon characters**, including, but not limited to, the copyrights in the characters Donald Duck, Huey, Duey, Louie, Pluto, Goofy and Roger Rabbit." *Id.* at 566 (emphasis added).

On appeal, the D.C. Circuit affirmed both the

issuance of the injunction and its scope. Echoing the reasoning of the *Orth-O-Vision* court, the *Walt Disney* court explained:

Where, as here, liability has been determined adversely to the infringer, there has been a history of continuing infringement and a significant threat of future infringement remains, it is appropriate to permanently enjoin the future infringement of works owned by the plaintiff but not in suit.

Id. at 568.

The Eighth Circuit likewise approved a generic injunction against infringement of the plaintiff's works in *Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345 (8th Cir. 1994). There, the plaintiff, a photographic studio, suspected the defendant, a film developer, of infringing its copyrighted works. To prove its case, the plaintiff prepared photographs of four of its employees, registered copyrights in the photographs, marked its photographs with copyright notices, and presented the marked photographs to the defendant for copying. *Id.* at 1347. On four separate occasions, the defendant dutifully prepared the copies. *Id.*

The plaintiff then filed suit for infringement. The district court ruled in favor of the defendant on the merits, but on appeal the Eighth Circuit reversed. *Id.* at 1348-49. After finding liability, the Eighth Circuit addressed the issue of injunctive relief. *Id.* at 1349. The plaintiff, the court explained, "requested a permanent injunction against future infringement of its unregistered copyrighted photographs." *Id.* Relying upon the D.C. Circuit's decision in *Walt Disney* and the Eleventh Circuit's decision in *Pacific and Southern I*, the Eighth Circuit held that relief of this scope is appropriate where there has been a history of continuing infringement and there is a threat of future infringement. *Id.* The court then remanded the case to the district court to determine whether those facts were present. *Id.*

The same issue has arisen more recently in three district court cases. First, in *Picker Int'l Corp. v. Imaging Equipment Services*, 931 F. Supp. 18 (D. Mass. 1995), the defendant, in the course of misappropriating the plaintiff's trade secrets, had copied various copyrighted materials of the plaintiff. In response, the court issued a broad injunction

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which extended to “[a]ny document or software bearing [the plaintiff’s] copyright notice.” *Id.* at 47. In support of its injunction, the court held that, when “there has been a history of copyright infringement which persuades the court that there is a threat of future violations,” an injunction may extend beyond the works in suit to “any other works presently owned by plaintiff.” *Id.* at 45.

Next, in *Sony Music Entertainment, Inc. v. Global Arts Productions*, 45 F. Supp. 2d 1345 (S.D. Fla. 1999), the defendant had copied an estimated 500 sound recordings owned by or exclusively licensed to the plaintiffs. *Id.* at 1346. In response to this rampant copying, the court issued an injunction prohibiting the defendants from copying any copyrighted sound recording owned by or exclusively licensed to the plaintiffs. *Id.* at 1348. The court specifically noted its authority “to issue a broad permanent injunction protecting present works” and also “works not yet created.” *Id.* at 1347.

Most recently, in *Kyjen Co. v. Vo-Toys, Inc.*, 223 F. Supp. 2d 1065 (C.D. Cal. 2002), the district court ruled on summary judgment that the defendant had infringed the plaintiff’s copyrights in eight stuffed animal toys. *Id.* at 1067-70. The court issued an injunction prohibiting the defendant from copying the eight litigated toys, “and all other copyrightable toys of Kyjen, and from manufacturing and distributing any such unauthorized copies.” *Id.* at 1071.

There are several obvious objections to the issuance of injunctions of this great breadth. However, none of these concerns has deterred the courts from entering broad injunctions in cases where they deem it appropriate.

Perhaps the most obvious objection is the simple fact that generic injunctions encompass works that have never been litigated. This exposes the defendant to contempt for creating works which have never previously been adjudged to be infringing copies.

This concern, however, appears to have fallen to the interest of judicial efficiency. The *Orth-O-Vision* court, for example, relied heavily upon the inefficiency of requiring the plaintiff to file a new

suit each time a serial copyist strikes again. *Orth-O-Vision*, 474 F. Supp. at 686. The early decision in *Southern Bell*, 35 F. Supp. at 428, relied upon precisely the same concern, and upon the burden that such a regime would impose on the courts.

Moreover, a broad injunction against copying provides the defendant with notice not to copy any of the plaintiff’s works. The prudent defendant, seeking to avoid the sanction of contempt, will stay a safe distance from the plaintiff’s works. This may place the defendant at a slight competitive disadvantage against others who may borrow more substantially from the plaintiff’s copyrighted works; but that may be a fair price to pay for repeated infringement.

Another objection to injunctions that extend beyond the works-in-suit is the fact that such injunctions encompass unregistered works. Under the Copyright Act, registration of a work is a jurisdictional prerequisite to any suit for infringement of that work. 17 U.S.C. § 411(a). Thus, defendants have argued, an injunction against the copying of unregistered works effectively bypasses the registration requirement. See *Olan Mills*, 23 F.3d at 1349; *Pacific and Southern I*, 744 F.2d at 1499 n.17; *Orth-O-Vision*, 474 F. Supp. at 685-86.

The courts have viewed this as a technical argument and have provided a technical response. For example, the *Olan Mills* court reasoned: “While registration is required under Section 411 of the Copyright Act in order to bring a suit for infringement, *infringement itself* is not conditioned upon registration of the copyright. See 17 U.S.C. § 408(a).” *Olan Mills*, 23 F.3d at 1349 (emphasis added). Thus, the court concluded, the infringement of uncopyrighted works may be enjoined, even if a separate suit for infringement of that uncopyrighted work could not have been brought. *Id.*

The Eleventh Circuit in the *Pacific and Southern* decisions adopted a similarly technical approach. The court noted that Section 502(a) of the Copyright Act provides the district courts with the power to issue injunctions to prevent infringement of “a copyright,” not merely “the registered copyright that gave rise to the infringement action.” *Pacific and Southern I*, 744 F.2d at 1499 n.17. Thus, once jurisdiction is established by filing suit on one

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registered copyright, the district court has the authority to issue injunctions encompassing other copyrighted works, both registered and unregistered. *Id.*

Still another concern is that a broad injunction may extend not only to unregistered works, but also to works that cannot be registered because they contain no copyrightable subject matter. *See* 17 U.S.C. § 410(a) (authorizing registration only of copyrightable works). Most courts have dealt with this concern simply by tailoring their injunctions to extend only to the copyrightable works of the plaintiff. *See Olan Mills*, 23 F.3d at 1349 (authorizing the extension of an injunction to include “copyrighted material not included in the suit”); *Sony Music*, 45 F.3d at 1348 (enjoining the copying of “Copyrighted Recordings”); *Southern Bell*, 35 F. Supp. at 429 (enjoining the copying of works in which the plaintiff “holds or may hereafter hold a copyright”).

The *Kyjen* court similarly limited the scope of its injunction to the “copyrightable toys of *Kyjen*.” *Kyjen*, 223 F. Supp. 2d at 1071. However, the *Kyjen* court made clear that the *defendant* bore the burden of proving that any work it copied contained no copyrightable subject matter. As set forth in the court’s permanent injunction, “[i]n any proceeding to enforce . . . this order, [the defendant] may raise as an affirmative defense any challenge it may have to the copyrightability of the works at issue in the proceeding.” *Id.* Thus, in *Kyjen*, the injunction extended to all of the plaintiff’s works, unless the defendant could prove in the context of a contempt proceeding that the works it had copied were entitled to no copyright protection.

One final objection to the breadth of injunctive relief in these cases is that the injunctions extend to works that do not yet even exist. Most of the courts have explicitly recognized this concern. *See Olan Mills*, 23 F.3d at 1349; *Pacific and Southern*, 744 F.2d at 1499 n.17; *Sony Music*, 45 F. Supp. 2d at 1347; *Orth-O-Vision*, 474 F. Supp. at 686. However, the courts simply have been unpersuaded by this objection.

The lone dissenting voice in recent history, raised

only briefly, has come from the Eleventh Circuit, the same court that decided the two *Pacific and Southern* cases. In *Cable News Network v. Video Monitoring Services of America*, 940 F.2d 1471 (11th Cir. 1991), the Eleventh Circuit reviewed a preliminary injunction that prohibited the defendant from recording or selling copies of any and all of CNN’s daily television broadcasts. *Id.* at 1476. Relying upon each of the concerns mentioned above, and dismissing the *Pacific and Southern* decisions as dicta, the Eleventh Circuit held that the district court had no authority to issue an injunction extending beyond the specific copyrighted work that the defendant had copied. *Id.* at 1480-86. Citing the Supreme Court’s then-recent decision in *Feist Publications, Inc. v. Rural Telephone Services Co.*, 499 U.S. 340 (1991), the court also questioned whether daily news broadcasts are entitled to copyright protection at all. *Cable News Network*, 940 F.2d at 1485 & n.23.

The Eleventh Circuit’s effort to limit the scope of injunctive relief in copyright cases did not last long. Sitting *en banc*, the Eleventh Circuit ordered rehearing of the *Cable News Network* case by the full court and vacated its earlier decision. *Cable News Network v. Video Monitoring Services of America*, 949 F.2d 378 (11th Cir. 1991) (*en banc*). Shortly thereafter, the district court entered a permanent injunction, superceding the preliminary injunction. Accordingly, the *en banc* Eleventh Circuit dismissed the appeal of the preliminary injunction. *Cable News Network v. Video Monitoring Services of America*, 959 F.2d 188 (11th Cir. 1992) (*en banc*). The Eleventh Circuit never issued a decision on appeal from the permanent injunction.

Apart from the Eleventh Circuit’s vacated decision in *Cable News Network*, 940 F.2d 1471, there appears to be no reported decision in the last 60 years in which a court has concluded it lacks the power to enjoin a defendant from copying all of the plaintiff’s works, present and future. The most recent such case appears to be *Metro-Goldwyn-Mayer Distribution Corp. v. Fisher*, 10 F. Supp. 745, 747 (D. Md. 1935), predating even the 1940 decision in *Southern Bell*, 35 F. Supp. 425. There, the court held that traditional principles of equity did not authorize injunctions of this broad scope. *Metro-Goldwyn-Mayer*, 10 F. Supp. at 747. *See also Sweet v. G.W.*

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Bromley & Co., 154 F. 754, 755-56 (C.C. E.D. Pa. 1907) (refusing to issue an injunction extending to future infringing works).

Thus, there now appears to be a fairly widespread acceptance among the courts that injunctions in copyright cases may extend well beyond the copyrighted works in suit and may even encompass all of the plaintiff's present and future works. Even within the Eleventh Circuit, the district court in *Sony Music*, 45 F. Supp. 2d 1345, issued such an injunction after the *Cable News Network* decisions. There will be cases, of course, in which the courts will conclude that broad injunctive relief is inappropriate on the facts of the case. But, apart from the Eleventh Circuit's vacated *Cable News Network* decision, there appears to be no case since 1935 in which a court has concluded that it lacks the power to issue such an injunction.

Injunctions against infringement of works not in suit are, of course, available only in limited circumstances. The case law now seems clear that, at a minimum, the defendant must have engaged in repeated copying of the plaintiff's works and there must be a threat of future infringement. See *Olan Mills*, 23 F.3d at 1349; *Walt Disney*, 897 F.2d at 568; *Sony Music*, 45 F. Supp. 2d at 1347; *Orth-O-Vision*, 474 F. Supp. at 868. Other factors favoring the grant of broad injunctive relief include a history of past injunctions against infringement of the plaintiff's works, *Southern Bell*, 35 F. Supp. at 428; the copying of works that are serial in nature, such as weekly television programs, *Pacific and Southern*, 744 F.2d at 1499 n.17; and the operation of a large-volume photocopying service without safeguards against infringement. *Basic Books*, 758 F. Supp. at 1542.

In appropriate cases, however, injunctions of this scope may be the important and powerful remedy available to copyright owners. Because the cases involving injunctions of this scope are relatively few in number, they may escape the notice of even those who specialize in copyright law. However, those advising copyright owners should take careful note of these cases so that they may advise their clients of the full scope of remedies available to them.

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rate and this was acceptable. At the mock trials, the attorneys opted to "come clean" and told the mock jurors that, in fact, the doctor had misrepresented certain facts on the application, but this did not matter because, under the terms of the policy, he was still entitled to benefits. This strategy backfired, and the doctor lost all four mock trials.

The attorneys completely revised their trial strategy and mock tried the case four more times. During the second round of mock trials, they argued the doctor needed disability coverage badly and simply followed the direction of the insurance company's broker in completing the application. They argued the doctor did not lie; he actually told the broker the true facts. It was the broker who instructed the doctor what to write on the application. This strategy was successful, and all four mock juries awarded \$1.5 million. At the real trial, the attorneys used the same strategy and the jury awarded \$1.5 million. Had the attorneys not mock tried this case and used their initial strategy, they probably would have lost the trial.

How Are Mock Trials Different From Focus Groups?

Although people use the terms interchangeably, mock trials and focus groups are very different. Focus groups are usually conducted by psychology and marketing professionals who claim to have sophisticated methodologies to identify the most and least ideal jurors for a particular case. Focus groups often are very costly and can include detailed psychological analysis and data collection. Techniques include requiring prospective jurors to use special keyboards to indicate positive and negative reactions to specific arguments. The responses are then correlated at the end of the focus group to determine the most and least effective arguments.

Mock trials are usually less expensive than focus groups and are conducted more like a real trial. Mock trials are an abbreviated form of an actual trial, with opening statements, testimony, presentation of documentary evidence, closing arguments, and jury deliberations. As a result, the mock jurors get a real "trial experience," which hopefully makes the results more meaningful. The mock trial presentation is dis-

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cussed further below.

Reasons to Use Mock Trials Rather than Focus Groups

In those few cases involving millions of dollars, where legal costs are no object, focus groups are a valid alternative to mock trials. However, focus groups are better for accumulating data for large demographics than for determining whether a particular juror will favor one side or the other in a given case. Thus, while focus groups may predict, for example, that as a general rule young African-American females are more likely to provide a favorable verdict than whites in any gender or group, this generality may not apply to Jane Jones, the 21-year-old African-American woman sitting on your panel. For this reason, many trial attorneys are skeptical about the cost-benefit of focus groups. In any event, few cases justify the expense of sophisticated focus groups.

On the other hand, mock trials provide most of the valuable information generated by focus groups at a fraction of the cost. Mock jurors hear actual testimony and struggle with real jury instructions in an atmosphere similar to the courtroom. Videotaped deliberations show that mock jurors understand the primary issues in cases, even though they see an abbreviated presentation. Mock trials show attorneys how prospective jurors view a case and which arguments jurors find most persuasive.

Information Learned Through Mock Trials

1. Mock Trials Provide an Unbiased Evaluation of the Case.

As lawyers spend months and sometimes years working on a case, they can become emotionally involved and myopic in their view of the case. It is sometimes difficult for trial attorneys to view facts and arguments on an objective basis. Mock trials are a "reality check" as to both liability and damages. If an attorney conducts an objective mock trial before two different panels and has been unable to convince a single juror regarding the merits of the case, the attorney should reevaluate the case very carefully. Conversely, a favorable reaction by mock juries may cause an attorney to reevaluate a settlement proposal.

2. Mock Trials Help Attorneys Evaluate Whether Juries Understand Their Case Themes and Accept the Attorneys' Arguments.

Every competent trial attorney recognizes the importance of establishing a clear case theme. Mock trials help lawyers refocus, or even identify, compelling case themes. The referenced case of the doctor versus the insurance company is a prime example of how a mock trial can reveal that a selected case theme will not succeed. In another case involving a brokerage house's liquidation of a customer's securities account, the plaintiff's attorney argued at the mock trial that the treatment of his client was akin to rape in that the plaintiff was financially abused without his consent and was powerless to prevent his broker from liquidating his account over his objections. Many mock jurors were offended by an analogy comparing the loss of money to being raped. Several jurors held a negative impression of the attorney as a result of this insensitive argument and, as a result, it was not used at trial. Accordingly, mock trials can provide counsel with important insight as to which case themes and arguments have the most positive impact upon juries and which should be rejected.

3. Mock Trials Help Attorneys Evaluate Their Cases and Their Witnesses.

Mock trials are an important tool to evaluate liability, damages, and juror impressions of witnesses. While it is possible for two jury panels seeing identical facts to reach opposite verdicts, where several panels consistently reach the same result, there is little likelihood that a new panel will reach a different result. Likewise, if panels repeatedly seem confused about the meaning of certain evidence, something must be done to clarify the message.

In one case where a woman sued the apartment complex where she was raped, the attorneys conducted a mock trial and learned the panels were willing to award significant compensatory damages, but no punitive damages. At the real trial, the injured plaintiff was awarded damages in line with what the mock jury panels awarded. Then, in a move which shocked the defendant, plaintiff waived her right to a jury trial on the issue of punitive damages, recognizing that the jury had already awarded everything she

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was going to receive. The judge then awarded plaintiff punitive damages equal to ten percent of defendant's net worth, an award plaintiff never would have received from the jury.

In another case, involving a complicated contract dispute, the defense conducted several mock trials using different case themes for each panel. Every panel found for plaintiff and awarded large damages regardless of which theme defendant used. As a result, defendant learned that no matter which arguments the defense used, jurors always awarded plaintiff substantial damages. Once defendant recognized the case was unwinnable, the company settled with plaintiff at a fraction of what a jury would likely have awarded.

In a product liability case involving the death of plaintiffs' child, a defendant manufacturer held mock trials to determine whether there was any way to avoid liability, given the tragedy of the accident and the sympathies any jury would have for the two parents. To the surprise of the defendant, the jurors found that, even though the accident was tragic, the parents were at fault and awarded a defense verdict. While the defendant expected some jurors might have this reaction, the defendant was amazed to learn that every mock juror believed the parents were the exclusive cause of the accident. Accordingly, what defendant perceived to be a multimillion dollar liability case became a case the defendant was ready to take to trial.

In another product liability case where a young, attractive, single woman suffered an amputation of her dominant arm, the product manufacturer conducted a mock trial to determine its liability exposure. While all the attorneys in the case were confident the damages would exceed \$1 million, they were shocked when four independent mock jury panels each awarded \$5 million. Even the plaintiff's attorney had not evaluated damages that high. Recognizing its tremendous exposure, the product manufacturer was thrilled to settle the case in a range plaintiff demanded which was far less than the mock jurors awarded.

4. Mock Trials Can Be Used as a Settlement Tool.

If a mock trial result is successful, it can be used to assist in settling a case. In a well-publicized California case, three workmen were severely burned in an acetylene tank explosion. It was generally agreed that the party facing the greatest liability was the contractor that allegedly created a dangerous condition. However, plaintiffs also named the acetylene tank manufacturer as a defendant, exposing it to economic damages which could easily have exceeded \$10 million, in addition to non-economic damages which were expected to exceed \$20 million. The manufacturer, therefore, held mock trials to determine the range of damages jurors would find, and the amount of fault jurors would attribute to the manufacturer, the other defendants, and to the plaintiffs.

The manufacturer was pleased when the mock jury panels found *no* liability on the part of the manufacturer. However, the manufacturer was shocked to see jurors attribute almost no comparative fault to the plaintiffs, even though in deliberations the jurors made sarcastic remarks about how foolish the plaintiffs' conduct was. When the manufacturer's attorney questioned the mock jurors after the verdicts about why they did not attribute more fault to the plaintiffs, they told him that despite the fact that the plaintiffs were objectively at fault, plaintiffs were so seriously injured "they suffered enough." At that point, the manufacturer recognized that if a jury found the manufacturer even one percent liable, it could suffer millions of dollars of damages with almost no set-off for comparative fault.

What the manufacturer did next is interesting and important for attorneys using mock trials. The manufacturer asked plaintiffs' counsel for permission to show the mock trial tapes to an independent mediator, who then reviewed the tapes, determined the mock trials were fairly conducted, and told plaintiffs the manufacturer was found to have no liability. This dynamic helped the manufacturer reach a fair settlement with the plaintiffs, which ironically required the manufacturer to turn over the mock trial videotapes to the plaintiffs so they could use them in preparing their case against the remaining defendants. As a result of this mock trial, the manufacturer escaped liability for less money than it would have cost to defend the case at trial.

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5. Miscellaneous Benefits.

Some attorneys prepare for trial weeks before it starts, leaving them little or no time to do what is necessary to fill in the gaps in their case. Mock trials force attorneys to prepare their case long before they might otherwise do so. As a result, attorneys give themselves a chance to take steps necessary to strengthen weaknesses discovered while conducting the mock trial. Attorneys who conduct mock trials should be involved in every strategic decision and execution of the mock trial to ensure it accurately portrays what is expected at the real trial.

As a side benefit to preparing the other side's case, attorneys often discover both weaknesses and strengths of the opponent which might never be learned until the actual trial. Attorneys who mock tried the case described above where a woman sued an apartment complex for negligent security after she was raped learned their initial strategy would actually increase comparative fault of the plaintiff. At the mock trial, plaintiff's counsel placed great emphasis on how dangerous the apartment complex was and how it was inevitable a rape would occur. Although the mock jurors awarded substantial damages, the mock jury also expressed concern as to why the plaintiff continued renting an apartment in such an obviously dangerous complex. They apportioned approximately 25 percent fault to the plaintiff. To address this issue at the real trial, the attorneys explained the criminal activity occurred during the evening, not during the day when plaintiff interviewed for an apartment. The attorneys showed photographs of the apartment complex taken during the daytime, showing that it looked clean and safe. The attorneys then explained plaintiff did not learn about the criminal activity until after she moved into the complex and then took immediate steps to vacate. As a result, the real trial apportioned only 10 percent fault to plaintiff.

How to Conduct Mock Trials to Make Them as Realistic as Possible

There are many ways to conduct mock trials. Attorneys can conduct mock trials with a wide range of costs and benefits. On the theory that any mock trial is better than none at all, some attorneys conduct

them without outside help. Depending on how well they put together the mock trial, the experience could be counterproductive in that a bad mock trial can lead to invalid lessons which, in turn, may result in poor formulation of a trial or settlement strategy. Good mock trials will generally include many of the following features.

1. Selection of an Unbiased Panel from Similar Veneer.

An appropriate panel should be selected from a veneer similar to where the trial takes place. Prospective mock jurors should be sent questionnaires to identify neutral mock jurors and ensure ethnic diversity. Jurors are generally paid anywhere from \$75 to \$100 per day to assure they will appear on time on the date scheduled.

2. Creation of the Presentation.

In some mock trials, jurors are given written factual backgrounds, relevant documents and other evidence, followed by live final arguments. This approach can be misleading because it does not allow jurors to evaluate real witnesses. Moreover, by the time jurors hear final arguments, they have already made up their minds about the case. Studies show that once people formulate opinions, it is difficult to move them, so it is unlikely final arguments will change their impressions. Therefore, opening statements should precede presentation of evidence so closing arguments will be more effective. This presentation most accurately reflects what happens at trial and generally leads to more valid results.

Although many people use live witnesses and live presentations in their mock trials, there are a number of reasons to reject this approach. The logistics of a mock trial generally require a case to be put on in four hours or less. "Live presentation" schedules almost always fall apart and witnesses or attorneys' mistakes made in such presentations can severely damage mock trial validity. Moreover, since one side usually puts on the mock trial and not the other, only one side's witnesses can appear live. This again leads to invalid results.

The best way to present mock trials is by video. Everything from opening statements to the testimony

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of witnesses should be on video. Where videotaped depositions are available, they should be used to maximize authenticity. When videotaped depositions are not available, actors or the real witnesses should be used. Actors need not be professional, but should be talented enough to appear natural and not overact. When the client or another cooperative witness has not had their deposition videotaped (or when the attorney must use an actor), the attorney should conduct a “mock” videotaped deposition with both direct and cross-examination. Obviously, in cases where witnesses' demeanors are the critical factor at trial, videotaped depositions are essential. However, most cases are won and lost on the facts and credibility is often determined by extrinsic facts as much as by witness demeanor.

The attorneys who are trying the case should present the opening statements and final arguments. Some suggest that if the plaintiff's counsel is organizing the mock trial, he should argue the defense side, but this is often a bad idea. Many trial lawyers are either “plaintiff” or “defense” oriented. A good plaintiff's attorney may not do a good job arguing the defense, especially if the attorney's heart is not in it. Moreover, if an attorney wants to see how jurors view an argument, the best time to do it is at the mock trial. Accordingly, to the greatest extent possible, everyone should play their actual trial role.

If plaintiff's attorney is organizing the mock trial, he should find a defense attorney to play the role of the adversary. However, because of his familiarity with the case, plaintiff's counsel must assist in preparing the defense argument, since the “mock” defense lawyer is not likely to be familiar with the case. Equally important, both attorneys should ensure their arguments oppose each other so that “different” cases are not presented. Remember, the goal is to create a fair representation of the case, not to “win” the mock trial.

3. Synthesis of Facts.

Bad mock trials are usually the result of bringing in too many case details. Keep in mind, most cases are decided by a handful of facts and witnesses. Mock trials are no different. Unfortunately, overanxious lawyers often insist on incorporating minute de-

tails of the case, which distract jurors from critical issues. Jurors sitting on the real trial may have several weeks to digest information; jurors sitting on mock trial panels reach a verdict after a few hours. Accordingly, it is important to synthesize the case to include only the most critical facts. Opening statements and final arguments should be approximately one-half hour per side and the presentation of evidence should take two hours or less.

4. Presentation Format.

It is best to hold mock trials in a medium-priced hotel. Some companies actually hold mock trials in their own facilities but, depending upon the facilities, the presentations can be awkward. It is preferable not to disclose which side is conducting the mock trial. In many cases, jurors will be almost equally divided about whom they believe is running the show. Steps should be taken to make sure jurors arrive on time, keep matters confidential, and are properly instructed. Breakfast and lunch should be provided. A neutral facilitator should indicate the nature of the presentation and guide jurors through the day. The jurors should be cautioned not to formulate an opinion until after the conclusion of final arguments and when they begin deliberation.

While some mock trials are done in front of a single panel, it is more valid and cost effective to break panels into two separate deliberation groups. The jury panels should be equally divided before they arrive based on age, sex, race, etc. The forepersons should be selected prior to breaking the groups into two, so that no time is wasted selecting a foreperson.

At the conclusion of final arguments, the panels should be placed in different rooms. Jurors should be provided with only the substantive jury instructions relevant to their decision. By providing fewer instructions, deliberations are expedited. Jurors should also be given verdict forms which closely match what the attorney expects will be given at trial. Counsel should consider a mock trial as an opportunity to see if jurors understand the instructions and verdict forms. In one mock trial, attorneys were astonished to find that, despite the fact that the instructions specifically stated an oral contract could be as binding as a written contract, the jurors rejected this point out of hand. Accordingly, at trial much more time was

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spent in final argument explaining this particular instruction.

While attorneys often choose to sit in on deliberations, this interference (although seemingly passive) can have an impact upon deliberations. Some people are reluctant to take a position contrary to the attorney sitting in on the deliberations. While having “neutral” observers take notes minimizes this problem, it deprives the attorney of the opportunity to see jury deliberations first hand. Accordingly, most mock trials are monitored using video cameras in each panel's room. This way, attorneys can monitor the deliberations and, since an attorney can listen to only one room at a time, the videotapes can be re-viewed later to see what was missed.

Often, attorneys reviewing the videotapes will learn valuable information from comments jurors made. Some juror comments can inspire counsel to select a new case theme. In one case, an attorney heard several jurors comment that “this case seems to be about a lot of bad decisions.” The attorney decided to focus his case theme on plaintiff's “bad decisions.” In another case pending in a primarily African American community, almost all the mock jurors described the plaintiff as a “rich white guy who we can't trust.” This helped the defense focus on facts relating to defendant's wealth and other facts indicating plaintiff was not trustworthy.

Wherever possible, there should be minimal interference with jury deliberations. Like real juries, mock juries sometimes get confused. Also, like real juries, usually one or more members of the jury panel will steer discussions back in the right direction. However, if something truly goes amiss, e.g., the jurors get confused as to what the law requires or miss a substantive fact due to an oversight in the mock trial itself, the moderators should correct the misperception. Nevertheless, careful attention should be paid to the cause of the misunderstanding since it is equally possible something similar could happen with the real jury.

Deliberations should end when the foreman indicates the jurors have finished filling out their jury verdict form or it becomes clear the jurors are hopelessly deadlocked. The attorneys should be given at least one-half hour with each panel to debrief jurors.

Conclusion

While mock trials are no guarantee that attorneys will be able to predict with 100 percent accuracy how a real jury will view a case, there is no doubt mock trials can provide attorneys with a valuable tool to formulate trial strategies as well as evaluate case settlement. Any attorney trying a case with a potential value of over \$500,000 should seriously consider conducting mock trials.

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cellent relationship between our bench and bar. Besides the opportunity of getting to know a judge, these lunches will enable a cross-section of more junior lawyers to get to know each other.

Zealous representation does not have to equate to discourteous advocacy. Indeed, I have heard many judges comment that their “pet peeve” is lawyers who do not show respect for each other. And that respect and courtesy is just as important outside the courtroom as well.

To the extent that ABTL and organizations like it can help break down those barriers between counsel, we can help restore and then maintain the camaraderie and professionalism my dad was fortunate to experience. Despite all the jokes, being a lawyer is a noble profession. There is no reason why we cannot cooperate more among ourselves, while still advocating our clients' interests in the strongest possible manner.

► *Dean J. Zipser is a partner in the law firm of Morrison & Foerster.*

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This article touches upon just a few of the insurance issues that may, and often do, arise in connection with business litigation.

Always Think About Insurance

A variety of events and circumstances may trigger an insurer's duties to its insured under different forms of liability insurance policies. For example, general liability policies commonly provide that the insurer must defend its insured against lawsuits that are potentially covered by the policy and indemnify the insured with respect to losses that are covered, regardless of whether the insured is a defendant or a cross-defendant. Directors and officers liability policies often require the insurer to pay for attorney's fees, costs, damages, settlements, judgments and other losses that arise out of the need to defend against or investigate "claims," including not only lawsuits, but also demands for monetary or non-monetary relief and investigations by government agencies such as the SEC.

The first complaint filed by a plaintiff, the first grievance letter from a disgruntled customer or competitor, or whatever other form the first notice of a potential claim takes, often lacks all of the allegations and demands that could trigger an insurer's defense obligations. Business disputes and litigation evolve over time. An adversary or plaintiff initially asserting theories of liability or types of damages that are not covered by insurance might later assert additional theories or damages in correspondence, a complaint, amended complaint, discovery responses, summary judgment oppositions, pre-trial motions, jury instructions or during trial itself. Moreover, a plaintiff on the offensive often becomes a cross-defendant in need of assistance from its liability insurer. Any of these developments and many others might trigger an insurer's defense and indemnity obligations. It is essential, therefore, constantly to reevaluate the possibility of available coverage.

What, Who and When?

1. What is Insured?

General liability policies typically cover liability arising out of bodily injury and property damage, including loss of use of tangible property. They also

cover "advertising injury" and "personal injury" offenses such as defamation, disparagement, violation of privacy rights, trespass, wrongful eviction, and infringement of copyright, trade dress or slogan, to name a few. Umbrella and excess liability policies often provide the same types of coverage as general liability policies, but may include broader protection against liability as well as additional amounts of coverage. Directors and officers liability policies cover losses that arise out of "wrongful acts" such as breach of fiduciary duty. They also might include coverage for the company, in addition to its directors and officers, for liabilities arising out of securities claims and other matters. Employment practices liability policies address losses arising from claims made by employees such as for wrongful termination, failure to promote or discrimination. There are many other types of liability policies, and liability coverage may also be found in "first party" policies or "package" policies. Many companies also purchase additional types of insurance policies or obtain endorsements to policies that provide liability coverages that are specially designed for their particular industry, and some obtain insurance coverage for punitive damages. (Yes, punitive damages.)

Any analysis of potential coverage should include a careful review of all relevant policies, including all declarations, forms and endorsements, and sometimes also policy binders and correspondence relating to the underwriting and issuance of the policy. As in most areas, a little knowledge of insurance policies can be dangerous. Relying on general assumptions, for example, about what a general liability policy may or may not cover, could result in substantial losses of insurance benefits. Think that "breach of contract" *cannot* be covered? Think again. See, for example, *Vandenberg v. Superior Court*, 21 Cal. 4th 815, 840 (1999), explaining that courts must focus on the nature of the risk and the injury, in light of policy provisions, to determine coverage – not on whether the insured breached a contract. Business litigators should consider having all relevant policies reviewed by a genuine insurance practitioner. You cannot necessarily rely on the clients, their insurance brokers, or even their insurers' claims adjusters to simply read the policies for themselves and reach proper conclusions about coverage. Words do not necessarily mean what they might first seem to say in the insurance context, and in many instances it can be difficult

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to discern just what it is that they seem to say. On top of which, the courts may have reached different conclusions or not reached conclusions at all regarding interpretation of policy language.

An analysis of potential coverage also requires a careful examination of a demand letter, complaint or other documents, facts or circumstances that might trigger coverage. The duty to defend arises when the facts alleged in the underlying complaint (or otherwise known to the insurer) give rise to a potentially covered claim, regardless of the technical legal cause of action pled by the third party. *Barnett v. Fireman's Fund Ins. Co.*, 90 Cal. App. 4th 500 (2001). Insureds and their insurers must consider all of the allegations of the complaint, and investigate facts existing beyond its four corners, to properly determine the scope of an insurer's duties to defend and indemnify.

2. Who is Insured and When?

Insurance policies afford protections to companies and individuals who are specifically named in the policies or endorsements to the policies. They also may insure generally described categories of entities or persons such as subsidiaries, partners, affiliates, managers, contractors, officers, directors, employees, and spouses. Business contracts often require one party or another to provide insurance coverage, and thus the search for relevant policies should also include a review of relevant contracts.

Insurance policies issued at different times and covering different periods may be relevant to a claim or loss. "Occurrence" based policies may require that the injury-producing event, circumstance or offense take place during the policy period, that the plaintiff sustain an injury during the policy period, or both. "Claims" based policies generally apply if the claim is made against the insured, the insured reports the claim to the insurer, or sometimes both, during the policy period, even if the alleged wrongful act may have occurred years earlier. Therefore it is important to consider policies that are in effect now, when the first event took place, and every period in between.

Pursuing Coverage

You can never go wrong in suggesting to a client that it consider putting all relevant primary and excess insurers on notice of a claim or suit at the earliest opportunity. In the case of "claims" based policies, a failure to notify the insurer of a claim or suit by a specific date – often the end of the policy period or an extended reporting period that remains in effect after the policy has expired – might excuse the insurer from having to pay for *any* of your client's defense costs or other losses. For both "claims" and "occurrence" policies, a substantial delay in notifying the insurer also could cause a loss of insurance benefits, to the extent that the delay has resulted in substantial and demonstrable prejudice to the insurer.

In addition, insurers almost always assert that they need not pay for or reimburse any defense fees or costs that were incurred before they were told of the claim or suit. However, this is not always the case. For example, a liability insurer has a duty to pay an insured's pre-tender defense costs where the insured was unaware of either the insurer's identity, the contents of the policy, or both, at the time the costs were incurred. *Shell Oil Co. v. National Union Fire Ins. Co.*, 44 Cal. App. 4th 1633, 1649 (1996). Even so, the insured may be required to demonstrate a reasonable degree of diligence in seeking to gather the necessary policy information.

Plaintiff's counsel also may want to take steps to ensure that a defendant's insurer is notified of a claim or suit if the defendant's insurance policies will be necessary to pay for a settlement or judgment. In thinking about the defendant's insurance as a source of recovery, plaintiff's counsel also should consider whether to tailor the complaint and the overall litigation to fit within or outside of the scope of the defendant's insurance coverage.

After an insurer is notified, anywhere from a few days to several months later the insurer will issue a written statement of its position regarding the coverage that is available and how the insurer intends to respond. Anytime an insurer asserts that a claim or loss is not covered, or that it is only partially covered, someone acting on behalf of your client should carefully scrutinize the insurer's reasoning and conclusions in light of the policy language, the facts at

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hand, and applicable law. Even if an insurer is correct to deny a claim on the information available at that time, you may ask the insurer to reconsider its position based on newly developed or discovered information that the insurer was not aware of or could not have discovered on its own.

Working With Insurers

1. Duty to Defend Versus Duty to Pay

General liability policies usually provide that an insurer has the “right and duty to defend” an insured against any lawsuit that seeks damages that are covered by the policy. The duty to defend requires the insurer to retain and pay for skilled and experienced attorneys to defend the insured against the plaintiff’s lawsuit. It also means that, in general, the insurer selects defense counsel. However, in certain situations where an insurer asserts a reservation of rights and a conflict of interest arises between the insurer and the insured, then the insured – your client – will have the right to select the defense attorneys at the insurer’s expense. (See, e.g., Civil Code Section 2860, which also imposes limits on the hourly rates that the insurer will be required to pay.)

Insurers often take several months to announce whether they will provide a defense. In the meantime, the insured has been required to engage defense counsel to investigate and defend against the plaintiff’s claims. Whenever an insurer contends that the insured is not entitled to select independent defense counsel, that is not necessarily the end of your term as defense counsel for this litigation. First, you and the insured may remind the insurer of your excellent credentials, superior record of successfully defending similar claims, intimate knowledge of the case at hand, and the additional expense the insurer will incur to bring new counsel up to speed. Second, if your hourly rates are higher than those the insurer is proposing to pay to its counsel of choice, you might negotiate with the insurer to pay a significant share of your fees, with your client agreeing to pay the balance (assuming of course that your client agrees). Third, if the insurer insists on hiring different counsel, you should consider carefully evaluating the insurer’s coverage position and assessing whether the insurer is required to provide independent counsel due to a conflict of interest. This is another situation

when an experienced insurance attorney familiar with the law in this area can be helpful to your client, and may help to keep the client’s defense team of choice in the game.

Other policies, such as D&O policies, usually will not require the insurer to provide a defense. The insured will have to retain defense counsel, but the insurer will have to advance or reimburse defense fees and costs. The insured will have the right to select defense counsel, but the choice of defense counsel often will be subject to the insurer’s consent. Some policies will provide the insured with an optional right to require the insurer to provide a defense, rather than to advance or reimburse defense costs, which is another reason why the policies should be thoroughly reviewed.

2. Cooperating and Communicating With the Insurer, A Careful Balance

Insurance policies state that the insured must cooperate with the insurer and provide information that is reasonable required to enable the insurer to investigate the insurance claim and to fulfill its defense and indemnity obligations. Insureds and insurers may disagree on how much information is necessary and how far the insured really must go to cooperate with the insurer.

Overly cautious policyholders and their counsel might adopt a “give them everything” approach so as to avoid any possible claim of noncooperation by the insurer. However, they may be unwittingly and unnecessarily (1) providing an insurer with privileged information that may negatively impact the insured’s coverage position or (2) *potentially* opening the door to an adversary’s discovery requests. First, where a dispute exists concerning the scope of an insurer’s duties, an insured is *not* required to provide an insurer with privileged communications pertaining to the coverage issue. (See, e.g., Civil Code Section 2860(d).) Second, while communications between defense counsel and an insurer who has a “duty to defend” the insured are clearly privileged, in some situations where insurers did not have a duty to defend, but rather were required to advance or reimburse defense costs, a few courts have held that communications between defense counsel and the insurer were not privileged. As a result, and although it might not be absolutely necessary, as a precautionary

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measure some defense counsel seek an agreement from plaintiffs that any information communicated by defense counsel to an insurer will not be subject to discovery. Experienced plaintiff's counsel understand that in many cases the defendant's insurer will need to be provided with information regarding the weaknesses of defendant's position in order to obtain the insurer's consent to a settlement (and the insurer's consent to a settlement is required in most circumstances). Therefore, plaintiff's counsel might be persuaded to agree not to seek discovery of communications between defense counsel and the insurer.

On the other hand, policyholders and their attorneys who withhold too much information from an insurer may, in extreme cases, jeopardize the insurance coverage altogether. On a lesser scale, failing to keep an insurer informed of the status and progress of a case, or refusing to provide the insurer with copies of relevant documents such as pleadings and discovery responses, may make it difficult for the insurer's adjuster or claims handler to understand the dynamics of the case and give the insurer's consent to a settlement. Defense counsel who want to obtain an insurer's consent to a settlement should seek to grab the insurer's attention in advance of mediations or settlement conferences. Whenever possible, defense counsel should avoid waiting until the last minute to engage the insurer in a discussion of how the insurer wishes to handle settlement discussions.

Counsel representing a business that has suffered property damage or other losses that might be covered directly by the client's property insurance or other first-party insurance policy should also consider privilege and discovery issues when providing the client's insurer with information. If the client or the insurer files suit against a third party to recover for the losses, the defendant third-party might seek discovery of the information that the client has provided to the insurer regarding the cause or extent of the losses. The defendant may argue that the attorney-client privilege does not apply to the insurer's communications with the client or plaintiff's counsel because those communications were not made in connection with the insurance company's defense of the client against a claim or suit.

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room, wired for audio and video conferencing, and the adjoining private patio area, which unfortunately (due to budget constraints) does not yet have furniture. On our way back to courtroom 6B, Judge Nakazato also showed us the judges' dining room, the public library, and the 10th floor counsel preparation room. A brief hallway chat with Judge David Carter was an unexpected and welcome addition to our tour.

As we returned to 6B and sat down in the gallery to begin eating our lunches, Judge Nakazato opened the discussion to questions from the group. We were happy to oblige, and Judge Nakazato began fielding our diverse questions on the scope of his civil calendar, discovery motions and practice, sanctions, his appointment to the bench, special masters, and whether judges ever discuss lawyer conduct.

Judge Nakazato's comments were sprinkled with superb advice for young lawyers, especially in relation to discovery: "bend over backwards" to allow opposing counsel to meet discovery requests; don't fight over discovery that you don't really need; make sure your requests for sanctions are reasonable; and when submitting documents to the court, proofread, proofread, proofread. Judge Nakazato even took a few moments to extol the many advantages of life as a magistrate judge.

The Bench/Bar Brown Bag was an outstanding opportunity to sit at the feet of a learned jurist and to meet other local attorneys. Thanks again to the ABTL for arranging the event, of which I hope there will be many more in the future.

► *Christopher A. Bauer is an associate at the firm of Sheppard, Mullin, Richter & Hampton LLP.*

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Originally, I put an application in to be a Municipal Court Judge – those were the days when we had two separate courts – and received my appointment from Gov. George Deukmejian in January 1990. I was elevated to the Superior Court in 1993 by Gov. Pete Wilson.

Q: Do you have any regrets about leaving the practice of law and becoming a judge?

A: No regrets. None. I have loved being a judge from the very first day and it has only gotten better.

Q: What do you love about it?

A: I love the independence of being able to make decisions. I make many decisions everyday and I try my best to gather all the necessary information, make good decisions, and then move on to other ones. I also love the ability to do good and make a difference. Judges are in a powerful position and, therefore, if they do their job correctly, they can do a lot to make real changes, like the Drug Court program. Also, being a judge is like going to law school for a second time. I get to watch trials with great lawyers and interesting cases. And I get to watch the whole thing from the best seat in the house. It is really exciting.

Q: You are well known as the judge who began Drug Court in Orange County. How did this come about and, now that you are no longer active in it, do you miss it?

A: About 10 years ago, I attended a seminar with the then Presiding Judge Jim Smith on the virtues of Drug Court. At that time, there were only a few drug courts up and running, including the first one that started in Miami in 1989. I was impressed by the concept of allowing non-violent drug addicts the opportunity to straighten out their lives and to become clean and sober. It took about one year to plan out the details and then I started it in 1995. At first, I encountered some opposition, especially from the District Attorney's Office, but after witnessing the many successes, I received a lot of support. Now we have Drug Courts in every Orange County courthouse. Do I miss it? I miss it a lot.

Q: Your tenure on the ABTL Board is about to end. How was your experience?

A: It was a great experience being on the Board. The ABTL has relevant, interesting programs and is comprised of some of the best civil lawyers I have had the opportunity to know. Indeed, it is telling that there is always such a strong judicial showing at each of the ABTL dinners.

Q: What role do you think the ABTL can and should play?

A: I think the ABTL is one the premiere attorney groups in both California and Orange County. I see its potential in becoming a place for round-table discussions between the best and the brightest. I would like to see it become an "Inns of Court" type organization in that regard, particularly for the younger lawyers who are interested in learning from the more seasoned trial lawyers and judges. Towards that end, I am strongly in favor of the new brown bag lunch campaign where younger lawyers have the opportunity to meet the judges (and other young lawyers) in a casual atmosphere to discuss the practice of law. In fact, I have volunteered as a participating judge this Fall.

Q: What is a typical day like for you?

A: It is easier for me to describe a typical week. I hear *ex parte* motions first thing in the morning and then start trial as early as possible after that. I am actually in trial between three and four days a week. I hear law and motion on Tuesdays. In the meantime, I review law and motion papers, prepare Statements of Decisions, and write my tentative rulings.

Q: What is your greatest pet peeve as a Judge?

A: I do not like when lawyers abuse the *ex parte* procedures. In fact, although I occasionally hear *ex partes* where some urgency is shown, often lawyers appear *ex parte* just because they have waited until the last minute to get something done. I would advise any party seeking *ex parte* relief to state the basis for the urgency on the very first page of the papers.

Q: We have all heard a lot about the actual and po-

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tential budget cuts in the Court system. How, if at all, have these budget cuts affected the Orange County Superior Court?

A: Although we are all concerned that these budget cuts could have some impact on the civil bar primarily, it is really too early to tell the level that these impacts might have. Presiding Judge Fred Horn is really on top of everything and, primarily due to his diligent efforts, the Orange County Superior Court is doing quite well. The Orange County Superior Court is on top of its trials, with very little back-log. Indeed, whereas many years ago we had an extensive back-log, at present there are virtually no continuances for lack of available courtrooms, or judges, and all of the cases that are ready for trial are going out on their scheduled date. Also, at this time, we have a full staff of judges, at least until Judges Thrasher and Jameson retire this Fall.

Q: What do you enjoy doing when you are not working?

A: Being with my family. Right now, we are anxiously awaiting the birth of our first grandchild (a baby girl) who is due this May and we are gearing up to be typical doting grandparents.

Q: If you could choose any job in the world other than judge, what job would you choose and why?

A: If I wasn't a judge, I would like to be the Judicial Appointment Secretary. I think we have such great judges in this State, and especially in Orange County, that I would like to make sure that the tradition continues.

Thank you Judge McEachen for your time.

► *Linda A. Sampson is a Senior Associate in the law firm of Morrison & Foerster.*



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opinion on how to handle an accounting issue. Just sending the former executive to jail or having the company restate the financial information does not end the problem. Each of these situations brings complex internal and external investigations, potential criminal indictments and civil claims.

In fact, if you or your company or anyone in your vicinity is under investigation, you would be ill advised to do anything that could be interpreted by anyone as interfering in any way with that investigation. The most recent verdicts are a clear indication that the Government is sending a strong message that lying to, or hiding evidence from, the Government is not going to be remotely tolerated.

Thus, companies faced with these situations must step out of the box and look at all the potential ramifications of their responses to problems at hand and weigh all of the potential scenarios and their outcomes. Whether a special counsel is named by a board of directors and/or forensic investigators are brought in to help with the investigations, the requirements to document, disclose and the advice given is changing and the tasks associated in the process are now more complex. We all must be aware of the new ground rules and watch where we step.

What is clearly apparent from each of these situations is the fact that a good company can be destroyed by one or more bad actors. The trust and confidence that the public has in how a company handles these types of situations can determine whether the company will survive the problem. Therefore, perceptions on how the situation is handled can be as important in determining whether a company will survive as much as the financial strength of a company itself.

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3. Subrogation and Releases: Don't Unwittingly Impair Insurers' Rights

Plaintiff's counsel also needs to think carefully about subrogation issues before entering into settlements and releasing claims against third parties. For example, suppose that the owner of a business is forced to shut down operations while undertaking costly repairs. The owner may want to pursue dual tracks of submitting a claim to its insurer for the property damages and business interruption losses, while also trying to recover the losses from the contractor and other potentially responsible parties. While the owner's insurer investigates and adjusts the loss, the owner will be incurring legal expenses to pursue claims against third parties and may want to enter into settlements with some or all of them. Before doing so, plaintiff's counsel should take steps to avoid impairing the insurer's subrogation rights, i.e., the insurer's ability to recover the loss from the responsible third parties if the insurer eventually compensates the owner. Plaintiff's counsel may advise the insurer of the settlement opportunity and seek the insurer's consent. If the insurer refuses to agree to a release of claims against the third party, plaintiff's counsel may invite the insurer to pay the amount of the proposed settlement to the insured and then take over the claim against the third party, at the insurer's expense.

It is also crucial to carefully consider the scope of a release and how it might impact your client's future ability to pursue insurance claims under policies issued by the defendant's insurer that are not related to the instant litigation. Many settlement agreements and releases will include a release of claims against not only the defendant, but also a laundry list of companies and individuals associated with the defendant, such as its insurers. Executing a general release of claims against a defendant and its insurers could have unintended consequences with regard to a loss that is unrelated to the subject matter of the litigation.

Conclusion (that's *not* all folks)

Perhaps the most important thing to take from this article is the following: consider carefully and thoroughly, and address fully with your client, the availability of possible insurance; do so at the outset of the

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matter, at the time of all significant events thereafter (like individual settlements), and on a periodic basis throughout the life of the matter, so that you give yourself the opportunity to reevaluate coverage issues as the facts (and potentially even the law) continue to develop. If your client has told you that it is handling all the insurance issues separately, you should nevertheless confirm from time to time that the client is still doing so, and as with all of your insurance activities on behalf of your client, be certain to document these activities for your file. That is *your* best insurance.

► *Peter J. Wilson is a partner in the law firm of Latham & Watkins. Randy G. Gerchick is an associate at the law firm of Latham & Watkins.*

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