ASSOCIATION OF BUSINESS TRIAL LAWYERS

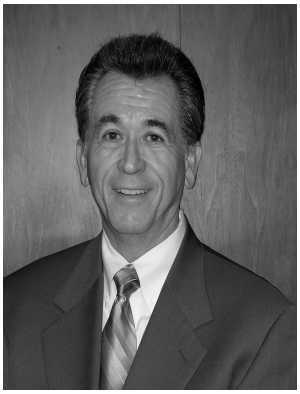
# abtl REPORT

ORANGE COUNTY

Volume VII No. 4 Winter 2005/2006

## Q&A with the Hon. David C. Velasquez

**By Linda A. Sampson**



*[Editor's Note: Our judicial interview this time is with Judge David C. Velasquez. Judge Velasquez was appointed by Governor George Deukmejian first to the Orange County Municipal Court in 1988 and then to the Orange County Superior Court in 1990. His current assignment is Supervising Judge of the complex panel, an assignment he has already performed for one year. Judge Velasquez is also a member of the ABTL Board of Governors.]*

Q: *Why did you decide to become a Judge?*

A: It just seemed like a perfect fit with where I was in

***-Continued on page 5-***

**-IN THIS ISSUE-**

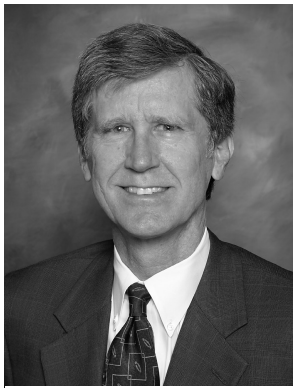


## Preserving the Record for Appeal: A Checklist for Trial Lawyers

**By Rick Derevan and Mike McIntosh**

"Successful appellate practice begins in the trial court." Hon. William F. Rylaarsdam, Associate Justice, Court of Appeal, Fourth Appellate District Division Three.

Justice Rylaarsdam is undoubtedly correct that the trial court is the place to start building a successful foundation for appeal. The reason, of course, is that, as a general rule, issues raised for the first time on appeal that were not litigated in the trial court are waived. This rule is based on fairness: It gives the adverse party an opportunity to join the issue and the trial court the chance to make a ruling. So the watchword of any trial lawyer who anticipates an appeal should be "make your record." Otherwise, you may find that the court of appeal will not consider the issue you think is dispositive of the appeal.



Rick Derevan

There are, however, exceptions to the rule that an issue must be raised in the trial court to be considered on appeal. One exception is where the issue is purely legal and the facts are undisputed. In such a circumstance, the court of appeal has discretion to consider a newly-raised issue. And the court is more likely to do so where the issue is of public importance. (*See, e.g., In re Marriage of Moschetta* (1994) 25 Cal.App.4th 1218, 1227-

Mike McIntosh

***-Continued on page 8-***

## President's Message
**By Hon. Sheila B. Fell**

So many things to say; so little time. It is difficult to accept that my year as president of this outstanding organization is at an end. The year is filled with pleasant memories and gratitude to the many members and participants who have so graciously contributed to the fine programs and events that mark ABTL as a "first class" professional organization.

Special people in my ABTL life this year were my great executive board consisting of Past President, Dean Zipser, Vice President, Gary Waldron, Treasurer, Jim Bohm, and Secretary, Martha Gooding.

Dean left the organization in such terrific shape that it practically ran itself, and he was always available for questions and guidance -- even on his vacation in Alaska! Gary was always ready to jump into a difficult situation and make it run smoothly. I am pleased to be able to turn the reins over to him. Jim has been a terrific treasurer -- hasn't lost a penny. He even filled in as secretary for a brief period when an emergency struck. Martha has accurately reported each topic hashed and rehashed at our board meetings. Even those not in attendance didn't miss much thanks to Martha's notes.

Program Chair, Ira Rivin, planned some wonderful programs, as we heard from notables in a various areas of interest to our members. We had great attendance at our monthly meetings, and to those of you who were not there, I'm sure you're planning on attending every meeting this year.

Richard Grabowski has done a superb job with the newsletter, and the newer attorneys will not soon forget the efforts of Sean O'Connor in setting up the brown bag lunches with judges and justices.

Thank you to each of our board members who did not fail to come up with great solutions and suggestions as the needs arose. With most of our board remaining in office, I'm sure this year will be just as productive and successful.

And, of course, thank you to Becky Cien who has helped coordinate our board meetings, dinner meetings

***-Continued on page 13-***

ASSOCIATION OF BUSINESS TRIAL LAWYERS
abtl
ORANGE COUNTY

1800 S. Fairfax ave.
Los Angeles, CA 90019
Phone: 323.939.1999; Fax: 323.935.6622
E-mail: abtl@abtl.org
**www.abtl.org**

## Insurance Disputes Arising out of Complex Business Litigation: The 10 Phases of Coverage

**By Edward Susolik**

It is a truism that complex business lawsuits invariably result in complex insurance disputes. In fact, general liability insurance policies provide coverage for a wide variety of business litigation lawsuits, including claims of misappropriation of trade secrets, unfair competition and copyright and trademark infringement. (*See, Sentex Systems, Inc. v. Hartford Acc. & Indem. Co.* (9th Cir. 1996) 93 F.3d 578.) Even business lawsuits that center on allegations typically not covered by general liability policies -- such as wrongful termination or sexual harassment -- nevertheless frequently involve secondary allegations of defamation, invasion of privacy or related torts that do implicate insurance coverage. (*See, Buss v. Transamerica* (1997) 16 Cal.4th 35.)

Although the insurance disputes engendered by these business litigation disputes are complex and fact specific, there are 10 recurring insurance coverage issues that are typically raised by any business litigation claim. These 10 issues constitute the paradigm that I call the "10 Phases of Insurance Coverage."

**1. <u>Duty to Defend</u>**

The duty to defend is the most important concept in insurance. Black letter California law requires an insurer to immediately defend its insured if the allegations in the complaint fall within, or may potentially fall within, the scope of coverage provided by the terms and definitions of the policy. (*Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263.)

The duty to defend frequently becomes the first battlefield between insurer and insured. Insurers file declaratory relief actions seeking judicial resolution of difficult coverage issues. Policyholders initiate bad faith complaints arising from the insurer's wrongful refusal to defend. Critically, many duty to defend issues can be promptly resolved through a motion for summary adjudication, allowing the insurer and policyholder to ascertain their rights and obligations early in the claims handling process.

***-Continued on page 12-***

## Remove and Remand - Real or "Sham" Defendants

**By Michelle A. Reinglass**

Defendants routinely remove, or attempt to remove, a case to federal court, presumably under the belief that they will gain some advantage over the plaintiff if they are in federal versus state court. Anecdotally there appears to be some justification to this belief. For one thing, if a plaintiff fails to timely request a jury trial following removal, it may result in waiver of the right to a jury trial, a defect for which there is little relief. (It is for this reason that all plaintiff practitioners are cautioned to include a "Jury Demand" in the initial Complaint, both in the caption page, as well as the prayer for relief.) Also, to prevail a plaintiff must convince all jurors to vote in his or her favor, in contrast to only needing nine out of twelve jurors in state court. Additionally, there has been a perception that federal court judges are more inclined to grant summary judgment than judges in state courts. However, that gap has been closing over the recent years.

Despite the perceived advantage to the defense by removing to federal court, there are still distinct advantages to a plaintiff. These include the initial conference between counsel pursuant to FRCP 26 (f), where the parties are required to discuss the claims and defenses, settlement prospects including selection of a settlement conference method, pretrial motions, and best of all, early discovery. Both sides are required to exchange preliminary documents supporting or opposing the various claims, and identify potential witnesses. In state court, extensive discovery would be required to gain this type of information. Federal judges make it easier to obtain ex parte relief in truly exigent circumstances. A Magistrate Judge is assigned to each case to handle discovery issues, often more accessible and more amenable to reading the tedious papers associated with such disputes. Some matters are resolved quicker in federal court, and even where there are delays, such as due to prioritization of a federal judge's criminal caseload, the parties still face strict and early trial preparation deadlines.

Nonetheless, not all removed cases should remain in federal court. For example, some defendants remove the case to federal court, by ignoring the existence of named non-diverse defendants. They do so out of the belief that such additional defendants are "sham" or fraudulently

***-Continued on page 15-***

## Intellectual Property and the Challenge of Protecting It

**By Hon. James E. Rogan**

When the Founding Fathers crafted our U.S. Constitution, they saw fit to include in Article I Section 8 the anticipation of a patent system and the protection of intellectual property. With their attention focused on the birth of a new Republic, why did they see the need to deal with so obscure an area of law? The answer is as important to our generation as it was to theirs. They understood that this young, agrarian colony would never become an economic and technological giant unless they embedded in the law the incentive for inventors to invent, for creators to create, and for later inventors and creators to study and improve upon those works. From this foresight came the American system of intellectual property protection, which gives inventors and authors a limited economic exclusivity for their genius. In 1790, President George Washington signed into law the foundation of our modern patent system. That same year, the first U.S. patent was granted, and the examiner of that patent was none other than Secretary of State Thomas Jefferson.

Since that time, the U.S. Patent and Trademark Office (USPTO) has issued nearly seven million patents and registered more than two million trademarks. Over these last two centuries, America has profited immeasurably from the strength of our Intellectual Property (IP) system. IP-based enterprises today represent the largest single sector of the American economy (almost five percent of the gross domestic product) and employ over four million Americans. During my years in Congress, I often asked colleagues, "What is America's number one export?" The typical answers I got were things like automobiles, agriculture, or textiles. All of those responses were wrong. *Intellectual property*, accounting for more than fifty percent of all U.S. exports, is America's largest export. IP-based exports are greater than our exports of automobiles, agriculture and textiles *combined*. When it comes to enjoying the fruits of technological advancement, everyone is a beneficiary of the Founders' wisdom in providing the framework for IP protection in the U.S. Constitution.

An appreciation for the historic importance of intellectual property guided me during my years as a member of the California State Assembly, the United States Congress, and as President George W. Bush's Under Secretary of Commerce for Intellectual Property and Director

***-Continued on page 17-***

## Coffee with the Hon. Kathleen O'Leary of the California Courts of Appeal

**By Laura S. Goodwin**

On Wednesday, January 18, 2006, as part of an ABTL hosted event I was fortunate to be one of six attorneys invited to enjoy a great conversation and coffee with the Honorable Kathleen E. O'Leary. Justice O'Leary began her judicial career in Municipal Court in 1981, and was appointed to the Orange County Superior Court in 1986, where she served three terms as presiding judge. In January 2000, Justice O'Leary was appointed, and unanimously confirmed, to the California Court of Appeal, Fourth Appellate District, Division Three.

The experience with Justice O'Leary was both enjoyable and very informative. First, Justice O'Leary gave us a "behind the scenes" tour of the Court of Appeal building. Then, she invited us to her chambers and shared information about the appellate court generally as well as her experience on the bench. Finally, we had the privilege of attending oral argument. The panel had quite a full calendar and we had the unique opportunity to hear six different cases.

Justice O'Leary began our morning conversation by providing a brief overview of the intricacies of the California Courts of Appeal, including the average caseload of each Justice and the important role of research attorneys. Although Justice O'Leary relies on her three research attorneys, each month she reads all the briefs (and any other information she feels is necessary) in the 9 or more cases assigned specifically to her. She also has a substantial understanding of the 18 or more cases assigned to her fellow panel members. Because each Justice spends considerable time reviewing his or her cases, Justice O'Leary emphasized that "brevity is golden!" She attributes her desire for attorneys to be direct and concise in their writing and speaking in part to her experience as a trial judge. As she emphasized, each Justice has different approaches based on his or her own life experiences.

Justice O'Leary shared with us about her involvement in public interest work and emphasized the importance of pro bono work. Even though her schedule is quite busy, she is strongly committed to the need to facilitate access to justice for all individuals and currently chairs the Judi-

***-Continued on page 16-***

## A WORD FROM OUR SPONSOR

## The Emergence of Electronic Discovery in Today's Litigation

**By Jenny Coleman - The Data Company**

By now, everyone has heard of electronic discovery but may not be familiar with the detailed process. E-Discovery is a process where lawyers collect, review, and produce electronic documents during the discovery phase of a case rather than boxes of paper. In the past, responses to requests for the production of documents involved simply searching for paper documents. These days, with the emergence of technology, discovery practices have evolved and changed our insight of what defines "responsive documents." Not only can responses to requests for the production of documents come from paper documents, but also (and more often are) word documents, spreadsheets, PowerPoint presentations, and email. These types of documents can reside on hard drives, CDs, disks, network servers, and back-up tapes. Broadly, the process of E-Discovery falls into the following four categories: Preparation, Collection, Review & Process, and Production.

**Preparation**

While undergoing the E-Discovery process, it is important to understand the nature of the electronic documents and files when looking for the "who, what, when, where, and subject" of the electronic documents. It is also very important to have a clear understanding about the processes and the technology being used when requesting electronic documents. Another important factor to consider is cost. The costs to collect and process electronic data are contingent upon two factors -- time and the amount of data. Typically, E-Discovery vendors charge by the hour to collect the data and then charge a per image processing fee. Knowing the number of workstations, servers, back-up tapes, etc. can help when budgeting for E-Discovery.

**Collection**

Collection is the physical process where information is copied from the client's data storage systems and computers. It is necessary during this process for the collection to be done in a way that it copies the data exactly as is and does not change any of its profile characteristics such as metadata (author, recipient, creation date, modified date, doc type, etc.). To ensure proper collection, on-site data collection is the preferred method. This method ensures that you get a true "copy" of the data as it resides on their system. An alternative, but not preferred method to

***-Continued on page 18-***

***-Interview: Continued from page 1-***

my career when the opportunity presented itself. Actually, that is how my entire legal career came about. Originally, I wanted to be a teacher, most likely a history teacher, but when I got out of college, teacher jobs were scarce. So I took an interim job as a paralegal at the Legal Aid Foundation of Los Angeles. I loved it -- especially representing clients at administrative hearings. So, that's when I decided to become a lawyer. But then in my 30s, my wife and I started talking about having a family and I started thinking about the importance of balance in my life. It so happens that, just while I was considering my future and the need for balance, I was asked if I was interested in becoming a judge. The timing was perfect, so I took the leap and have been very pleased with my decision ever since.

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

A: None. I love being a judge.

Q: *What do you love about it?*

A: It is intellectually stimulating, challenging, and really fun, particularly given my good fortune in having the opportunity to witness such talented lawyers as the ones who appear in my court.

Q: *Do you miss trying your own cases?*

A: Sometimes. I really loved trying cases. The excitement really does get into your veins. Granted, the preparation is a headache (as any trial attorney knows), but the excitement of being in trial makes it all worthwhile. Then again, there are so many aspects of being a judge that are just as rewarding, or more. For instance, I really enjoy being a part of trying to help the parties reach a settlement. Settlement conferences have a very theatrical aspect to them. I often say that the purpose of the first half hour of a settlement conference is to deal with the emotions of the parties and the attorneys -- not the money, not the issues, just the emotions.

Q: *Have you developed any particular preference for matters and arguments before you?*

A: I really enjoy trying civil actions. Except for my first two years of practice (which were in the civil arena), most of the time that I was practicing law, I was practicing criminal law at the D.A.'s office, first in Los Angeles and then here in Orange County. But because of those

***-Continued on page 6-***

***-Interview: Continued from page 5-***

first two years -- which were two years more than a lot of my colleagues who were becoming judges at the same time -- I was assigned to civil. I thought it was great from the beginning. It was like a breath of fresh air. Every day was different and the same holds true now. I could hear medical and legal malpractice cases, personal injury cases, business disputes, consumer disputes and many other types of cases. It was fun to learn a little bit about a lot of things.

Q: *Was it hard to get used to trying a civil action?*

A: Not at all. When it comes to trials themselves, I look at every case the same way. I look at the facts. No case should be tried in a cookie-cutter fashion. That simply isn't fair to the parties or the attorneys.

Q: *How many judges are on the complex panel? Are there any plans to expand the complex panel or does the current size adequately handle the caseload of complex matters?*

A: There are currently five judges at the Civil Complex Center. We are currently handling a total of 1135 cases, with each judge having an average caseload of approximately 227 cases. Right now, the Administrative Office of the Courts has expressed no current plan to expand the complex panel, nor do I think that we really need any more judges in complex right now. Indeed, everyone is working very hard to stay on top of all of these cases and to process them expeditiously.

That is not to say that Orange County in general could not use a few more judges. I think that we could use maybe 10 more judges countywide, but I don't know if that is in the works yet. In the meantime, so much has been done here in Orange County to ensure that the judiciary keeps on top of all of its cases and avoids any future backlogging. For example, many courts like to use Pro Tem Judges and it really helped when Judge Thrasher organized Mediation Court. One of the problems with getting more judges is that our Orange County judges have done such a great job handling their caseloads, that it may not appear that Orange County needs more judges.

Q: *What is your current caseload makeup?*

A: Recently, there has been a shift in the caseload makeup that is heard in the Civil Complex Center. Before, I would say that 60% of the complex cases were construction defect. Now, given the influx of class actions, construction defect cases probably make up closer to 40% of the caseload, with class actions (including wage and hour actions and overtime claims) making up somewhere between 20 - 30% of the caseload. Previously, class actions probably only accounted for about 10%. Finally, the remaining makeup consists of securities cases, CEQA claims and particularized cases that are deemed complex due to the volume of documents associated with them and other complex discovery concerns, the need to coordinate many different cases, numerous parties or long trial estimates.

Q: *Do you handle the majority of your MSCs?*

A: I handle a lot, but not the majority. I do always try to have an MSC before trial, but a lot of times, the parties in complex cases have already paid for a private mediator, so often settlement discussions have already run their full course. Nevertheless, what I have recently tried to do, with the help of several of the complex panel judges is to organize what I refer to as "Sweeps Week," where we try to sweep away some of the cases by setting nothing but settlement conferences for an entire week. I would set up to six conferences per day during the "Sweeps Week." Recently, there was a 75-person railroad accident. The injuries ranged from death to significant to minimal. Four judges, including me, were able to settle 11 out of 19 of these cases scheduled for settlement conferences that week. It was great.

Q: *How can lawyers make a complex case more understandable to a jury?*

A: Be organized and keep it moving. Particularly in long, complex cases, a jury is going to get bored very quickly. Indeed, jurors these days have been programmed by television and want quick snippets that they can understand and want you to keep it entertaining. If you spend too much time flipping back and forth in binders to compare multiple documents, you are going to lose them from the very beginning.

Also, in the past I have seen cases where jurors don't even get copies of the key documents. I really can't imagine being a juror and hearing a case where you don't get to see every document. Putting all the documents on a CD does wonders to make a case easier to understand and, besides, it can be very difficult to hand out 12 sets of binders. At complex, we really stress the practicality and effectiveness of the electronic presentation of evidence if it makes sense to your case economically. Another idea, particularly if a case doesn't warrant the use of technology, and if all the documents in a case cannot fit into one single binder, is that the lawyers should consider getting

***-Continued on page 7-***

***-Interview: Continued from page 6-***

the documents pre-admitted, so that when the document is introduced to the jurors for the first time, they are not bored by the technical/evidentiary aspects of getting it admitted. In that case, I would consider giving every juror an empty notebook and passing out 12 copies of the document being discussed at any given time to each juror so that the juror can fill his/her own notebooks as needed. But overall, each trial attorney needs to be deliberative about what is the most effective way to communicate with the trier of fact.

Q: *So it sounds like you are an advocate for using technology?*

A: Absolutely. I think technology is great. I really think that technology (especially in a complex case) is one of the key "tools of persuasion." Besides, the alternative -- lugging in potentially 500 binders -- just does not really work anymore. I recently had a six-month court trial where the evidence was presented electronically. Had the documents not been put on a CD, I would have really killed my back lugging binders filled with documents, comparing a document in one binder to a document in another and then still trying to keep track of the three other binders that were open on the bench. In that case, the attorneys were very well-organized, and we could jump from one document to another or we could compare two documents side-by-side in what was essentially a power point presentation from the attorneys' lap tops. It really helped to keep the case going and to keep everyone on the same page. Also, one of the attorneys had the great idea of using a 42 inch plasma screen television monitor instead of the court's customary 15 inch monitor. It was an extremely effective way to present photographs, especially where the details in the photos were important to the case.

Q: *Any other advice you would you give lawyers in preparing a complex case?*

A: I would recommend three things (in this order) to make an attorney more successful in court, at least at the complex level. 1. Communication. 2. Communication. 3. Communication. First, you have to be able to communicate with the lawyers on your side. It is very frustrating when one hand doesn't know what the other hand is doing. Second, communication with the opposing side is very important. Being civil and working together goes a long way toward resolving things or at least making getting through trial much more pleasant. Fighting for the sake of fighting does everyone a disservice. Finally, communicating with the court is very helpful. A smart judge will follow the lead of the lawyer who communicates with him or her and shows that he or she has control over the matter. For instance, if you come in willing to lead and arrive at court with a package showing, from womb to tomb, your thoughts on how this case should be handled and organized from the beginning (e.g., what are the key discovery issues, the key legal issues), chances are the case will be run as you contemplated. Similarly, educate the judge on your case. Now, I don't mean providing a 5-page brief on the standards of a demurrer. Judges already know that. I am referring to the facts and the substantive law of your case. Judges are like jacks-of-all-trades: We know a little about a lot of things. We don't pretend to know your case better than you. If you are organized and show that you have control of your case, chances are we are going to follow your lead.

Q: *Do you have any pet peeves?*

A: A lack of civility is definitely what bothers me the most. I really don't like it when attorneys make ad hominem attacks on opposing counsel or the opposing party, or when they argue with each other at counsel table. In addition to being a pet peeve, it often leaves me perplexed and wondering what must have transpired outside of my presence. For instance, counsel may have had a disagreement in the hallway before coming into my courtroom. But all I might see is one person who seems to be getting worked up over something trivial. Even if his anger is justified, I don't know what happened outside of my courtroom and the angry attorney sometimes ends up looking irrational. It is like walking in on your children in the middle of a he-said/she-said disagreement and not knowing whom to believe. Fortunately, the lawyers whom I see (particularly in complex cases) are terrific. The vast majority (as much as 99%) are professional and courteous to the parties, the attorneys and the court. But because I see so many wonderful and professional lawyers, those who lack professionalism really stand out.

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

A: Being with my wife and two kids -- my daughter is 15 and a sophomore in high school and my son is 12 and is in sixth grade. Just keeping up with their soccer games and the like gives me a million things to do. Quite simply, in my free time, I mainly parent and do the things that my kids want/need to do.

That said, one of my favorite things to do is to go traveling with my family. We have undertaken to visit every national park. My wife and I started this undertaking before we even had children. As a result, however, we are

***-Continued on page 8-***

***-Interview: Continued from page 7-***

going to have to start revisiting some of the parks that our kids missed. The next trip, however, falls outside of the national park venue as we are planning a trip to Europe. My kids haven't been there yet and we would like to take a big family trip before my daughter turns 16. Kids really do leave the nest before they move out and this may be the last time (with school, jobs, boyfriends, etc.) when we can all get away together for an extended period of time.

Q: *If you could choose any job in the world other than a judge or lawyer, what job would you choose?*

A: As I said before, I always wanted to be a teacher. I have had some experience at teaching law related classes. Indeed, I taught as a lecturer at UCLA Law School earlier in my career teaching trial techniques. In the past, I have done some teaching by adopting a Santa Ana school and supporting its "Stay in School" program and, more recently, I enjoy helping younger attorneys in the OCBA's "Bridging the Gap" program. In many ways, I feel like being a judge and/or a lawyer is a lot like being a teacher. If you can't boil down the law or the facts in a way that a 12-year old could understand, then you are simply not doing your job.

Thank you Judge Velasquez for your time.

▪ *Linda A. Sampson is Of Counsel in the litigation department in the Orange County office of Morrison & Foerster LLP and Assistant Editor of the ABTL Report.*

***-Appeal: Continued from page 1-***

28.) But since courts of appeal are not required to consider newly-raised issues, it is best not to rely on exceptions, but instead to protect the trial court record.

The purpose of this article is to provide for trial lawyers a basic checklist for trial lawyers of places to make a record -- from the beginning of a trial court case to the end -- so that you won't see in an opinion dreaded language to the effect that the an argument on appeal need not be considered because the point was not adequately preserved below.

**Pleading**

Plead all theories of the case. As one court of appeal said, "[o]bviously, appellant cannot challenge a judgment on the basis of a cause of action it did not advance below." (*United States Golf Ass'n v. Arroyo Software Corp.* (1999) 69 Cal.App.4th 607, 623.) In this case, the court rejected an appellant's attempt to claim for the first time on appeal that the facts gave rise to a Sherman Act violation, which had not been pleaded. And sometimes it is necessary to plead special matters to avoid being tossed out of court. (*See, e.g., CAMSI IV v. Hunter Tech. Corp*. (1991) 230 Cal.App.3d 1525, 1536-37 [party relying on discovery rule to avoid statute of limitations must plead specific facts showing discovery and why discovery could not have occurred earlier with reasonable diligence].)

This rule about pleading all theories applies equally to affirmative defenses, which in some cases have specific pleading requirements. (*See, e.g., Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 385 [party is required to plead *facts* showing equitable estoppel, not just the conclusion that the adverse party is estopped]; *Brown v. World Church* (1969) 272 Cal.App.2d 684, 691 [to properly raise statute of limitations defense, party must either plead specific statute barring claim or *facts* showing that claim is barred]; *see* Code Civ. Proc. § 458.)
One important corollary to these rules is that courts do not allow appellants to reinvent their theories of the case on appeal. Where a case has been tried, the court of appeal will focus not just on the complaint, but also on the theory advanced at trial. (*Richmond v. Dart Indus., Inc.* (1987) 196 Cal.App.3d 869, 874 [misrepresentations alleged in complaint had not been the focus of disputed facts at trial, but instead other misrepresentations had].)

**Summary Judgment**

**Separate statement.** Complying with rules 342 and 343 is a must, because if a fact is not in the separate statement, a trial court has discretion to refuse to consider it. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 315-16.) A recent case, however, has somewhat limited the trial court's discretion in this respect. (*Parkview Villas Ass'n, Inc. v. State Farm Fire & Cas. Co.* (2005) 133 Cal.App.4th 1197.) In this case, the issues were fully joined in the parties' memoranda of points of authorities and the trial court at the hearing indicated that it would decide the motion on the merits. But after taking the case under submission, it granted the motion on the basis that the responding parties' separate statement was inadequate. The court of appeal reversed, finding that even though the responding party had failed to comply fully with the separate statement requirements, the trial court abused its discretion in granting summary judgment without giving that party a

***-Continued on page 9-***

*-Appeal: Continued from page 8-*

chance to correct the deficiencies in the separate statement.

**"Joining" in co-parties' motion.** Simply joining a co-party's motion is not good enough to preserve your right to have judgment entered in your client's favor. Instead, you must file your own motion. (*Village Nurseries, L.P. v. Greenbaum* (2002) 101 Cal.App.4th 26, 46-47.)

**Continuances.** Continuances are not routinely granted, particularly considering the lengthy 75-day notice period for summary judgment motions. You must show that the facts to be obtained are essential to the opposition; there is reason to believe the facts exist; and the reasons why additional time is necessary to obtain the facts. (*Ace American Ins. Co. v. Walker* (2004) 121 Cal. App.4th 1017, 1023; *Cooksey v. Alexakis* (2004) 123 Cal. App.4th 246, 253-54.) If you haven't been diligent a court will likely deny your continuance motion.

**Objections to evidence.** Two points here, one legal and one practical. The legal point is that objections must be in writing and that you must renew your objections at the hearing and ask for a ruling. (Code Civ. Proc. § 437c (b)(5); *Vineyard Springs Estates, LLC v. Superior Court* (2004) 120 Cal.App.4th 633, 642-43.) The practical point is that trial courts (and appellate courts) absolutely hate boilerplate objections and you would be well-advised to limit your objections to critical, dispositive matters. You are more likely to get a favorable ruling that way, and it is not outside the realm of possibility that a court of appeal may one day conclude that a trial court has no obligation to wade through pages of boilerplate objections.

**Pleading.** It bears reemphasis that it is important to plead all appropriate theories of recovery. If the theory on which a plaintiff wishes to oppose summary judgment is not pleaded in the complaint, the plaintiff must seek leave to file an amended complaint -- which is a discretionary call for the trial court that could be avoided by having pleaded the theory in the first instance. The reason the complaint must be amended is that a moving party is required on summary judgment only to negate the theories of the complaint *as pleaded*, not on some theoretical possibility not included in the pleadings. (*IT Corp. v. Superior Court* (1978) 83 Cal.App.3d 443, 451-52; *580 Folsum Assocs. v. Prometheus Dev. Co.* (1990) 223 Cal. App.3d 1, 18 [if a party wishes to offer a different factual assertion from that alleged in complaint, it must move to amend the complaint before a hearing on a summary judgment motion].)

**Admission and Exclusion of Evidence**

**Motions in limine.** The critical question is whether an in limine motion is sufficient to preserve the record without further offering to admit the contested evidence (if you are the proponent) or objecting to it when offered at trial (if you are the objecting party). (*See, e.g., People v. Boyer* (1989) 48 Cal.3d 247, 270 n.13, disapproved on other grounds by *People v. Stanbury* (1995) 9 Cal.4th 824, 830 n.1; *People v. Morris* (1991) 53 Cal.3d 152, 189-90, disapproved on other grounds by *Stanbury*, 9 Cal.4th at 830 n.1; *Redwood Empire v. Gombos* (2000) 82 Cal.App.4th 352, 361 n.11.) The general rule is that unless the court makes a definitive ruling on the motion in limine, the record is not preserved and if you want the evidence in, you must offer it at trial; if you want to keep it out, you must object when it is offered at trial.

And be wary of "moving target" in limine motions where the court disposes of a case without a trial, conducting instead "streamlined" offers of proof proceedings on motions in limine. In such a case the victory may be temporary only because a court of appeal will review the decision as it would a nonsuit following an opening statement, giving all inferences to the losing plaintiff. (*Panico v. Truck Ins. Exch.* (2001) 90 Cal.App.4th 1294, 1296.)

**Objections at trial**. The objection must be (i) on record; (ii) timely; and (iii) on a specific ground. Evid. Code § 353(a). On appeal, the specific ground urged for exclusion must have been made in the trial court. (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 171-72.) If you can't think of a specific ground, object anyway. The trial court just might sustain the objection! And if you can think of more than one ground, state them all.

**Offers of proof at trial.** An offer of proof must show by *specific* description of the proposed *evidence* its substance, purpose, and relevance. (Evid. Code § 354(a); *People v. Schmies* (1996) 44 Cal.App.4th 38, 53.) It is not enough to state the substance of the *facts* to be proved. (*Semch v. Henry Mayo Newhall Mem. Hosp.* (1985) 171 Cal.App.3d 162, 167-68.)

**Miscellaneous In-Trial Matters**

**Bench conferences.** If bench conferences are not reported, and the court makes a ruling or gives direction that may be critical, make a record later out of the presence of the jury.

***-Continued on page 10-***

*-Appeal: Continued from page 9-*

**"View" of premises.** Be sure you understand the implications of a view of the premises, accident scene, or whatever. (Code Civ. Proc. § 651.) It may trump evidence received in court and be essentially unreviewable. (*People v. Buttles* (1990) 223 Cal.App.3d 1631, 1639-40; *see also Hogue v. Southern Pac. Co*. (1969) 1 Cal.3d 253, 258-59.)

**Video depositions.** Unless the trial court specifically orders, a court reporter does not take down video testimony played at trial. (Cal. Rules of Court, Rule 243.9.) For that reason, Rule 243.9 requires that extracts in writing be lodged in the trial court.

**Demonstrative evidence.** Use words to describe what is occurring in the courtroom, particularly if the witness is pointing to charts or physical evidence. Try to place yourselves in the shoes of a judge reviewing the record. Will she understand what the witness is talking about?

**Juror questions.** Make sure they remain in the court file.

**Exhibits.** Try to convince the trial court to keep custody of exhibits if there will be an appeal. If not, work with opposing counsel to maintain an appropriate chain of custody so that the exhibits' authenticity will not be questioned and so that they will remain available to be included in a clerk's transcript or appendix or later to be transmitted to the court of appeal under Rule 18.

## Jury Instructions

Section 647 of the Code Civil Procedure provides that jury instructions are "deemed excepted to." But there is less to this than meets the eye. Section 647 only preserves an objection that an instruction is wrong as a matter of law. (*Mattco Forge, Inc. v. Arthur Young & Co*. (1997) 52 Cal.App.4th 820, 840-41.) Arguments that an instruction is too general or is incomplete are not preserved unless a specific objection is made and a further desired instruction is proposed. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 948-49, disapproved on other grounds by *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563; *Ornales v. Wigger* (1950) 35 Cal.2d 474, 478, disapproved on other grounds by *Alarid v. Vanier* (1958) 50 Cal.2d 617, 622-24.)

Watch out for waiver. If you propose the same or similar instruction to one that you now claim is objectionable, the error will be waived. (*Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 255.) Similarly, stating that you have "no objection" to a proposed instruction waives the benefit of section 647. (*Electronic Equip. Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 856-57.) And finally, make sure the court clerk keeps your proposed (but refused) instructions in the court file. (*Thomas v. Laguna* (1952) 113 Cal.App.2d 657, 660; *accord, e.g., Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1531-33; *Beane v. Los Angles Transit Lines* (1958) 162 Cal.App.2d 58, 59-60.)

## Misconduct

Make a timely objection and ask for an admonition to preserve the argument for appeal. (*Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 318.)

## Verdict Forms

There are three kinds of verdict forms (i) general; (ii) special; and (iii) hybrid, i.e., a general verdict with special interrogatories. Knowing the effect of each may inform your decision which to use in a particular case.
A general verdict is one where the jury finds "generally upon all or any of the issues, either in favor of plaintiff or defendant . . . ." (Code Civ. Proc. § 624.) If a case goes to the jury on two or more theories "of which only one is supported by substantial evidence, and a general verdict is returned in favor of the plaintiff, it is presumed that the verdict was based on the theory that is supported by the evidence." (*Lundy v. Ford Motor Co.* (2001) 87 Cal. App.4th 472, 480.) In such a case a defendant might prefer a general verdict with special interrogatories to determine precisely what the jury found and avoid having a judgment affirmed on the basis of this presumption. (Code Civ. Proc. § 625.)

Special verdicts are ones where "the jury finds the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law." (Code Civ. Proc. § 624.) Despite their popularity, special verdict forms present a myriad of problems that should be considered in the drafting process:

- Is the special verdict clear about damages? Should the figures found by the jury on different causes of action be added together in the judgment or are they duplicative? (*See, e.g., Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1582-85.)

***-Continued on page 11-***

*-Appeal: Continued from page 10-*

- Are the special verdict form questions (or the jury's answers) ambiguous, incomplete, or inconsistent? (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1156-57; *Lambert v. General Motors Corp.* (1998) 67 Cal. App.4th 1179, 1182-85.) A party must object if the problem is evident on the face of the form. (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 131 [defendant claimed that form omitted essential question, but did not object until after jury discharged].) But a failure to object is not always fatal, but instead seems to turn on whether the party is engaged in a deliberate litigation strategy or trying to reap a "technical advantage." (*Compare Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 457 n.2, and *Mixon v. Riverview Hosp.* (1967) 254 Cal.App.2d 364, 376-77, *with Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1687.) Since the law concerning waiver in the context of special verdicts is not a model of clarity, it never hurts to make your record.

- If an inconsistency is caught before the jury is discharged, the trial court should send the jury back to deliberate. (*Mendoza v. Club Car, Inc.* (2000) 81 Cal. App.4th 287, 303-06.) If an inconsistency is not discovered until after the jury is discharged (and has not been waived), the trial court must attempt to interpret the form in connection with the pleadings, evidence, and instructions. (*Woodcock, supra,* 69 Cal.2d at 456-57; *see also Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1344-46; *Cavallaro v. Michelin Tire Corp*. (1979) 96 Cal.App.3d 95, 100-02.)

**Statements of Decision**

Ask for a timely statement of decision in court trials. (Code Civ. Proc. § 632; Cal. Rules of Court, rules 232, 232.5.) Without a statement of decision, the court of appeal will presume that the trial court decided in favor of the prevailing party on *all* issues in the case. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-34; *In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 649.) If you call to the trial court's attention factual omissions or ambiguities in the statement of decision and the court does not address your concerns, you are rewarded: In that case, "it shall not be inferred . . . that the trial court decided in favor of the prevailing party . . . on that issue." (Code Civ. Proc. § 634.)

**Postjudgment Motions**

**Jurisdictional filing periods.** The time for filing postjudgment motions is jurisdictional, with the most common period being 15 days from mailing notice of entry of judgment. (Code Civ. Proc. §§ 629, 659.)

**Jurisdictional decision period.** If you are the moving party, make sure the trial court knows it has a jurisdictional time period within which to rule, and if the court does not do so, the motion is deemed denied. (Code Civ. Proc. §§ 629, 660.)

**Required specification of reasons if new trial motion granted.** If a trial court *grants* a new trial motion, the trial court must -- either in the order or separately -- prepare a specification of reasons for granting the motion on each ground stated. (Code Civ. Proc. § 657.) A careful lawyer for the moving party will be sure that the trial court is aware its obligation to prepare a specification of reasons.

**Filing motion as prerequisite for raising issues on appeal.** Ordinarily a party need not file a posttrial motion as a prerequisite to raising an issue on appeal. (*In re Estate of Barber* (1957) 49 Cal.2d 112, 118-19.) But there are exceptions. The first major exception is where there is a claim that damages are excessive or inadequate. (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 918-19; *Glendale Fed. Sav. & Loan Ass'n v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 122.) This rule, however, does not preclude asserting error in admitting or excluding evidence or in the jury instructions, which may have influenced the amount of the award. (*Glendale Fed., supra* 66 Cal.App.3d at 122.) A second exception is when a record needs to be developed to raise an issue before the trial court. Two typical examples include claims of jury misconduct and newly-discovered evidence. One trap for the unwary in the context of jury misconduct claims is the requirement that the moving party file a "no knowledge" declaration stating that neither the attorneys nor the client was aware of potential misconduct until after the verdict was returned. (*Weathers v. Kaiser Found. Hosps.* (1971) 5 Cal.3d 98, 103.) This requirement prevents a party who knows of misconduct from hedging his or her bets by not raising the issue in the hope of a favorable verdict and bringing a misconduct claim only if the verdict is unfavorable. (*But see Krouse v. Graham* (1977) 19 Cal.3d 59, 82 ["no knowledge" declaration not required where facts confirm that counsel could not possibly have known of alleged misconduct before verdict was rendered].)

**New trial motion as "savior."** Because trial courts have great discretion in ruling on a new trial motion, a trial court may grant a motion even if an appellate court

*-Continued on page 12-*

*-Appeal: Continued from page 11-*

would not consider the argument on the ground the error had not been properly preserved for appeal. (*See, e.g., Malkasian v. Irwin* (1958) 61 Cal.2d 738, 747-48.) So, if you have failed to make an appropriate record in the trial court on a particular point leading up to the posttrial motions, make the argument anyway. If convinced the error is prejudicial and that you are entitled to relief, the trial court may rule in your favor notwithstanding a failure to properly make a record.

**Paying or Accepting the Benefits of a Judgment**

Voluntarily paying a judgment without coercion (in the form of threatened execution) or accepting the benefits of a judgment may result in the loss of a right to appeal. (*Rancho Solano Master Ass'n v. Amos & Andrews, Inc.* (2002) 97 Cal.App.4th 681, 688; *Alamitos Land Co. v. Shell Oil Co.* (1933) 217 Cal. 213, 213-14.) The lesson here is to enter into a stipulation if money will change hands and an appeal is contemplated or underway.

**Appeals**

The time within which to appeal is jurisdictional. (*In re Estate of Hanley* (1943) 23 Cal.2d 120, 123.) Failure to appeal from an appealable order -- even if the order precedes the judgment -- results in the loss of the right to challenge the order. (*Berge v. International Harvester Co*. (1983) 142 Cal.App.3d 152, 158.) One example of an appealable prejudgment order is denial of a motion for leave to intervene. (*Redevelopment Agency v. Commission on State Mandates* (1996) 43 Cal.App.4th 1188, 1194 n.3.)

A notice of appeal should specify the appealable order or judgment from which the appeal is being taken, but in certain cases, a court of appeal may construe a notice of appeal that specifies a *non*appealable order as being from an appealable judgment or order. (*Walker v. Los Angeles County Metro. Transp. Auth.* (2005) 35 Cal.4th 15.)

It goes almost without saying that the trial lawyer's first goal should be to win the trial. But trial outcomes are always in doubt and the lawyer should also keep in mind the need to make a record at all stages of the proceeding.

▪ *Rick Derevan is a partner in Snell & Wilmer LLP's appellate practice group and is a member of the California Academy of Appellate Lawyers and a Fellow of the American Academy of Appellate Lawyers. Mike McIntosh is an associate in Snell Wilmer's appellate practice group.*

*-Insurance: Continued from page 3-*

**2. Right to Independent Counsel**

A derivative of the duty to defend is the right to independent counsel. California Civil Code Section 2860 imposes a mandatory duty upon insurers to provide independent counsel when the resolution of a third-party claim bears directly on the outcome of the coverage dispute between the insurer and its insured. (*San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358, 364.)

The right to independent counsel is one of the most heated disputes in insurance. Disputes arising over the right to independent counsel can take many months to resolve informally. To the extent that the insurer refuses to recognize the right to independent counsel, it may be necessary for the insured to initiate litigation and file a motion for summary adjudication on that issue. Furthermore, while the litigation is being prosecuted, the insured may need to involuntarily wrest control of the defense away from insurer-appointed counsel through a formal substitution of attorney.

Under such circumstances, the insurer may claim a breach of the duty to cooperate and purport to withdraw from the defense. Ultimately, obtaining the right to independent counsel is critical to the proper resolution of any insurance coverage dispute between the insured and its insurer.

**3. Control of Litigation**

Even in situations where independent counsel has been appointed, issues regarding control of the litigation frequently arise. Civil Code Section 2860 provides that "both the counsel provided by the insurer and independent counsel selected by the insured shall be allowed to participate in all aspects of the litigation." Based on this provision, insurers frequently argue that their appointed counsel has the right to be directly involved in all discovery, law and motion and strategy decisions.

From the perspective of the insured, any efforts by the insurer to control the litigation directly contradict the purpose of Civil Code Section 2860 and should be strenuously resisted. Although independent counsel and the insured have an obligation to fully cooperate and share information and documents with the insurer and its appointed "monitoring" counsel, at the end of the day there can only be one ultimate decision maker in the litigation: independent counsel. Thus, a bright line must be drawn

***-Continued on page 13-***

*-Insurance: Continued from page 12-*

between the legitimate monitoring activities of insurer's counsel and an improper attempt to become involved in substantive issues and decision making in the litigation.

**4. Hourly Rate**

Disputes involving the hourly rate to be paid arise in virtually every case involving independent counsel. Pursuant to Civil Code Section 2860, the insurer must pay independent counsel "the same rates that actually paid by the insured to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community." Based on this language, insurers typically will argue that independent counsel must accept the lowest "off the rack" rates paid by that insurer.

Independent counsel should resist such efforts. First, the hourly rate paid by insurers to their panel counsel does not truly reflect all the consideration that panel firms receive. For example, a law firm that has a commitment to a large volume of cases saves significantly on overhead and other costs, including marketing. In addition, the regular hourly rates do not include year-end bonuses or other incentives that may also be paid.

Second, an "apples to apples" comparison must be made. Many business litigation disputes are extremely complex and require sophisticated counsel. Likewise, such disputes frequently involve high damages and require specialized handling. Thus, what the insurer pays its lawyers to handle simple disputes is not relevant.

Ultimately, resolving hourly rate disputes is much easier when in a litigation mode. For example, an insured can serve comprehensive discovery upon the insurer seeking information regarding what hourly rates the insurer pays to lawyers for similar claims. Independent counsel should be entitled to payment of the highest rate that the insurer pays in other cases. After completion of discovery, disputes regarding hourly rates must be resolved by binding arbitration.

**5. Litigation Guideline**

Virtually all insurers have "Litigation Guidelines" that they require their regularly appointed panel defense counsel to follow as a condition of employment. Many of these insurers attempt to impose these same obligations upon independent counsel. Such efforts should be rejected by independent counsel.

In *Dynamic Concepts, Inc. v. Truck Insurance Exchange* (1998) 61 Cal.App.4th 999, the court held that not only was it an improper interference in the attorney-client relationship for an insurer to attempt to impose any of its standard litigation guidelines upon independent counsel, but "questioned" their use even for insurer appointed counsel. The Court stressed that, "[u]nder no circumstances can such guidelines be permitted to impede the attorney's own professional judgment about how best to competently represent the insureds." (*Dynamic Concepts* at 1004, fn. 9.)

The *Dynamic Concepts* case is only the most recent articulation of the fundamental principle that an insurance company cannot engage in the practice of law or impede the professional judgment of the attorneys defending its insureds. (California Business & Professions Code Section 16125; *See also, In the Matter of the Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures* (2000) 2 P.3d. 806.

**6. Recovery of Pre-Tender Fees**

The sine qua non of any insurance claim is tender to the insurer. If the insurer has no notice of the claim, no coverage can exist. On some occasions, tender is made weeks or months after the claim is filed. Late tender can result from various factors, including inability to locate the policy, a lack of understanding that the claim may potentially trigger insurance coverage or simple inadvertence. Whatever the reason for the late tender, insurers

***-Continued on page 14-***

*-President: Continued from page 2-*

and fundraising event. She has performed a valuable service for us all.

Before I turn the column over to Gary Waldron, I just want to put in a plug for the annual seminar to be held this October in Maui. I promise that you will not have a better program experience than one that is sponsored by ABTL. Members from all over the state, including judges and notable attorneys will be present and participate in sharing a wealth of knowledge. The location is superb, the weather will be ideal, and a good time will be had by all who attend. I look forward to seeing you all there.

Thank you for giving me the opportunity to lead this fabulous group. I now relinquish my position into the capable hands of Gary Waldron.

▪ *Hon. Sheila B. Fell is a Judge of the Orange County Superior Court of California.*

*-Insurance: Continued from page 13-*

uniformly take the position that they are not responsible for reimbursement of attorneys' fees and costs incurred prior to tender.

Although recovery of pre-tender fees is not possible in every case, insureds should attempt to obtain pre-tender fees whenever possible. Recovery of pre-tender fees will depend upon the circumstances of each case. For example, if a case is filed with a flurry of *ex parte* applications, requests for temporary restraining orders, injunctions and other early litigation activity, the insured should be entitled to reimbursement of its attorneys' fees for these activities even before tender. Likewise, if the insurer has suffered no prejudice as a result of the defense activities --and in fact benefits from such defense expenditures -- and if independent counsel would have been warranted in any event, then the insurer should reimburse pre-tender fees as a matter of equity and fairness. Further, an insured may also be excused from late tender because of a lost policy of other mitigating factors. (*See Shell Oil Co. v. National Union Fire Ins. Co.* (1996) 44 Cal.App.4th 1633; *Fiorito v. Sup.Ct.* (1990) 226 Cal. App.3d. 433.

**7. Recovery of Post-Tender and Pre-Acknowledgment Fees**

A derivative of issues regarding pre-tender fees are attempts by insurers to avoid payment in full of an insured's attorney's fees incurred post-tender but before acknowledgment of the defense by the insurer. Once an insurer refuses to defend its insured, that insurer must pay all attorney's fees incurred after its refusal to defend, in full and without any reduction in the hourly rate. (*Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223; *Foxfire, Inc. v. New Hampshire Ins. Co.* (1994) WL 361815.) This same rule applies equally when the insured incurs attorney's fees post-tender but before acknowledgment of the duty to defend. The insurer must pay all of the attorney's fees and the regular hourly rate charged by that counsel.

**8. Reasonableness of Fees**

The litigation audit is an offshoot of Litigation Guidelines and the bane of appointed panel defense lawyers everywhere. Insurers will typically scrutinize bills of independent counsel even more carefully than the bills of regular panel lawyers. While appointed panel lawyers usually have no choice in the matter, independent counsel have no obligation to endure unreasonable attempts to reduce their bills. Rather, the insurer is obligated as matter of law to pay all reasonable fees and expenses.

Pursuant to Civil Code Section 2860, all billing disputes must be submitted to binding arbitration. It may be wise for independent counsel to immediately petition for arbitration, so that billing issues are resolved early in the case and a protocol is established.

Furthermore, the insurer's refusal to pay all outstanding bills may be a breach of the duty to defend or even an interference with the contract between the insured and its independent counsel.

**9. Settlement**

The settlement context is rife with disputes and conflicts between insurers and their insureds. For example, insurers frequently attempt to obtain contribution from their insureds for settlement because some portion of the settlement deals with uncovered claims. Insureds just as strenuously demand that insurers pay the entire amount of such settlements.

Similarly, many disputes arise regarding timing of settlements. For example, insureds may demand that the insurers immediately settle outstanding claims, even up to policy limits. Insurers, on the other hand, may evaluate the case much differently and view it as economically more feasible to litigate the case. Interestingly, professional liability claims frequently involve the converse situation, as insureds demand that the insurer fight the claim all the way through trial while insurers seek the predictability of a settlement.

Finally, high deductible or self-insured retention policies also create interesting settlement dynamics, as insurers may wrongfully attempt to settle cases within the deductible or retention amounts (which the insured then has to pay).

**10. Post-Judgment**

Ironically, resolution of the underlying claim does not mean that the litigation process is over. Rather, it frequently signals the *beginning* of a lengthy, second lawsuit with the policyholders own insurer. Typically, the insurer's conduct throughout the 10 phases of insurance coverage becomes the principal issue in the insurance lawsuit.

For the insured, most post-judgment disputes concern litigation for breach of contract or bad faith. For example, if the insurer had an opportunity to settle within

***-Continued on page 15-***

***-Insurance: Continued from page 14-***

policy limits but chose not to do so, any judgment in excess of policy limits may be the responsibility of the insurer. Further, the insured may sue for reimbursement of defense fees and costs not paid or the complete failure by the insurer to defend and indemnify.

From the insurer's perspective, two principal issues arise post-judgment. First, an insurer who has issued a reservation of rights letter may seek reimbursement of attorneys' fees and costs, which were incurred in the defense of clearly uncovered claims pursuant to *Buss v. Transamerica* (1977) 16 Cal.4th 35. Second, an insurer that pays a settlement to a claimant may later seek reimbursement of that settlement through a declaratory relief action finding that there was no coverage for the claim at issue. (*Maryland Cas. Co. v. Imperial Contracting Co.* (1989) 212 Cal.App.3d 712.) Both of these mechanisms are rarely utilized by insurers, however, as they involve significant litigation costs in enforcing the rights at issue and typically concern insureds without the resources to pay any significant judgment.

Understanding the 10 phases of insurance coverage is critical to properly representing one's client in complex business litigation. This is especially true in circumstances where an insurer acts improperly in discharging its obligations and prejudices the defense of the insured in the litigation.

▪ *Edward Susolik is a partner at Callahan & Blaine, where he is head of the Insurance Department and specializes in complex business litigation and insurance law. He also teaches insurance law as an adjunct professor at USC Law School and is an editor for the Rutter Group Practice Guides on Insurance Litigation..*

***-Remand: Continued from page 3-***

joined. A plaintiff faced with the prospect of diversity jurisdiction permitting removal under 28 U.S.C. Section 1441 (b), may name other defendants to defeat complete diversity. However, a defendant may nonetheless remove the action if they can show the additional defendants to be "sham", or "fraudulent" thereby preventing a cause of action from being stated. (*Morris vs. Princess Cruises, Inc.* (9th Cir. 2001) 236 F.3d 1061, 1067; *Triggs vs. John Crump Toyota, Inc.* (11th Cir. 1998) 154 F.3d 1284, 1287.)

By removing a case, under such circumstances where multiple defendants would defeat diversity, the defendant bears a heavy burden to justify its claim of diversity jurisdiction. (*Green v. Amerada Hess Corp.* (5th Cir. 1983) 707 F. 2d 201, 205.) Defendant in its Notice of Removal must include an explanation of the basis for its claim of fraudulent joinder of these additional defendants. A defendant is deemed to be fraudulently joined "if a plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to settled rules of the state." (*McCabe v. General Foods Corp.*, (9th Cir. 1987) 811 F. 2d 1336, 1339 (citing *Moore's Federal Practice* (1986) para. O. 161[2].). Defendant must "demonstrate that there is no possibility that the plaintiff will be able to establish a cause of action in state court against the alleged sham defendant." (*Good v. Prudential Ins. Co. Of America* (N.D. CA 1998) 5 F. Supp. 2d 804, 807.).

Sometimes the District Court Judge will give notice on its own of the intent to remand the action. More commonly, the plaintiff whose case is removed would have to file a motion to remand, in which factual refutation of the allegations of fraudulent joinder would be set forth.

Defendant has the burden of proving the necessary elements of federal court jurisdiction. *(Gaus v. Miles, Inc*., 980 F.2d 564, 566 (9th Cir. 1992); *Jernigan v. Ashland Oil Co.* (5th Cir. 1993) 989 F.2d 812, 815-816; *Boyer vs. Snap-On Tools Corp.*(3d Cir. 1990) 913 F.2d 108, 111.) Thus defendant would be compelled in its Opposition to the Motion for Remand to set forth the factual and legal support for its claim that the non-diverse defendants have no liability.

In determining whether joinder of a party is "fraudulent", it should be borne in mind that the term does not imply intent or lack of character or integrity; rather it refers to the inability to state a cause of action against the nondiverse defendant, or that no cause of action exists. A joinder has been held to be fraudulent "if there is no real intention to get a joint judgment, and... there is no colorable ground for so claiming. (*AIDS Counseling & Testing Ctrs. Vs. Group W. Television, Inc.* (4th Cir. 1990) 903 F.2d 1000, 1003; *McCabe vs. General Foods Corp.*, supra, (9th Cir. 1987) 811 F.2d 1336, 1339. The test applied is whether plaintiff has any possibility of establishing liability against the non-diverse party. (See *Dodson V. Spiliada Maritime Corp.* (5th Cir. 1992) 951 F.2d 40, 42; *Ritchey v. Upjohn Drug Co.* (9th Cir. 1998) 139 F.3d 1313, 1318-1319.) However, plaintiff's burden is lighter than the defendant's –even a "slight" possibility of recovery will defeat defendant's claim of fraudulent joinder. (*Hartley v. CSX Transp. Inc.* (4th Cir. 1999) 187 F.2d 422, 426.

***-Continued on page 16-***

***-Remand: Continued from page 15-***

In considering a motion to remand, the court must "resolve all contested issues of substantive fact in favor of the plaintiff and must resolve any uncertainties as to the current state of controlling substantive law in favor of the plaintiff...". *Boyer v. Snap on Tools Corp.*, 913 F.2d 108, 111 (3rd Cir. 1990), cert. denied, 498 U.S. 1085 (1991) quoting *Coker v. Amoco Oil Co.*, 709 F.2d 1433, 1440-41 (11th Cir. 1983).

The Court in deciding such a claim, may go beyond the pleadings and consider evidence as it would for a summary judgment motion. The Court may consider affidavits or other evidence on the issue of whether a named defendant is "sham" or "fraudulent". (*West America Corp. V. Vaughan Basset Furniture* (9th Cir. 1985) 765 F.2d 932, 936, fn.6; *Cavallini v. State Farm Ins. Co.* (5th Cir. 1995) 44 F.3d 256, 263.) Any ambiguity or dispute in the evidence will defeat defendant's claims. (*Travis v. Irby* (5th Cir. 2003) 326 F. 3d 644, 649.)

Except for a procedurally dispositive defense such as statute of limitations, most affirmative defenses that would otherwise be pled in an Answer will not be considered in deciding whether to remand the case. ( *Ritchey v. Upjohn Drug Co.*, supra, (9th Cir. 1998) 139 F.3d 1313, 1318-1319.) If on the other hand the defense does involve a procedural matter which could present a bar to plaintiff bringing the action, then the court may take judicial notice of, for instance, the date of filing of a lawsuit or action.

There can be further consequences to a removing defendant beyond having the case remanded back to state court.

If a defendant's decision to remove was wrong as a matter of law, it may face an award of attorneys fees to the plaintiff. (*Ansley v. Ameriquest Mortgage Co.* (9th Cir. 2003) 340 F. 3d 858, 864. The matter of whether to award or not award fees to a prevailing plaintiff is within the sole discretion of the district court. (*Mortera vs. North American Mortgage Co.* (N. D. Cal. 2001) 172 F. Supp. 2d 1240, 1245.) However, a losing defendant on a remand motion may also face sanctions under FRCP 11, if it is established that defendant removed the action to federal court without an "objectively reasonable basis" for doing so. (*McKinney V. Board of Trustees of Maryland Comm. College* (4th Cir. 1992) 955 F.2d 924, 928; *Standridge v. Wal-Mart Stores, Inc.* (ND GA 1996) 945 F. Supp. 252, 254.)

Furthermore, a plaintiff may use to his or her advantage the court's rejection of defendant's claim of sham filing, as a finding of merit. Even if the court's rejection of the "sham" claim is not sufficient to support an award of attorneys fees at this stage, it may still be cited as a basis for denying summary judgment later on in the case. Thus, a defendant should exercise caution in removing the case where non-diverse defendants exist, and consider doing so only where strong facts support a finding of fraudulent joinder.

Thus, neither the inclusion of a diverse defendant, nor the allegation such defendant is a "sham" should be done without considering the merits and consequences. A plaintiff should not automatically assume that removal is a "fait accompli" because a defendant has raised a claim of "fraudulent" joinder. Keep in mind defendant's heavy burden to sustain such a claim, and the high likelihood that a case with non-diverse defendants will still be remanded in the face of defendant's "sham" assertion. A defendant should not automatically remove a case because of the belief that certain defendants were included solely to defeat diversity jurisdiction. Courts have held that even such a motive will be overridden by facts supporting even the mere possibility that claims against that defendant have merit.

▪ *Michelle Reinglass is an employment rights attorney in Laguna Hills, and serves as a mediator and arbitrator. She is a member of the ABTL Board..*

***-O'Leary: Continued from page 4-***

cial Council's Task Force on Self-Represented Litigants. Justice O'Leary has received many honors and awards for her superb role both on and off the bench. Most recently, she received the Orange County Bar Association's prestigious Franklin G. West Award for her lifetime achievements advancing justice and the law. Her work, both past and present, serves as an inspiration for us all.

It was both a privilege and an honor to spend the morning with Justice O'Leary. Not only did I come away with a better understanding of the California appellate system, I also received important insight and advice from a remarkable person and Justice. I want to thank Justice O'Leary for taking time out of her busy schedule to meet with us. It was truly an invaluable experience.

▪ *Laura Goodwin is an associate in Jones Day Irvine Office. Prior to joining Jones Day, Laura served as a law clerk to the Honorable William J. Rea on the United States District Court for the Central District.*

*-Property: Continued from page 4-*

of the USPTO. Interestingly, I found in each of these venues that intellectual property issues rarely were partisan. The battle lines typically did not break down along Republican or Democrat lines: when IP warfare erupted, it tended to be a battle between those who understood the importance of intellectual property, and those who did not.

During my tenure in the Bush Administration, we celebrated the bicentennial of the U.S. Patent Office. While the anniversary itself generated few news stories, its significance should not be underestimated. The basic right to benefit from one's thoughts and ideas has turned America into the most technologically advanced and economically vibrant power on Earth. The phenomenon is true elsewhere: around the world, an indisputable correlation exists between a country's economic strength and the vitality of its IP protection.

Our bicentennial celebration came at a time of great challenge for the agency and for intellectual property rights generally. An explosion of patent filings and increasingly complex technologies were threatening to overwhelm the USPTO. The average time it takes today for a patent application to make it through the agency is about twenty-seven months; that average delay was expected to reach four to five years in the near future. Alarmingly, in some complex and critical technologies, average pendency rates already stretch to five years, with future pendency increases projected to grow from there. The modern failure to provide quality patent examination and processing in a timely fashion disadvantages U.S. inventors and businesses greatly.

As innovation accelerated rapidly and technology became more complex, the USPTO continued operating under the same basic business model as it did in Thomas Jefferson's day. The USPTO receives about 350,000 new patent applications annually. Those applications go to the back of the line and take their place among the almost one million pending applications awaiting examination. Without the funding to keep up with the hiring and training of qualified examiners to process highly complex applications in a timely manner, the USPTO has developed a horrible backlog reaching crisis levels. Without reform, the backlog in the next few years was projected to skyrocket to over one million applications. Of course, quality suffers under increased agency pressure to clear out the backlog.

President Bush understands the problem. His Administration, along with a bipartisan group of congressional leaders, supported my effort to reform the agency and move it away from an Eighteenth Century, one-size-fits-all bureaucratic model and usher it into the market-driven Twenty-First Century.

First, we reached out to our applicants and listened to their ideas. We initiated an aggressive top-to-bottom review of the agency to find new ways to improve patent quality and reduce pendency. Based upon this review, we proposed the comprehensive Twenty-First Century Strategic Plan to transform the agency into an Information Age, e-commerce based organization that responds to changing market conditions rapidly.

When fully implemented, the reorganization of the USPTO will cut the size of the USPTO's inventory substantially, and ensure that the patents issued and the trademarks registered are of the highest quality. It is built on the premise that American innovators need to obtain enforceable IP rights here and abroad as seamlessly and cost-effectively as possible. A patent office that takes years to issue a patent of questionable validity starves the engines of new technology, more skilled jobs, and better products and services. These reforms required change, and in Washington change never comes easy. Much of the plan is moving forward, but Congress needs to quit "taxing technology" and end the practice of diverting USPTO fees to unrelated budget areas. The USPTO receives no tax dollars: it exists on the fees paid to it by its users. Also, USPTO users must discard some of their outmoded, wasteful filing practices and USPTO employees must be highly trained and certified in their areas of expertise and maintain that certification throughout their careers.

As the USPTO confronts these challenges, a greater danger lurks that threatens to undermine the rights of IP owners. From the wholesale pirating of copyrighted music and movies to the loud demand in some circles that IP rights be discarded, many now ignore our Founding Fathers' wisdom respecting the importance of protecting intellectual property.

Cracks in the IP foundation threaten the entire economic house. On the copyright front, peer-to-peer file sharing has enabled millions of individuals to steal billions of dollars in copyrighted music and motion pictures. At the same time, the promise of securing patent rights for pharmaceutical products -- the main reason research and development for new "wonder drugs" exists -- is challenged globally. There is a growing sentiment in some quarters that intellectual property rights are not as important as tangible property rights, and infringement of IP is a matter of personal right. This is a dangerous approach, both to ancient notions of private property rights as well as to future incentives for innovation. Under our laws, we evict squatters and we jail purse snatchers. That same moral sense of right and wrong must apply to pro-

***-Continued on page 18-***

*-Property: Continued from page 17-*

tecting intangible property rights, which encourage the development of new inventions, new technologies, and new creations.

If we do not respect the laws that protect things like software, databases, motion pictures, and songs, why should a more IP-hostile world beyond our shores deal any differently with thieves and pirates? If we do not ensure effective patent protection for new pharmaceuticals, what incentive will there be for industries to fund the research and development that results in life-saving new medicines?

Here, the lessons are clear. We cannot respect property rights selectively. We must not repudiate property rights because it suddenly becomes convenient, trendy, or expedient to politicians reaching for some new giveaway at the expense of others.

I affixed my signature to over 300,000 new patents while I was USPTO Director. I hope each signature executed helped to facilitate a better and more prosperous world through greater innovation.

This modern day application of the Founders' dream for America cannot be maintained without an understanding of intellectual property. IP protection merits the same respect in law as does the protection afforded to one's home or other tangible belongings. Without a better understanding of intellectual property and its role in our economy, the vitality of existing IP laws and our nation's technological advancement is at risk.

Intellectual property creates wealth and improves the quality of life. We must not allow the canons of our constitutionally-based IP protections to be discarded or bastardized. Our Founding Fathers' wisdom remains both proven and relevant, and the stakes they identified for our nation remain high.

*The Honorable James E. Rogan is a former gang murder prosecutor in the Los Angeles County District Attorney's office, a state court judge, Majority Leader of the California State Assembly, U.S. Congressman, U.S. Undersecretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office. Today he is of counsel at Preston Gates Ellis in their Orange County office. Harper Collins published his best-selling memoir, "Rough Edges," in July 2004.This article is reprinted and revised with permission from the Journal of Technology and Law Policy © 2004.*

*-Sponsor: Continued from page 5-*

on-site collection is data provided to you on CD-ROM, disk, etc. and is only a copy of the file, and does not contain the "metadata" or behind the scenes information about a file.

**Review & Process**

Once information is collected, the E-Discovery vendor will then work with counsel to establish a set of terms that will be used to pull out the documents that may be significant to the litigation. These search terms are used to help scale down the massive collection of documents to a more manageable and relevant size. Remember, it is also important to have proper knowledge of search and retrieval software and training, and a significant amount of document storage space as well. Documents are then run through an E-Discovery software program, and then converted to group IV TIFF or PDF images where text can be extracted. De-duplication on the database to filter out documents can be done at this time as well. After all documents have been run through the software, the client will then receive TIFF or PDF images of the documents and corresponding text files. Some vendors provide "native" file review as well, which allows you to review electronic files in their native format. Occasionally, the E-Discovery vendor may come across "problem" documents such as password problems, unknown file type, corrupt documents, etc. When this occurs, the documents can be segregated and worked on individually to fix the problem with little exception handling. Reviewing and producing electronic documents is an extensive undertaking and should not be left to a legal assistant to read through using basic search and retrieval methods. Using an experienced E-Discovery vendor will help avoid the risk of providing too much or not enough producible data.

**Production**

After filtration, documents are ready to be reviewed and can be produced on a variety of external electronic media such as CD-ROM, DVD-ROM, disk, digital tape, or on secure online web repositories depending on the size of the collection. For time purposes, it is important to have an agreement upfront regarding which type of electronic media will be used. Now, you can search through the data quickly to find the exact information you need at any time.

**Electronic Discovery Vendors**

The E-Discovery process requires careful selection of



*-Continued on page 19-*

*-Sponsor: Continued from page 18-*

your E-Discovery vendor. An E-Discovery vendor has the ability to work with a client's IT staff to distinguish where documents are stored, what format they are stored in, and how the data can be retrieved in a way that does not change it. Furthermore, E-Discovery vendors have the proper equipment and personnel to provide everything from pre-consultation and training to software applications and trial strategy.

**Conclusion**

More than 90% of all business documents exist electronically, many of which are never printed. The production of electronic documents and data is now a part of our litigation culture. By processing electronic documents electronically, lawyers and their clients can significantly cut discovery costs and save time by eliminating needless steps. Taking your time and educating yourself about E-Discovery vendors prior to needing them for a case will save you an enormous amount of time, effort, and money.

*For more information about electronic discovery services, please call Jenny Coleman at 901-261-1293 or Charles Wright at 901-261-1223, or visit our website at www.TheDataCo.com/e-discovery.*

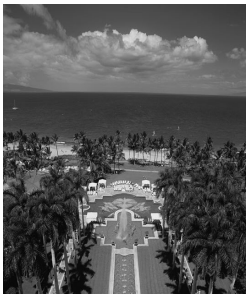
## SAVE THE DATE

### ABTL 33rd ANNUAL SEMINAR
### OCTOBER 19-22, 2006
### GRAND WAILEA RESORT

## "WHEN THINGS GO WRONG"

**You are invited to join us for another year of unmatched ABTL programming, while enjoying the beauty of Hawaii.**

**The ABTL returns to Maui in 2006 and has negotiated incredibly reduced room rates at the Grand Wailea.**



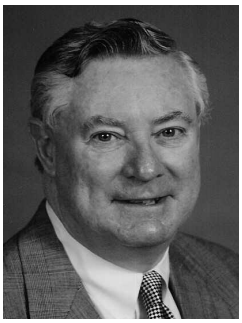
***Garden Rooms at $220 & Ocean Rooms at $255.***

**Mark your calendar and join us in Hawaii. Mahalo!**

## ABTL DINNER PROGRAM

# THURSDAY, FEBRUARY 23, 2006

# Terence MacCarthy



## "What You May Not Know About Impeachment"

As one of ABTL's most popular speakers, Terry MacCarthy returns to educate and entertain us on the topic of Impeachment, an issue of paramount importance to all trial lawyers. Don't be left out, register early!

The Westin South Coast Plaza Hotel,
686 Anton Blvd., Costa Mesa, CA

**6:00 p.m**. Judges Reception
**7:00 p.m.** Dinner and Program

*Cost:* 2006 ABTL Members **$65**
Non-Members **$90**

*Tables of 8 Members Cost:* **$500**
*Tables of 8 Non-Members Cost:* ***$720***

ASSOCIATION OF BUSINESS TRIAL LAWYERS
abtl
ORANGE COUNTY

1800 S. Fairfax Ave.
Los Angeles, CA 90019