ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

ORANGE COUNTY

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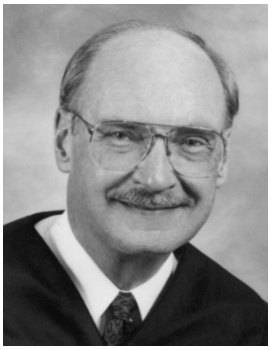
Q&A with the Honorable Raymond J. Ikola



[Editor's Note: Our judicial interview this issue is with Judge Raymond Ikola. Judge Ikola has held a variety of positions on the Superior Court since his appointment, including Supervising Judge of the Civil Panel. He now is assigned to the Complex Civil Litigation Panel.
Disclaimer: The editor was a law school classmate of Judge Ikola and they practiced together until Judge Ikola's appointment to the bench. But as a condition of the interview, the editor agreed not to ask about the judge's law school escapades.]

Q. I understand you have a Ph.D in electrical engineering. Tell me a little about your engineering career and why you decided to go to law school.

A. I worked as a research engineer for eight years with RCA Laboratories in Princeton, New Jersey, mostly conducting research on certain types of microwave solid-state devices. I became bored with the work after the first six years. For reasons unknown to me, and

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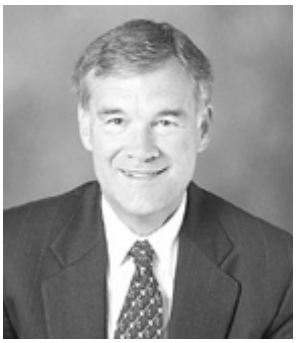
The Lawyer as Expert Witness: Perils and Pitfalls

By Robert E. Gooding, Jr.

Several months ago, I received a call from a lawyer on the East Coast asking if I would be willing to testify as an expert witness in an arbitration in New York. The case involved a multi-million dollar dispute between two large directors' and officers' liability insurers centering on the reasonable settlement value of a significant securities class action case that had been litigated, and then settled, in state and federal courts in Alabama.

As one who has had considerable experience representing defendants in securities class actions, I was asked to review the voluminous record in the case—including multiple complaints filed in related cases in federal and state courts, motions to dismiss and other relevant pleadings, "hot" documents produced in discovery, deposition transcripts, interviews of key witnesses, correspondence, and other materials—and render an opinion on what the case could reasonably have settled for. After checking on conflicts, I accepted the assignment and embarked upon what turned out to be a time-consuming and arduous process.



This was, for me, a new experience. As a business trial lawyer, I had worked with and prepared scores of expert witnesses in securities, antitrust, and other complex commercial cases. And, while I had testified previously as a percipient witness, I had never before had the opportunity to testify as an expert. My direct testimony took the better part of a day, and I was vigorously cross-examined by an able and experienced trial lawyer for nearly two full days. The assignment proved to be challenging and interesting, and—while I still would

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President's Message: The Search for Truth

by Andrew J. Guilford, President

A trial has been called a search for truth, and ultimately the job of business trial lawyers is to find that truth. Over the 25 years I have been plying this trade, I believe the search for truth has become more difficult, or perhaps I have just become more aware of the challenges in finding the truth. Good trial lawyers must be fully aware of these challenges, and aware of the different tools available in pursing the truth.

Early on, as a young and perhaps naive litigator, I was frankly amazed to see how easily some witnesses could lie. As a more experienced trial lawyer, I learned that rationalization, the passage of time, and the psychology of human memory can make people think that a lie is the truth. With huge dollars on the line, and the passage of time between an event and the trial concerning that event, the human mind can rationalize a lie into the truth. Examination strategy hoping to convince a witness not to lie will be largely ineffective in cases with such rationalizers.

Similarly, human perceptions are faulty, which can result in an honest person honestly believing that a bald defendant had curly hair. Perception, and understanding what we perceive, is also affected by the truism that half the human population has below average intelligence, and for every person with an IQ around 120, there is a person with an IQ around 80. In our judicial system, such persons are sometimes witnesses, and such witnesses present examination challenges.

Societal trends might also impact truth-telling. For example, our post-modern cynicism about societal values and governmental institutions no doubt make it easier for some to lie. I fear that few children these days hear the same story in school that I heard every February 22 about a fallen cherry tree, George Washington, and the virtue of telling the truth!

Finally, of course, some people are just darn good liars, either through personal psychopathology or maybe just through years of practice!

What can we do in our judicial system to combat all

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DO YOU HAVE SOMETHING TO SAY?

If you are interested in submitting material for publication in any upcoming issues of the abtl Orange County Report, please contact our Executive Director at 323.939.1999 or submit your material directly to abtl@mediaone.net.

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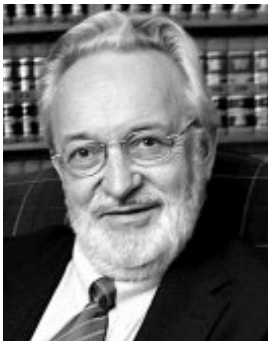
Writ Proceedings in the Court of Appeal

By Hon. William F. Rylaarsdam

This article previously appeared in The Verdict, the Journal of the Association of Southern California Defense Counsel.



Although appeals are often handled by appellate specialists, petitions for extraordinary relief filed in the Court of Appeal are generally handled by trial counsel. Therefore, such counsel should be aware of the technical requirements for such writs, the manner in which such writs are handled by the appellate courts, and the criteria for granting requested relief.

The most common writ petitions filed in the Court of Appeal are petitions for a writ of prohibition (seeking an order restraining the trial court from taking some contemplated action) and for a writ of mandate (seeking an order compelling the trial court to take certain action). Petitions for writ of certiorari (review of a completed judicial act which is not appealable at all, such as a judgment after a de novo trial in the superior court in a small claims action or an order holding someone in contempt) are rare.

The petition for extraordinary writ frequently includes a request for a stay, that is for an order prohibiting the trial court from proceeding with the contemplated action until the appellate court rules on the matter or prohibiting the trial court from taking any further action with respect to the case at issue until the appellate ruling. Absent the issuance of such a stay, the filing of the petition does not deprive the trial court of jurisdiction to proceed.

Procedural Requirements

Counsel preparing a petition for extraordinary relief should carefully study rule 56 of the California Rules of Court which specifies the contents of the petition and its supporting documents. The petition must be supported by an "adequate" record. This means that copies of all relevant documents from the trial court must be supplied either as an appendix to the petition or by way of a separate volume or volumes containing exhibits. An "adequate" record requires that all documents pertaining to the issue, including those filed by the opposition and relevant transcripts of the trial court proceedings, must be supplied to the court.

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abtl February Dinner Program: The Y2K Presidential Election and the Judicial System: Lessons for Litigators

By Sean Sherlock

Just when you thought passions had subsided over the 2000 Presidential election, the abtl's February program proved that the coals are still hot. Our distinguished panel, led by moderator Andy Guilford, also included Wylie Aitken and Professor John Eastman of Chapman University School of Law. As always, the panel came with sterling credentials. Mr. Aitken represented now-U.S. Congresswoman Loretta Sanchez in her 1996 election recount dispute with then-Congressman Robert Dornan. Professor Eastman is a renowned election law expert, and was invited by the Florida legislature to testify before it while the legislature was deliberating whether to enter the Florida recount fray following last year's presidential election.

Our panel emphasized that an election dispute lawsuit is unlike any other type of lawsuit. In addition to being greatly compressed, the process, the parties, and the result are highly politically-charged. The lawyer must cope with all the typical challenges posed by a high profile case, and is shackled in a significant way by politics: Sometimes good legal arguments need to take a back seat to political reality. Judges in such cases are also under intense pressure because election law cases do not typically appear on their docket, but when they do appear, they are accompanied by significant media and public scrutiny, not to mention second-guessing.

Overall, our panel provided an entertaining and informative insight into an area that, while many of us may never practice in it, we cannot help but be intrigued by it.

▪ **Sean Sherlock, Snell & Wilmer L.L.P.** i*s a partner in the Irvine, CA, office and a member of the firm's Commercial Litigation Group.*

MARK YOUR CALENDAR:
abtl 28TH ANNUAL SEMINAR
OCTOBER 11—14, 2001
La Quinta Resort & Club

abtl April Dinner Program: Recent Decisions of the U.S. Supreme Court

By Deborah Mallgrave

At the April abtl dinner, Professor Charles Whitebread of the USC Law School entertained abtl members with his humor, insight, and analysis of significant cases decided by the United States Supreme Court in its 1999-2000 term. While providing a witty account of the Court's important decisions, Professor Whitebread amused us all with his clever insights into the Court's decision making process and telling observations about the cloistered life of Supreme Court justices compared to the general population.

We learned, for example, that the justices are not swept up in the reality television show craze. During one oral argument — rather than incisive questioning — a number of justices exclaimed "you're kidding" upon hearing that a policeman bursting into the wrong house to arrest the wrong person was being filmed for a reality television show at the time.

Professor Whitebread also described how the court rejected a challenge to *Miranda*, perhaps the court's best-known decision among the general public. Considering how deeply these rights are embedded in our society — thanks to the popularity of yet more television shows — Professor Whitebread pointed out that this decision may be based in large part on the Chief Justice's desire to "not be the guy who took away America's rights." He also told us that Sandra Day O'Connor is the "go-to" justice who was in the majority in all but 4 of the term's 73 cases.

And finally, while not part of the 1999-2000 term, *Bush v. Gore* did not escape the professor's scrutiny. Calling it the most memorable moment of the Supreme Court in U.S. history, he said that after this case, he wouldn't predict anything. Whether your practice involves issues of constitutional law or business litigation, Professor Whitebread's theories and anecdotes were informative and entertaining, and left us all with something to think about.

▪ **Deborah Mallgrave, Snell & Wilmer L.L.P.** i*s an associate in the Irvine, CA office and a member of the firm's Commercial Litigation Group.*

CUTTING OFF CALIFORNIA STATE COURT CLASS ACTIONS BEFORE THEY START: Recent Appellate Decisions Should Embolden Defendants to Attack Class Complaints Swiftly by Demurrer

By Michael G. Yoder & David Koch

Michael G. Yoder

David Koch

The initial steps of the class action dance may be changing in California state courts. For over thirty years, the predominant method of determining the legal sufficiency of a prospective class has been an evidentiary hearing after class-related discovery has taken place. Preparation for such a hearing, including class discovery, can be expensive and it can occupy the time of key executives and company personnel. Moreover, since California law generally permits any plaintiff, including a class plaintiff, to pursue merits discovery even while a demurrer or motion to strike is pending, class defendants face an even greater burden in responding to merits discovery early on in the action. As a result, many defendants agree to expensive settlements simply to avoid the cost and burden of discovery. Cognizant of this fact, several recent appellate decisions have encouraged the early screening of class allegations by demurrer or motion to strike.

These decisions may become especially significant given the tendency of plaintiffs' counsel in many areas of the law to pursue class-action litigation in state rather than federal court. For example, the adoption of the Private Securities Litigation Reform Act (the "PSLRA")[1] has prompted many plaintiffs to pursue state rather than federal claims for securities violations since a federal court plaintiff must now provide detailed allegations of wrongdoing before commencing discovery. Under the PSLRA, the filing of a motion to dismiss the complaint automatically stays discovery until the motion is decided.[2] In other words, federal courts will not allow discovery in a securities class action until the plaintiff's allegations are shown to possess some merit, thus removing some of the pressure on defen-

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dants to settle early, even when a complaint is of questionable merit, to avoid costly discovery. The spate of recent California state court cases sustaining demurrers to class actions encourages California trial courts to adopt a similar approach by more seriously entertaining challenges to class allegations before the commencement of expensive and time-consuming discovery.

Historical Preference for Certification Hearings

When the California Supreme Court decided *Vasquez v. Superior Court* [3] in 1971, it substantially altered the procedural steps for prospective class actions in California state courts. Before *Vasquez*, the issue of class status was usually decided by a demurrer to the complaint.[4] The *Vasquez* court, however, examined the class-certification procedures of the California Consumers Legal Remedies Act, which expressly provide for an evidentiary hearing targeted at the issue of class status, [5] and determined that such procedures were desirable for all class actions. Trial courts soon adopted rules providing for class certification hearings. Indeed, one court went so far as to say that a demurrer to class allegations should never be sustained where procedures for a class certification hearing are available,[6] and such hearings became the routine method of determining the viability of a prospective class action in California state courts.

Trend Favoring Demurrers to Challenge Class Claims

The pendulum now appears to be swinging away from requiring a costly certification hearing for every class action and toward "weeding out legally meritless [class] suits prior to certification" by the use of demurrers to class allegations.[7] Although the idea of challenging class status by demurrer is not new, judicial acceptance of such early challenges may be growing. A handful of cases in the 1980s suggested that class allegations may be screened upon demurrer.[8] In the late 1990s and into this decade, however, the number of appellate court and California Supreme Court decisions recognizing the propriety of challenging class status by demurrer has grown.

The recent decisions discuss two general grounds for bringing a demurrer to a putative class action: (1) to challenge the sufficiency of the class itself, including issues of an ascertainable class and a well-defined community of interest; and (2) to challenge the legal merits of a cause of action. The most recent treatment of a demurrer challenging the sufficiency of class allegations

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A Word from this Issue's Sponsor: Standard of Value

ZAMUCEN & Z&H HOLMES, LLP

Steve Zamuchen

Jamie Holmes

'What is anything…until it is valued?'[1], opined Shakespeare, and here's the rub, what is the standard of value? Let's name a few values: Fair Value, Market Value, Fair-Market Value, as well as Investment, Liquidation, Intrinsic, Fundamental, Going Concern and Book value. This listing of the various types of value raises the second question: when do you apply each? The question is important in litigating value disputes and in creating contractual documents. The answer depends upon WHAT is being valued and the PURPOSE of the valuation. Guidance is found in statutory and case law, and not the least in the documents and business papers of the parties: contracts, for example. Below is a table that sets forth the valuation type and when it is to be applied.

Fair Value	Dissolutions under California Corporations Code § 2000: dissenting stockholder, minority oppression. Going private.
Market Value	Real property appraisal.
Fair Market Value	"Value in the Marketplace" of businesses. ESOPs, charitable contributions, gift and estate tax. California: Eminent domain.
Investment Value	Business valuation in marital dissolution in California. Value of goods, services or business to particular investors.
Liquidation Value	Business or asset valuation when company's operations are expected to cease.
Intrinsic Value (Fundamental Value)	Valuation of an equity security that is not publicly traded. Alternative to market value. Value of an interest in a professional practice.

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since my undergraduate days in engineering, I had it in the back of my mind that I'd probably enjoy being a lawyer – so I made the switch. For me, that turned out to be the best decision I ever made.

Q. Ordinarily, one would think that an engineer would think about going into patent law. Did you?

A. Yes, for about one nanosecond. Actually, I didn't want to risk infecting my legal career with the boredom I experienced in engineering. That probably would not have happened if I had chosen to pursue a career in patent law, but at the time I was attracted to trial work, and pursuing a career in patent law did not seem to be the quickest path to the courtroom.

Q. To understand the type of background you bring to the bench, tell me a little about your law practice.

A. Over the years I handled a wide variety of business litigation matters – for both plaintiffs and defendants. In the late 1970's and early 1980's John Wayne Airport (then Orange County Airport) was the source of many lawsuits concerning rights of access asserted by commercial air carriers under federal law as against the rights of residents desiring freedom from noise, and as against other commercial carriers asserting their own right of access to a scarce supply of "slots." I was an active participant in several of those battles. In that same time frame, I was also plaintiffs' class counsel in a dispute over the interpretation and potential reformation of residential ground leases underlying much of Newport Beach and Irvine. In the late 1980's and early 1990's, I handled a substantial amount of litigation over proprietary rights in system-level software, including copyright, trade secret, trademark, and contract issues. This work was the closest I ever came to my old engineering roots. And, of course, over the years, I worked on many other types of cases, including officer-director liability, partnership and real estate disputes, legal malpractice, some securities and environmental litigation, and other types of cases I've likely forgotten about.

Q. You were appointed to the bench in 1995. What have been your assignments since your appointment, and how have you enjoyed them?

A. My initial assignment was to the Civil Panel, which is the group of direct-calendar judges handling the caseload of unlimited civil actions, excluding those designated complex. In 1998 I was assigned to a newly-formed panel called the HITT team (High Impact Trial Team). Presiding Judge O'Leary had designated this group of judges to make a concerted effort to reduce the inventory of cases that had been pending more than two years. We presided over trials of these "older cases", five days a week, week in and week out, with no case management responsibilities. Among these older cases were some of the most interesting disputes in the courthouse. Many of these cases had aged for a reason and there was something unique about them. In 1999, I went back to the Civil Panel with the normal fast-track case management responsibilities. In 2000, I served as Supervising Judge of the Civil Panel, and in January 2001, I was assigned to the Complex Civil Litigation Panel where I now serve. Along the way, I sat for two years on the Appellate Division of the Superior Court, which, in Orange County, is a part-time assignment. I have enjoyed each and every one of these assignments. Each brought its own special challenges and rewards.

Q. What suggestions do you have for younger lawyers who want to be good trial lawyers?

A. If you're in a large firm, where early trial experience is not easily had, try to spend some time in the courtroom watching the best lawyers practice their craft. If a way could be devised to allow younger lawyers to accumulate billable hours (or billable equivalents) by spending several weeks each year watching a superb trial lawyer try a case, it is likely that trial skills of the bar generally would improve. Writing memoranda of points and authorities, drafting pleadings, and taking discovery, while necessary skills, do little to develop the art of persuasion essential at trial. Hands-on training is also available from the extended Trial Advocacy College every spring sponsored by the OCBA. Also, the four American Inns of Court in Orange County offer excellent opportunities to learn from (and break bread with) the best. Although this newsletter is directed to business trial lawyers, the younger lawyer truly yearning for more early trial experience should consider opportunities with the District Attorney, the Public Defender, or the U.S. Attorney. Excellent trial lawyers are found in all of these offices – and courtroom opportunities for younger lawyers usually come earlier. There are other resources as well. Seek them out.

Q. Without naming names, can you give some examples of good and bad lawyering you've seen in your court that could help others learn how to do something right or not do something wrong?

A. The Good: I had scheduled extended oral argument

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on motions for judgment notwithstanding the verdict and new trial after a jury had returned a very substantial verdict. The lawyer for the moving party presented me with a briefing book that contained a collection of items the lawyer thought significant, all marked with index tabs, including copies of exhibits, snippets of testimony, and excerpts from cases. Over several hours of nearly nonstop argument, it appeared to me that any question I could ask, and any issue the opposition could raise, would be responded to by pointing to an excerpt from the book that was directly responsive to the issue, all without looking at an index to find the excerpt, and without any evasion of the issue raised by the question or argument. The argument was superb, and goes down in my book as the best demonstration of preparedness I've yet witnessed.

A. The Bad: In general, the average lawyer does not know the law of evidence. While I don't pretend that I make the correct call on every evidentiary ruling, too many lawyers have an abysmally low working knowledge of the Evidence Code.

Q. Do you care to comment about the use of computer technology at trials? What have you seen that works and doesn't work?

A. On occasion, lawyers have "hooked up" their laptops for real-time transcription and I find real-time reporting of testimony is very helpful to me as the judge. You'd have to ask the lawyers whether real-time is helpful to them. Displaying exhibits from a CD can work well, but only if the monitors are large enough or the image is projected on a screen. Sometimes the lawyers have used monitors that are too small, and a simple overhead projector would have worked better. The Elmo is a very convenient device for the lawyer, but again, use monitors that are large enough or project the image. The projectors used with the Elmo or CD displays tend to be noisy, and the constant fan noise can be an annoyance. Get the quietest projector you can find. To be honest, technology can easily be overdone, and unless the documentary evidence is massive, the old-fashioned, simple overhead projector with inexpensive transparencies is still very effective.

Q. Do you always allow oral argument on motions if counsel request it? Do you find oral argument to be always, sometimes, or never valuable?

A. I allow oral argument on all motions without requiring a special request by counsel. Of course, if counsel wish to submit on the papers without argument, they may do so. Although the final ruling is almost always the same as my tentative ruling based on the papers, I still find oral argument to be valuable in most instances in one of two ways. Most often, the oral argument confirms to me that I didn't miss anything on review of the papers, and my tentative view is reinforced. More importantly, there are those more infrequent occasions on which oral argument does present the issue in a different light, or does cause me to rethink my tentative view. Finally, even though oral argument does not often result in a different ruling, I look forward to the oral argument – to engaging in the debate and in testing my views. It's one of the fun things about this job.

Q. Do you have any particular preferences in your courtroom that a lawyer filing a motion or conducting a trial ought to know about?

A. No. Follow the California Rules of Court and the local rules that have survived state preemption, and you'll be fine.

Q. How have you enjoyed the transition from being a lawyer to being a judge?

A. More than I could have imagined. I've had the best seat for some major trials, I've watched skilled trial lawyers at work, the work itself is never dull and is often challenging, I've gotten to know wonderful lawyers in practice areas that were not in my own background, and my colleagues on the bench are just a superb group of human beings, all doing their best to do the right thing – to get it right. The environment is really quite refreshing.

Q. What do you like to do in your spare time?

A. I write computer programs – endlessly – while listening to classical music. I've also started traveling to other California counties to take color photographs of each county's trial court. I've finished color enlargements of the trial courts in 17 counties -- only 41 to go.

Q. What is the best book you have read recently?

A. With so much reading on the job, and with much time spent on my other hobbies, reading is not my pastime of choice. So if you expand your notion of "recently," I enjoyed "When Pride Still Mattered – A Life of Vince Lombardi" by David Maraniss.

▪ **Hon. Raymond J. Ikola, Orange County Superior Court**

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much rather be *asking* the questions in a courtroom than *answering* them—I came away thinking it was a valuable learning experience.

First, of course, it is always helpful from a trial lawyer's perspective to find out what it is like to be on the other side of the fence. As one who has examined and cross-examined many expert witnesses in the courtroom, there is nothing quite like learning first hand what it is like to be in the hot seat yourself. I will be able to put the experience to good use the next time I prepare a witness to testify. But the experience also highlighted for me some of the potential perils and pitfalls of the lawyer testifying as an expert. Before accepting such an assignment, you would do well to reflect on some of the issues that arise in this setting.

What is the subject matter of the proposed expert testimony?

Most judges and many arbitrators take a dim view of lawyers testifying as an expert where the core of the testimony is simply to offer an opinion on the substance of the law in a particular area. That is a job for the judge or arbitrator after briefing and argument by the lawyers for the parties. See, e.g., Summers v. A.L. Gilbert Co., 69 Cal. App.4th 1155 (1999). Expert testimony by a lawyer will often draw a motion in limine, and such motions are not infrequently granted. In my case, I was not simply being asked to opine on the state of the law, but rather to help educate the arbitrators, based on my experience in a variety of cases, about the various factual, legal, and practical factors that typically influence the settlement value of securities class actions. Although a motion in limine was filed, it was quickly disposed of because the arbitrators believed my testimony would assist them in an area in which they had very little experience. Before accepting an assignment to testify as an expert, make sure that the subject matter of your testimony will be genuinely helpful to the finder of fact and will not just be a re-hash of the law in a particular area.

What discovery obligations will face you (and your firm)?

Before accepting an assignment to testify as an expert, it is important to reflect on the discovery obligations to which you—and your law firm—may be subjected. As an expert witness, you will certainly be expected to produce all of the notes and documents upon which you have relied in reaching your opinions. In addition, however, you may also be called upon to make available for inspection any and all pleadings, briefs, correspondence, and other materials in the files of your firm in unrelated cases raising similar issues which you (and possibly other lawyers in your firm) have handled on behalf of other clients.

Anything you (or others in your firm) have written or said in the past that is arguably inconsistent with the opinion you are being called upon to give in the case at hand may be fair game for discovery. In the case in which I was involved, for example, the opposing lawyer might well have wanted to see documents reflecting other securities class action cases my firm had handled; whether those cases had settled, and if so, for what amounts; the factors that had influenced the settlement value of each case; the "hot docs" that existed in each case and how they compared with the critical documents in the case at hand; and generally the strengths and weaknesses of each case. I was certainly cross-examined at length on all of those issues.

If I had thought my firm would be subjected to such a barrage of discovery—with all of the complications of potentially having to produce confidential client files and documents in other unrelated proceedings—I never would have agreed to accept the assignment. (In fact, some law firms of which I am aware have a *policy* against their lawyers testifying as experts precisely to avoid this kind of problem.) Fortunately, since the case in which I was asked to testify was in arbitration, very

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of these enemies of the truth? Our primary weapon in combating lies is cross-examination. I believe that skilled opponents in an adversary system of justice armed with the right to cross-exam form a great engine for the pursuit of truth. Just as competition in the marketplace can produce efficiency, and competition in the marketplace of ideas can produce wisdom, likewise, competition in courts can produce truth. Our judicial system fights enemies of truth by protecting the right to cross-examine.

Our judicial system can also combat the enemies of truth through the vigorous enforcement of perjury laws.

Enforcing written contracts also can promote the truth in some situations, since a written contract sometimes is way to memorialize forever facts at a particular moment unaltered by the imperfections and evil inten-

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tions of some witnesses. Our judicial system should therefore be cautious in refusing to honor words that people have confirmed and agreed upon in writing.

The judicial system should also strive to create an environment of dignity, respect, and solemnity that can promote the truth with many people. I believe courthouses should be "temples of justice" where our Third Branch of government performs its duties in seeking the truth. These duties are a sacred charge. Courthouse architecture and yes, even dignified upgrades such as wood paneling and marble, can create an environment which promotes the truth. Judges in black robes on elevated benches are part of this, and I have sometimes wondered if courtroom wigs might promote the truth. (When I asked a distinguished English jurist about this, he noted that I might be onto something, but wearing a wig was quite too uncomfortable to be worth any marginal benefits in promoting the truth!) The judicial system should therefore consider whether proceedings in former department stores, converted mobile homes, or even informal arbitration proceedings might impact truth-telling.

Truth seekers might also look to our brief ceremony enacted thousands of times every day in our state when a witness is put under oath. We must treat that ceremony with respect, dignity, and a solemnity even in, and perhaps particularly in, an informal arbitration or a converted department store! Trial lawyers should be aware of Code of Civil Procedure section 2094, amended just last year. That section gives the option of creating an alternative oath "calculated to awaken the person's conscience and impress the person's mind with the duty to tell the truth." When, as a kid, I would spin some yarn, a disbelieving buddy would challenge, "Swear on a Bible?" True enough, if I had accepted the challenge, the spin would have disappeared! There may be trials, even in 21st Century California, where testimonial oaths should be given on the Bible (or the Koran, or something held holy and sacred by the witness).

The truth can indeed be hard to find, but trial lawyers can learn helpful lessons even from youthful challenges and stories of Washington's cherry tree. The can also learn lessons at abtl dinner programs. Come join your fellow business trial lawyers in reviewing some of these issues at our dinner program on June 6, 2001!

▪ **Andrew J. Guilford, Sheppard, Mullin, Richter & Hampton LLP,** *is a partner in the Costa Mesa, CA office and the immediate Past President of the State Bar of California.*

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little in the way of document discovery was contemplated. If the case had been in litigation in the courts, the situation might well have been otherwise. In any event, the scope of possible discovery was something about which I carefully inquired—and about which I satisfied myself—before ever agreeing to sign on as an expert.

How much time do you have to devote to the endeavor?

Testifying as an expert—and being prepared to withstand cross-examination—takes an enormous amount of time, and I found that very little of the effort required can be usefully delegated. As busy litigators, we are used to handing over a great deal of the "heavy lifting" to the associates, legal assistants, and staff members on whom we have come to rely so heavily. And, in my case, I was the beneficiary of welcome assistance from several able associates in my office who helped summarize the scores of witness interviews and deposition transcripts that had been taken in the case. But in the end, I found that I had to be personally familiar with the principal documents and testimony of the key witnesses, and there was no substitute for reviewing these materials myself. The exercise paid off well in cross-examination, but if I had not been able to find the time to devote to the personal preparation, it would have been better not to have taken on the assignment at all.

Will your opinion come back to haunt you in future cases?

It is important, *before* agreeing to testify, to do enough initial investigation both to be comfortable with the opinion you are being called upon to render and to satisfy yourself that it is not inconsistent with positions you may be called upon to take on behalf of clients in future similar matters. Transcripts of testimony have a long half-life, and if the opinion you give is contrary to positions you would ordinarily be advocating on behalf of clients in similar circumstances, resourceful adversaries would like nothing better than to embarrass you by throwing your own words back at you. Unless you are careful, what you say may come back to haunt you.

Testifying as an expert witness can be a challenging and rewarding experience for a business trial lawyer. It certainly gives one a renewed appreciation for the hard work and tenacity required of those with whom we all work who testify as experts in commercial cases on a more regular basis. But my experience also taught me that, especially for a lawyer, it is not a task to be taken on lightly or without careful consideration of the potential pitfalls.

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(Class Action: Continued from page 5)

is a Fourth District decision, *TJX Companies, Inc. v. Superior Court.*[9] In holding that a trial court must hold an oral hearing before ruling on a demurrer to a class action complaint, the *TJX* court extensively discussed the value of screening class actions at the pleading stage rather than waiting for an evidentiary hearing. The court first cited numerous precedents in which demurrers to class allegations were sustained and upheld on appeal.[10] It then explained the primary reason to assess class status at the pleadings stage – the possibility of avoiding the burden and expense of class-related discovery and preparation for the certification hearing. The potential class in *TJX* exceeded 300 members and raised the specter of extensive pre-certification discovery, including numerous depositions of individual class members. The court recognized that allowing the suit to proceed to a certification hearing without first analyzing the validity of the class by demurrer would "pose substantial costs because of the burdensome discovery necessary for the class certification hearing."[11]

A similar rationale underlies the importance of the demurrer in the context of challenging the legal merits of underlying class claims, as the California Supreme Court recently emphasized in *Linder v. Thrifty Oil Co*.[12] In *Linder,* the trial court denied certification of a class action based upon its assessment that the underlying cause of action lacked merit. The California Supreme Court reversed, holding that a trial court generally may not consider the legal merits of the underlying claim in ruling on a motion for class certification.[13] Instead, the Court stressed that parties have available demurrers and other pretrial motions to "[weed] out legally meritless suits prior to certification."[14]

The role of a merits-based demurrer is especially significant in light of the fact that a summary judgment or other dispositive motion generally cannot be brought in a putative class action before the issue of class certification is decided.[15] A demurrer affords a class action defendant the opportunity to raise legal challenges to the merits without waiting for a ruling on class certification, and before class and merits discovery proceeds. Of course, merits-based challenges on demurrer will

(Continued on page 11)

(Class Action: Continued from page 10)
likely succeed only in limited contexts, primarily where the allegations of the complaint frame an essentially legal issue that can be decided without the development of material facts. But in the appropriate context, a merits-based demurrer may be a class defendant's only opportunity to eliminate meritless claims before class and merits discovery begins.[16]

The California Supreme Court's *Linder* decision provides a good example when a merits-based demurrer might be in order. One of the central issues of the case was whether certain conduct described in the complaint fell under the Song-Beverly Credit Card Act. The trial court denied class status after the certification hearing based in large part on its decision that the statute did not apply. When the case reached the California Supreme Court, Linder argued that the lower courts improperly "prejudged the legal merits" at the certification hearing. The Court agreed and held that the court should have addressed the legal merits only by demurrer or other dispositive pretrial motion. Indeed, the nature of the issue raised in *Linder* is one that arguably could be disposed of on demurrer, namely, the interpretation of a statute and its application to a particular set of facts as alleged in the complaint. Given that, under *Linder* if such issues are not resolved on demurrer, the next opportunity to challenge the merits of a class claim will arise only after the certification hearing and extensive class-related and merits-based discovery takes place. A demurrer, therefore, can obviously be an invaluable tool in the appropriate context to decide important legal issues early on.

Standard for Sustaining a Demurrer Remains High

Although recent decisions do encourage the use of demurrers to challenge prospective class actions, it should be recognized that the standard for sustaining such demurrers remains quite high. A demurrer to class allegations is sustained only when there is not a "reasonable possibility" that a viable class may exist.[17] In other words, it must be clear that plaintiff could not establish a community of interest and that individualized issues predominate over common issues.[18] Cases in which trial courts sustained demurrers on this basis include a suit brought by health care workers against various manufacturers and sellers of latex gloves when the workers suffered allergies and other medical problems due to exposure to the gloves.[19] The court sustained defendants' demurrer to the workers' amended complaint without further leave to amend largely on the basis that the case involved employees using "different gloves manufactured by different defendants over different periods of time with different frequencies of use;" waiting for an evidentiary hearing, therefore, "would be incorrect, and wasteful of the time and money of the court and the parties."[20] Another court sustained a demurrer to class allegations where numerous hospital patients were injured or died when receiving coronary care at a university medical center.[21] The court ruled that diverse issues as to proof of reliance on physician representations as well as the complexity of damage issues far outweighed any potential benefit a class action may have provided. On the other hand, a trial court's sustaining of a demurrer to class allegations was reversed in a case where a plaintiff brought a class action against her insurance company for improperly switching customers from one type of policy to another.[22] The appellate court ruled that the mere existence of separate transactions at different times for each customer did not eliminate the "reasonable possibility" that a viable class existed.

Adding to a class defendant's burden on demurrer is the general rule that a trial court must accept all factual allegations of the complaint as true.[23] This does not, however, require the trial court to accept as true conclusions alleged by the plaintiff; for example, the trial court need not accept as true a class plaintiff's allegations that there is a community of interest among potential class members and that common questions of fact and law predominate over individual issues.[24] Nonetheless, the "reasonable possibility" standard, and the general rules applicable to any demurrer, tip the scales in favor of the plaintiff, and make it easy for a trial court to defer until a class certification hearing its determination as to whether a viable class exists. But the recent trend in decisions recognizing the need to assess class claims early on in a lawsuit should give new confidence to trial courts in sustaining demurrers to baseless class allegations. As the *TJX* court emphasized, a demurrer to class action allegations is a "critical pretrial proceeding," indeed so critical that an oral hearing is required.[25] Accordingly, a class defendant who overlooks the demurrer is ignoring what may be a potent weapon to attack the class causes of action before the time and expense of discovery begin.

Conclusion

The much-maligned demurrer may be making a comeback as a tool to dispose of meritless class actions. Federal legislation has explicitly provided methods for class action defendants to avoid the costs and burden of discovery while challenging the validity of class allegations, and recent California decisions appear to support

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similar methods in state court. As trial courts become more willing to critically assess demurrers to class allegations, defendants should give serious thought to challenging class actions at the pleading stage before they are subjected to the costly process of class-related and merits discovery.

Footnotes

1. Pub. L. No. 104-67, 109 Stat. 737.
2. 15 USC § 78u4(b)(3)(B).
3. (1971) 4 Cal.3d 800.
4. *See, e.g., Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695.
5. Cal. Civ. Code §§ 1770 *et seq*.; See Cal. Civ. Code § 1781 for hearing procedure on class certification motions.
6. *Wechsler v. Laskey-Weil, Inc*. (1974) 42 Cal.App.3d 728 (reversing order sustaining demurrer to class allegations because Los Angeles County Superior Court Rules require a pretrial hearing to determine class issues.)
7. *Linder v. Thrifty Oil Co*. (2000) 23 Cal.4th 429, 440.
8. *See Rose v. Medtronics, Inc.* (1980) 107 Cal.App.3d 150, 154; *Brown v. Regents of University of California* (1984) 151 Cal.App.3d 982, 989.
9. (2001) 87 Cal.App.4th 747, *as modified by* 2001 WL 287390 (Mar. 26, 2001).
10. *Brown v. Regents of Univ. of Calif*. (1984) 151 Cal. App.3d 982 (affirmed dismissal of class action on demurrer); *Silva v. Block* (1996) 49 Cal.App.4th 345, 349 (trial courts properly and routinely decide the issue of class certification on demurrer); *see also Canon v. U.S.A., Inc. v. Superior Court* (1998) 68 Cal.App.4th 1 (where complaint demonstrates need for individualized inquiry, class allegations should be disposed of at the pleading stage to avoid the expense of an evidentiary hearing or class related discovery).
11. *TJX*, 87 Cal.App.4th at 753; *see also Bartold v. Glendale Federal Bank* (2000) 821 Cal.App.4th 816, 836 ("A party is entitled to such discovery before the class is certified not after.").
12. (2000) 23 Cal.4th 429.
13. *Id*. at 443.
14. *Id.* at 440.
15. *See, e.g., Home Sav. & Loan Assn. v. Superior Court* (1976) 54 Cal.App.3d 208, 210-13.
16. A state court class-action defendant should consider combining a demurrer with a motion for a discovery stay pending resolution of class pleading and related issues. Such a stay arguably would guard against the very evils that the recent decisions supporting early class challenges describe by preventing discovery until a viable complaint is on file. The result would mirror the automatic stay provided for under the PSLRA. 15 USC § 78u4(b)(3)(B).
17. *Silva,* 49 Cal.App.4th at 348.
18. *Id*.
19. *Kennedy v. Baxter Healthcare Corp*. (1996) 43 Cal. App.4th 799.
20. *Id*. at 807.
21. *Brown*, 151 Cal.App.3d at 985.
22. *Wilner v. Sunset Life Insur. Co.* (2000) 78 Cal. App.4th 952.
23. *Silva*, 49 Cal.App.4th at 350.
24. *Id*.
25. *TJX*, 87 Cal.App.4th at 751.

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(Appeal: Continued from page 3)

If a reporter's transcript is being prepared but is not yet available, counsel must prepare a declaration describing the reported proceedings and advise the court that the transcript has been ordered and when it will be supplied. Failure to provide an adequate record is likely to result in an automatic and immediate denial of the petition.

The petition must be filed as soon as possible and in no event later than 60 days after the particular ruling of the trial court sought to be reviewed, unless a specific statute requires an earlier filing. (See, e.g., Code Civ. Proc., § 437c, subd. (l).) A petition filed within this 60-day period may nevertheless be denied if any delay is likely to have caused prejudice to the real party in interest.

Copies of the petition and supporting documents must be served on the respondent court and any real parties in interest *before* the petition is filed. The petition must be accompanied by proof of such service. Many courts require proof of personal service, particularly when an immediate stay is requested.

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At times, the real party in interest will automatically file a response. However, this is not necessary, unless the court requests such a response. Sometimes, the court will request an informal response before acting on the petition. In most instances the petitions are denied without any response having been filed.

A request for an informal response is just that; all the court requires is a letter from counsel stating his or her client's position. In very rare instances, for example, if the response in effect concedes the issue, the court may issue a peremptory writ upon receipt of such an informal response. Normally, if the petition is not denied following receipt of the informal response, the court will issue an alternative writ or, in some cases, an order to show cause why the requested relief should not be granted.

An alternative writ orders the trial court to alter its prior ruling or show cause on a specified date why the petition should not be granted. An order to show cause does not expressly provide the trial court with the alternative to change its ruling. It will provide a briefing schedule and a date for oral argument. Although the archaic form of an alternative writ may create the impression the matter has been adjudicated in favor of the petitioner, it also really means only that a briefing schedule and a date for oral argument is specified. However, if, upon receipt of the alternative writ, the trial court changes its order, the matter becomes moot. If not, respondent files a brief, petitioner may file a reply, the matter proceeds to oral argument, unless waived, and the court ultimately issues an opinion granting or denying the petition.

Criteria for the Granting or Denial of the Petition

It is no secret that most writ petitions are summarily denied. This is because most petitioners fail to show they are entitled to the *extraordinary* relief they ask for. The very designation as "extraordinary" indicates that, unless unusual and aggravating circumstances are shown to exist, the petition should be denied. In many cases the facts contained in the petition fail to show the trial judge acted other than in a proper exercise of its discretion. Another reason many petitions are denied is because they fail to provide all the information required to be provided under rule 56 or fail to supply a complete and fair record.

A very common reason for denying a petition is that the petitioner has an adequate remedy at law. That is, the issue can be reviewed in the course of the normal appellate process. For example, orders such as those overruling a demurrer, sustaining a demurrer as to some but not all causes of action, denying summary judgment or summary adjudication of issues, granting summary adjudication as to some but not all causes of action can all be reviewed in an appeal from the judgment. Only in the rare instance where the issue is of public importance and in need of early resolution because of *public* considerations (as distinguished from the needs of the particular litigants) will the court issue an alternative writ under these circumstances.

One issue where appellate courts are likely to consider granting writ relief involve privileged information or documents, where, once there has been a compelled disclosure, any subsequent appellate relief would be meaningless because it could not cure the problem. So, for example, if the trial court issues an erroneous order compelling the disclosure of a document subject to the attorney client privilege, the Court of Appeal is likely to issue an alternative writ if the petition satisfies the requirements of rule 56. Other than with respect to issues involving privileges, the appellate courts will generally defer to the trial court's discretion in making discovery orders. Although many petitions are filed seeking reversal of discovery orders, they are nearly always summarily denied.

Another example of an issue which is either resolved immediately or never will be, is where a trial court wrongfully refuses to disqualify itself upon the proper filing of a challenge under Code of Civil Procedure section 170.6. If the matter proceeds before that judge, there is no appellate relief available to the party who filed the affidavit of prejudice. Similarly, if a motion to quash for lack of personal jurisdiction is improperly denied, writ relief is the only reasonable alternative available to defendants. Absent such relief, they are put between the rock of letting the matter go by default and then appealing and the hard place of making a general appearance and thereby waiving the issue.

Courts of appeal may also give favorable consideration to a petition which shows the trial court refused to grant parties the benefits of a specific statute intended to protect them from having to litigate. An example here is the SLAPP statute (Code Civ. Proc., § 425.16), which requires the dismissal of suits which are brought in an attempt to chill the exercise of free speech in connection with public issues. A refusal of the trial court to dismiss such a suit would deprive the defendant of the very benefit the statute is intended to provide. Orders

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granting or denying motions for good faith settlement under Code of Civil Procedure section 877.6 are often claimed to have this effect but here the appellate courts will generally defer to the trial court's exercise of discretion and deny the petition.

Conclusion

Because of the expense involved and the small likelihood of success, counsel considering filing a petition for extraordinary relief should carefully consider whether the trial court order sought to be attacked is truly of such a nature that (1) the order did not merely involve a proper exercise of the trial court's discretion and (2) the effects of the order cannot be cured in the subsequent course of the litigation or on appeal from the judgment. Even if both of these issues are answered in the affirmative, counsel should ask whether the order which they wish to attack is of such weighty magnitude that the court of appeal is likely to interrupt its normal, heavy workload to put their case at the head of the list. Few petitions qualify under these criteria.

▪ **Hon. William F. Rylaarsdam, California Court of Appeal, 4th District, Div. 3,** *appointed 1995; appointed by California Judicial Council to serve on its Appellate Task Force and Complex Litigation Task Force.*

(Sponsor: Continued from page 5)

Going Concern	Business value of company as a going concern.
Book Value	Accounting term for stockholders' equity: Assets minus Liabilities.

Fair Value

Minority oppression legislation under California Corporations Code § 2000 is based on the Revised Model Business Corporation Act (RMBCA). The company may be required to purchase the minority shares, or be liquidated and the proceeds equitably distributed. California allows the controlling shareholder to elect not to purchase the minority shares in favor of some other means of settlement, if there is dissatisfaction with the fair value of the stock. Fair Value is differentiated from Fair Market Value in that the Fair Value standard does not always consider the "willing buyer". Fair value is defined in the RMBCA:

The value of the shares immediately before the effectuation of the corporate action to which the shareholder objects, excluding any appreciation or depreciation in anticipation on the corporate action unless exclusion would be inequitable.

California Corporations Code § 2000 defines it as:

The fair value shall be determined on the basis of the liquidation value as of the valuation date but taking into account the possibility, if any, of sale of the entire business as a going concern in a liquidation.

There are two premises under Corporations Code § 2000: Going-Concern sale vs. Liquidation sale. The fair value as a going concern means the value in continued use, as a unity of income producing assets. Should potential liquidation costs be included as part of 'Going Concern' value? Opinion varies in California according to the fact set. Should minority or marketability discounts be allowed? Generally in California such discounts are not allowed. The transfer of stock is not an open market transaction, a fact that would mitigate against discounts. However, in *Weigel Broadcasting Company v. Smith, et al.,*[2] an Illinois case, this can be at the court's discretion.

There is more. Liquidation value can vary according to: (1) value in place, but not in current use; (2) value as an orderly disposition on a piecemeal basis, and; (3) value as a forced liquidation on a piecemeal basis.

The nature of the proposed transaction should be discussed with the valuator.

Market Value

Market value is the standard most often used in real property appraisal assignments. Here is the general definition:

The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

1. Buyer and seller are typically motivated;

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2. Both parties are well informed or well advised, and acting in what they consider their best interests:
3. A reasonable time is allowed for exposure in the open market;
4. Payment is made in cash in United States dollars or under comparable financial arrangements; and
5. The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

Fair Market Value

For business valuations, the most widely acknowledged standard of value is Fair Market Value. It is the "value of the marketplace". The most often used definition of this standard is stated in Revenue Ruling 59-60 and echoed by the American Society of Appraisers:

.... the amount at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of the relevant facts.

California eminent domain law contains the following definition in 1263.320 of the Civil Code of Procedure:

The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.

Even though real estate is valued at Market Value, it is often called Fair Market Value, or Cash Value.

Investment Value

Investment value is the value of goods and services to a particular investor, (or class of investor). It depends upon the investor's investment requirements: risk aversion, earning power, and synergy with other owned investments. In a business valuation, the special requirements of a given owner or prospective owner are taken into account. In California divorce cases, the special condition is that a sale is not contemplated; the business continues in operation as a going concern. The value is the value to the earning spouse. Goodwill is included in the value.

Liquidation Value

Three premises were mentioned under "Fair Value". The value will vary according to:

1. Value in place, as part of an integrated group of assets, but not in use and not in a going-concern.
2. Orderly disposition, piecemeal.
3. Forced liquidation, piecemeal.

Intrinsic Value (Fundamental Value)

This is an analytical judgment of value based on a rigorous analysis of the characteristics of the investment. It is the "true" or "real" worth of the equity item, that will become the market value when other investors reach similar conclusions. The term is not specifically defined in law. Intrinsic value is allied to Fair Market Value in that specific perceptions of the equity eventually lead to a consensus in the marketplace.

Intrinsic Value has also been used to value professional practices in divorce cases.[3] The value of the institution as a contributor to partner's revenue is measured. The definition proposed by Reilly and Schweihs in their text, ***Valuing Accounting Practices,*** is called the **'owner's value':**

The value of the partnership interest to its current owner given the owner's current use of the interest, current resources and capabilities for economically exploiting the partnership interest.

Going Concern

This is a premise of value, not a standard. It is value in continued use in the production of income. The method of measuring "Going Concern" value can be under Fair Market Value, or Fair Value, Investment Value or even Intrinsic Value. Individual assets are valued at "value in use". Sometimes "Going Concern Value" is used to describe the goodwill built up by a business.

Book Value

This is an accounting term for stockholders' equity. It is the excess of assets over liabilities. Assets are listed at their historic cost, less allowances such as depreciation. The value of assets on the books is often called 'carrying value'. It is not a reliable representation of market value because assets and liabilities are not appraised to current value.

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Conclusion

Valuation is as much art as science. The ***standard*** of valuation is much more precise. Contractual documents generally designate the valuation standard to be used. Litigating value disputes requires knowledge of the statutory and case law that may be applicable - related to the item and the purpose of the appraisal. Referring to our table should help to make sense out of the maze of conflicting standards of value.

Footnotes

1. A very loose translation from Troilus and Cressida.
2. Weigel Broadcasting Company v. Smith, 682 N.E.2d 745 (Ill. Ct. App. 1997)
3. Howell v. Howell, 1998 WL 972312 (Va. Cir. Ct.)

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