ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

ORANGE COUNTY

Volume III No. 2 October 2001

Q&A with the Honorable Arthur Nakazato

[Editor's Note: Our editor caught up with Magistrate Judge Arthur Nakazato to find out how life on the federal bench is treating him. Before his appointment, Art was a renowned business litigator, who also took the time to be active in the community and the bar. He served, among other positions, as chair of the OCBA Federal Court Committee, as the first President of the Orange County Asian American Bar Association, and as the founding director and first President of the Orange County Japanese American Lawyers' Association.]

Q: For those who don't know you well, can you tell us a little about the type of practice and cases you had before taking the bench?

A: During the nearly eighteen years I was a lawyer, I maintained a complex business litigation practice, representing both plaintiffs and defendants, in securities, copyright infringement, and employment-related matters. My clients ranged from individuals and small businesses to Wall Street brokerage firms and large publicly-traded corporations like AT&T Corp. and Apple Computer, Inc.

Q: What is a typical day like for you as a magistrate judge?

A: I am typically in my chambers between 7:00 - 7:30 a.m. and work until 6:00 - 6:30 p.m. I perform substantially the same duties as those of a District Judge with the exception of the trial of felony cases. In the Central District, magistrate

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Dealing With California's Anti-SLAPP Law

By Andra Barmash Greene and Peter T. Christensen

Most business litigators do not regularly tangle with arguments based on First Amendment rights to free speech and petition. This is the reason why business litigators should be keenly aware of California Code of Civil Procedure section 425.16. An attorney's failure to consider the implications of this statute before filing certain claims may cost the attorney's client, among other things, a very significant fee award to the opposing party.

Andra Barmash Greene

Peter T. Christensen

Code of Civil Procedure section 425.16 is a procedural mechanism by which so-called "SLAPP" suits - Strategic Lawsuits Against Public Participation - are tested and potentially dismissed early in litigation. The Legislature enacted the statute in 1992 in response to its impression that lawsuits were being filed by business interests against private citizens to punish citizens for speaking out about public issues and exercising their constitutional rights to petition the government. *See Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 816 (1994). The Court of Appeal has described the hallmarks of a typical SLAPP suit as follows: "SLAPP suits are brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff. . . . Thus, while SLAPP suits 'masquerade as ordinary lawsuits' the conceptual features which reveal them as SLAPPs are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights." *Id*. at 816 (citations omitted).

The Procedural Mechanism Of Section 425.16

A defendant invokes section 425.16 by filing a special

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President's Message: by Andrew J. Guilford
Temples of Justice

In previous columns, I discussed the role of American litigators in our justice system and the difficult search for truth occurring in our justice system. An important factor in the search for truth by American litigators is the physical place where the search occurs: our courthouses.

As officers in our Third Branch of government, we should be aware of the importance of the place where we do justice, and the need to support proper courthouses.

Political philosophy presents strong arguments for the importance of courthouses. It is there that our political system resolves our disputes, protects our rights, and punishes our criminals, even to their deaths. Some have argued these are the most important things our government does. Even strident anti-government libertarians can see that tax dollars should be spent on at least some of the functions that take place in courthouses. As lawyers, we should understand these strong arguments for spending tax dollars on courthouses.

Beyond political philosophy, there are strong reasons for allocating tax dollars to courthouses found in issues of perception, symbolism, and pragmatism.

We need impressive courthouses because the power of our courts comes principally from public perception. Stalin scoffed at papal power by asking how many divisions marched for the Pope. Ultimately, no divisions march for our courts. The Executive and Legislative Branches have power denied to the Judicial Branch to command and pay the military. My constitutional law professor at UCLA, Reginald Alleyne, noted that a few Supreme Court guards were ultimately the only physical force accountable to the Supreme Court beyond public perception. As noted by Supreme Court Justice Sandra Day O'Connor:

> "The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States, and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands." (Planned Parenthood of Southeastern Pa. v. Casey (1992) 505 U.S. 833, 865.)

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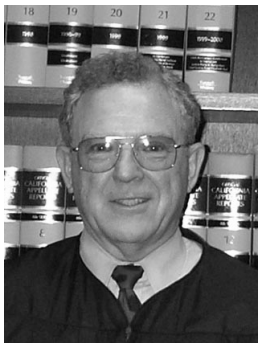
ASSOCIATION OF BUSINESS TRIAL LAWYERS
abtl ORANGE COUNTY

P.O. Box 28557, Santa Ana, CA 92799
Phone 323.939.1999; Fax 323.935.6622
E-mail abtl@mediaone.net
www.abtl.org

Orange County's New Complex Civil Litigation Center

By Hon. William F. McDonald



On August 6, Chief Justice Ronald George formally dedicated the Orange County Superior Court's five-courtroom Complex Civil Litigation Center. Soon the Center will be a virtually paperless court facility. Two systems, working together, will achieve this goal. One, the electronic filing system, should be fully operational before the end of the year. The other, the HOTROD evidence presentation system, is fully operational now.

When the decision was made by the Orange County Superior Court to take over the vacant old federal courthouse at the corner of Flower and Santa Ana Boulevard for use by the Complex Civil Panel, it was also decided to address the serious problems created by a paper-based filing and evidence presentation system.

The court was inundated with paper. Two billion pages of documents were filed in civil cases in the court in 1995. The court had 15 billion pages of documents in active case files and 90 billion pages of files in archives. The paper-based filing system was slow and labor-intensive. The court had run out of storage space in Santa Ana.

The Judicial Council approved the Orange County Superior Court's application to develop and operate a pilot program of electronic filing in civil cases. Electronic filing is being used now in certain criminal and family law cases. These filing systems typically are field-based systems, in which documents are searched by fields rather than words. An electronic filing system for civil cases desirably should be text-based, rather than field-based. A text-based system would permit word and phrase searches of filed documents and "hot links" to cited documents. Filed documents would be instantly accessible. No longer would days pass while the case file volume containing the referenced document was identified, located, and retrieved.

A public/private partnership was entered into between the court and SCT/West Publishing Company to develop the electronic filing system. By the end of the year, attorneys will be able to file and serve documents via the Internet. The public will be able to read filed documents via the Internet.

Cases assigned to the complex civil panel typically are among the most paper-intensive. The court file alone in a typical case might consist of 100 volumes, each 4-6 inches thick. In addition several thousand exhibits may be used at trial. The court and the attorneys for each party typically each have a

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ABTL June & September Dinner Programs

By Sean Sherlock

While attendees of the abtl's dinner programs are accustomed to informative and entertaining programs, those in attendance at the June program were particularly engaged by a program which tested our own eyewitness skills. The program, entitled *The Search for Truth*, was led by a distinguished panel moderated by Orange County Superior Court Judge Stuart Waldrip, and including Jeffrey Shields of the Shields Law Office, and Don Morrow of Paul, Hastings, Janofsky & Walker. The panel also included reknowned eyewitness identification expert Dr. Robert Shomer.

As the program began, a ruckus broke out at the front of the room. But just as soon as most of us were able to shift our focus away from dessert, the hooligans were ushered out of the room. That's when the fun started. Panelists Jeffrey Shields and Don Morrow announced that they would be calling eyewitnesses to testify to what they observed of the incident. Since many in attendance had indulged generously in the pre-dinner wine tasting, a chill came over the audience at the prospect of being publicly interrogated. Fortunately, four good sports were chosen – Superior Court Judges Marjorie Carter, Ron Kreber, and David McEachen, and OCBA President Danni Murphy. The exercise proved its point, which is that four honest, credible witnesses can have very different accounts of an incident, even minutes after it happens.

Following the eyewitness testimony, Dr. Shomer discussed his research on eyewitness identification. Among the key points: Eyewitness testimony is inherently unreliable, and needs to be corroborated with documentary or physical evidence; the confidence of a witness, while persuasive to a jury, has nothing to do with his or her accuracy; and no particular group of people (with the sole exception of Secret Service Agents) is better than any other at accurately testifying to events.

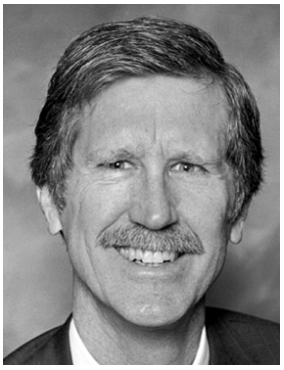
Overall, the program was great fun, and all in attendance learned something helpful to their practice. Thanks to our panelists, especially Dr. Shomer, who went to great trouble to be there.

For the abtl's September program, we traveled to the new Complex Civil Litigation Center for an open house, a demonstration of its new HOTROD system, and a presentation on new civil jury instructions by superior court judge Stuart Waldrip and Fourth District Division Two Court of Appeal Justice James Ward. For a complete description of the HOTROD system and how it came about, see the article in this issue by the supervising judge of the CCLC, William McDonald.

► **Sean Sherlock, Snell & Wilmer, LLP**

New Rules on Appeal

By Richard A. Derevan, Editor ABTL Report



For the past several years, an appellate advisory committee appointed by Chief Justice George and chaired by Justice Kennard has been taking a comprehensive look at the rules on appeal. That effort is about to bear fruit. On January 1, 2002, a complete rewrite of Rules 1 through 18, having now been approved by the Judicial Council, goes into effect. The committee's work is continuing, tackling the appellate rules in stages, so eventually all of the appellate rules (1-80) will be completely rewritten. While many — if not most — of the changes are purely stylistic, intended to make the rules more clear, there are a number of substantive changes made in this first set of revisions.

While I recognize that this newsletter is directed principally to trial lawyers, it is a fact of life that — despite the best admonitions of the courts of appeal and entreaties from appellate lawyers looking for work — trial lawyers sometimes handle their own appeals. For instance, one court of appeal went so far as to say that "trial attorneys who prosecute their own appeals . . . may have 'tunnel vision,' [and] would be well served by consulting and taking the advice of disinterested members of the bar, schooled in appellate practice." *Estate of Gilkison*, 65 Cal. App. 4th 1443, 1449-50, 77 Cal. Rptr. 2d 463, 466-67 (1998). So, it may be appropriate, even in a journal with an audience made up principally of trial lawyers, to briefly describe the highlights of new rules 1-18. By no means, however, will this article cover all the changes. If you can't wait until you get your 2002 rules book, hurry on down to http://www.courtinfo.ca.gov/rules/amendments.htm, where you can find the new rules and the advisory committee's comments.

Extensions of Time to Appeal

Perhaps the most significant changes are made in rule 3, which deals with extensions of the "normal" time to appeal on account of motions made after a trial or an appealable order. Old rule 3, for example, did not deal with reconsideration motions made after an appealable *order*. Two lines of authority developed. One line of cases analogized reconsideration motions to new trial motions and holds that the time to appeal the underlying order is extended until 30 days after the reconsideration motion is denied. A second line of cases, however, inferred from rule 3's silence concerning reconsideration motions that the extended period did not apply. The new rule comes down squarely and explicitly in favor of the former line of cases. The advisory comment explains that this addition to rule 3 is "intended to encourage recourse to the trial court for relief from an appealable order; if granted, such relief would obviate the need for an appeal." It is important to emphasize, however, that new rule 3's treatment of reconsideration motions deals only with those coming after an *appealable order*; it takes no

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A Word from this Issue's Sponsor:

By David L. Hahn & Robert R. Lovret

Stonefield Josephson, Inc.

Business trial lawyers frequently look to CPA's to serve as expert witnesses regarding economic damages. Often overlooked are some of the more subtle contributions a CPA can make during other phases of a dispute. Some of this assistance may not be appropriate in all circumstances due to cost or privilege considerations; however, such assistance has at times proven very valuable.

Most experienced CPA's consider themselves business advisors first and "bean counters" second. The natural desire is to utilize one's financial experience and training to assist clients in the design and implementation of successful business strategies rather than just quantifying the historical results. The same is true for CPA's who provide litigation consulting services. Frequently, through the information gathering and analysis required to evaluate economic damages, the financial expert is able to provide valuable insight that helps counsel more effectively argue their case.

Proximate Cause

We often see cases where business losses, relative to prior periods, are readily apparent. The link, however, between the alleged wrongdoing and those losses is either weak or not considered at all. In such cases, it is often possible to identify alternate factors causing the loss. A good place to start is with an analysis of the sequence and chronology of events. In one case, we were able to determine that a plaintiff's business had been in serious decline for several months prior to the alleged wrongdoing. Payroll records indicated that all of the sales staff had been terminated weeks before the alleged conduct. In this case, it was not difficult to for us to conclude that the business would have eventually failed due to causes entirely unrelated to the conduct of the defendant.

Using the Internet and electronic databases to supplement traditional sources of data, we often uncover specific historical information regarding individual businesses, the causes of financial setbacks, the reasons for success, or the business dynamics motivating concurrent business decisions. In some cases we have been able to identify information that was inconsistent with the key allegations forming the basis for claims of economic damage.

Economic and Industry Research

In most disputes, not all of the available information will neatly line up in support of a particular methodology or assumption. Conflicting information must be carefully considered, and an appropriate conclusion reached. This process is at the heart of forensic analysis. It is a recipe for disaster for an expert to consider only the factors in support of the client's position. Usually, it is not the conclusions reached that destroy the expert's credibility, but rather the failure to consider relevant information.

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(Complex Courthouse: Continued from page 3)
complete copy of the court file and exhibits. The attorneys also have their own litigation files. The sheer volume of paper involved made finding anything in a reasonable time during trial very difficult. Trials, as a result, took far longer than they should.

The gravity of the paper problem became apparent as we were preparing for a six month trade secrets trial. The courtroom was full of boxes of files and exhibits. They were piled in every available space. Boxes were piled to the ceiling in the exhibit storerooms adjacent to the courtroom. The back hall was full of stacks of the volumes of the court file. The court facilities people came to me and expressed concern that the weight of all the paper in the courtroom area might cause the floor to collapse.

Trial attorneys were requesting permission to use a variety of electronic devices to improve their presentations. The devices usually included some kind of electronic projector linked to monitors or monster big screen television sets, and designed to replace the old overhead projector. The more sophisticated systems included large computer hard drives, disc storage devices, and bar code readers. These systems typically required technicians to run the things. Wires and cables were strung every where, presenting a safety hazard. The equipment was large and clunky and usually took up the space of a substantial portion of the paper it eliminated. Viewing quality frequently was not very good. In one trial the images were so poor, I told counsel on a Friday I was going to withdraw permission to use the equipment. Counsel worked over the weekend and came in with a new and satisfactory system. However, while the viewing quality was satisfactory, the system was still large and clunky.

With the assistance of the court's technology group, the judges on the Civil Complex Panel developed the specifications for a courtroom system which would be able to take advantage of the electronic filing capabilities and the latest in courtroom presentation technologies with flexibility for future changes. We named the system "HOTROD" or Human Oriented Tactical Realtime Optimum Display system. A user fee was decided upon as the fairest approach to fund the system. The court could not afford to buy or lease the equipment without additional funding — which was not available. An increase in filing fees was considered. This would require asking the legislature for a special bill. This was considered inequitable as there was no way to limit the increase to those who would use the equipment. We also did not wish to be locked into particular equipment in a field where rapid obsolescence is the norm.

Bids were solicited based both on the technology specifications and what the charges would be to users to utilize the system. Four companies responded, all basing their bids upon having an exclusive contract with the court. Only one bid fully met our specifications. Interestingly, that bid also contained the lowest user charge. The company submitting the bid was Doar Information Systems. A public/private partnership was entered into with Doar.

The wiring was done by Doar at no cost to the court. All wiring is under the floors or in the ceilings. By hiding the wiring, the traditional image of a "temple of justice" courtroom has been maintained.

All court reporters assigned to Complex Civil courtrooms use "Realtime" recording systems. Monitors to follow the transcription are provided on the counsel tables, on the bench, in chambers, and in the panel's research attorneys' area. Modem connections are provided at the counsel tables so the lawyers can, if they wish, transmit the transcription back to research attorneys in their offices.

The "heart" of the HOTROD system is the Doar DEPS (Digital Evidence Presentation System) podium. A high resolution document camera, a commercial grade VCR, a multifunction graphics tablet, a visual image printer, an audio cassette deck, a DVD player and the connector for a computer input (laptop or hard drive) are integral parts of the DEPS podium. The user can select inputs and control the various functions from a single wireless remote Control. The entire system is user friendly. A technician to operate the system is not necessary. A 20 - 30 minute training session is provided. An attorney need only connect a laptop or hard drive to be ready to go.

High resolution VGA displays are provided for all participants. LCD monitors are located at the counsel tables and the judge's bench. A special CRT monitor with a light pen is at the witness stand. This enables the witness to highlight, underline, and circle portions of documents and other images. An analogous device is the telestrater seen during sports commentaries. A 7-10 foot projection screen and projector are provided for the jury, controlled by a "kill" switch on the bench. Documents and other exhibits received into evidence will be stored on a CD. A CD reader and viewer are in each jury deliberation room so the jurors can review the evidence.

It is estimated trial time in complex cases will be reduced by as much as 20% through the use of HOTROD. Since trials in civil complex cases frequently last three to six months, the time savings will be significant.

HOTROD was demonstrated to the Chief Justice and the others present at the dedication ceremony by means of a mock trial. The players, Robert Becking, Linda Shelton, and Catherine Fair, are all research attorneys assigned to the Complex Civil Panel. They had no contact with HOTROD until August 3, three days before the ceremony. The demonstration proceeded smoothly. This speaks well not only for the creativity of the players, but also for the ease of operation of HOTROD.

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judges preside over jury and bench trials in civil cases (by consent), conduct settlement conferences, hear law and motion matters, and handle case management. Also, because magistrate judges in the Central District routinely review habeas petitions filed by state prisoners and administrative decisions in immigration and social security cases, I act as an appellate judge on such matters by reviewing the underlying record for procedural or substantive errors and authoring Report and Recommendations ("R&Rs") and Memorandum and Orders ("M&Os"), most of which are in the nature of formal judicial opinions. I have authored well over 300 R&Rs and M&Os.

Q: What ways can lawyers use magistrate judges more effectively?

A: Because of the tremendous caseloads and paperwork they generate, lawyers can use all judges, including magistrate judges, more effectively by taking a very conservative, discriminating approach in bringing and opposing motions. Lawyers should really take great pains to determine whether they have a realistic chance of prevailing on a motion or opposing a motion. Further, if the decision is made to bring or oppose a motion, a lawyer should focus the judge's attention on the one or two arguments that are likely to be "winners" instead wasting the judge's time and attention on marginal or collateral arguments.

During settlement conferences, lawyers can use judges more effectively by being fully prepared to discuss their settlement position with the judge in a very candid manner. They should be prepared to tell the judge what her or his client's bottom line settlement position is and why, so the judge can determine whether there is a realistic chance of achieving a settlement. After presiding over a couple hundred settlement conferences, I find that too many lawyers and their respective clients begin settlement discussions by making unrealistic demands and counter-offers that no opposing party would realistically consider under the circumstances and that border on insulting. This type of posturing is very counter-productive and extends, not reduces, the time of a settlement conference. In short, lawyers can use settlement judges more effectively by encouraging their respective clients to present very realistic, bottom-line demands and counter-offers instead of slow-dancing towards what they really want in terms of a compromise

Q: What are the secrets to success in your courtroom, including any personal preferences that might not be reflected in the rules?

A: Being civil and courteous, bending over backwards to resolve disputes, and appearing overly reasonable and accommodating to opposing counsel will score points with me and the other judges every time.

Q: What are your pet peeves about lawyers who appear before you?

A: I really only have one -- baseless ex parte applications, especially those filed late in the day. Bringing an ex parte applications is like hollering "Fire!" in a crowded theater. They are very disruptive and highly disfavored because they literally require judges to stop whatever they are working on and consider them immediately. For some reason, I am seeing a rise in the number of ex parte applications brought due to poor planning. Poor planning does not warrant ex parte relief. For example, applying for an order to conduct discovery on shortened notice because the discovery cut-off date is looming is not an emergency, especially where the application is devoid of any facts showing the applicant has been pursuing a diligent discovery program, and there are other facts showing the applicant did not start taking any discovery until the proverbial last minute. Consequently, if you bring an ex parte application, there had better be a "fire" or true emergency. Before bringing an ex parte application in the Central District, lawyers should read *Mission Power Engineering Company v. Continental Casualty Company*, 883 F.Supp. 488, 492-493 (C.D. Cal. 1995), and *In re Intermagnetics America, Inc.*, 101 B.R. 191, 193-194 (C.D. Cal. 1989).

Q: What do you enjoy most about your job?

A: I really enjoy working on cases that involve a variety of very sophisticated, sometimes novel, constitutional and statutory issues. The caliber of lawyering is generally very good and it is truly a pleasure to watch and interact with skilled and gifted advocates. I also feel very privileged and honored to work with some of the nicest, brightest, and hardest working public servants in the country.

Q: In your private practice, you did not have a criminal defense caseload. What types of proceedings do you handle on the criminal side, and how have you enjoyed that aspect of your calendar?

A: During the days that I am on criminal duty, I routinely preside over initial appearances, post-indictment arraignments, and bail and detention hearings. Additionally, I review new criminal complaints, search and arrest warrants, and various other preliminary matters. I really enjoy the criminal cases because I get a chance to interact with a lot of different types of people, and the facts are generally very interesting. The members of the federal criminal bar are truly a pleasure to work with because they are very civil and courteous towards each other and the Court -- more than a few civil practitioners can learn a lot about what it means to be civil from members of the criminal bar.

Q: I know that you are very sophisticated in your computer skills, at least off the bench. Do you use technology in your courtroom, and if so how?

A: Yes, for better or worse, I'm known as the Central District's resident computer geek. Because I'm technology-oriented, my courtroom and chambers have become the Court's beta-site or laboratory for new equipment. For example, my courtroom was recently rewired to accommodate dual ELMO projectors,

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(Q&A: Continued from page 6)
one at my bench and one next to the counsel's lectern, so that documentary and other forms of physical exhibits can be projected throughout my courtroom during trials and hearings. Flat screen LCD monitors are on both counsel tables, the witness stand, the clerk's desk, and my bench. Attorneys can hook up their laptops to the ELMO system and broadcast audio/video feeds during hearings and trials. In the not too distant future, we are going to have large, flat screen gas plasma monitors in lieu of regular large and bulky tube monitors for the jury. I'm helping the Court modify and improve the software used to control the ELMO system. All non-trial proceedings are tape recorded instead of transcribed. Depending on availability, I have used telephonic and/or video conferencing equipment to conduct certain types of proceedings where counsel are located out of town.

Q: If you could have dinner with a famous person - living or dead - who would it be and why?

A: Geez, that is an interesting question. Let's see, since it would be a waste not to take advantage of bringing back the dearly departed, I think I would choose Thomas Alva Edison because he is one of, if not the most, prolific and important American inventors and techno-geeks of all time. During his life, which embraced both the Civil War and World War I, Edison obtained over 1,000 patents in such fields as telegraphy, phonography, electrical lighting and photography. I think it would be fascinating to chat with such a visionary and find out what inspired him to come up with some of his greatest inventions and ideas, and to hear about the mental process he went through to develop them. It would also be interesting to find out what he thinks he could have invented if he had the technological knowledge and tools that are now available.

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

A: In what little spare time I have, I enjoy woodworking, working on various home improvements, and tinkering with computers and various electronic gadgets. I also enjoy walking my dog, running, and biking at the beach.

Q: You are celebrated in Orange County legal circles for outstanding work in planning the groundbreaking ceremonies for the new federal court building. When you were doing that planning, did you imagine you would be on the bench in that very building?

A: Not really, but after seeing the plans, the mockup, and hearing about the Court's need for a second magistrate judge in Santa Ana, I must confess that I did start to fantasize about what it would be like to serve as a federal judge in the new courthouse. The courthouse celebration occurred in July 1994 and I was not appointed until August 1996. Further, for nearly two and one-half years, I floated between Los Angeles and Santa Ana, sitting in various temporary chambers and courtrooms until the new Santa Ana Courthouse was finally finished in January 1999. But good things are worth waiting for and it

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(Appeal: Continued from page 4)
position on another split among the courts of appeal, namely whether a reconsideration motion is proper after a *judgment*. Former rule 3 also contained at least one trap for the unwary and one ambiguity that have been corrected in the new rule. Under the old rule, the time for filing a notice of appeal from the denial of JNOV motion was extended only if that party had also filed a motion for new trial. While most parties who file a JNOV motion also file a new trial motion, new rule 3(c) provides for an extension of time after an order denying a JNOV motion — in the words of the rule's comment, "regardless of whether the moving party also moved for a new trial." Second, the new rule makes it plain that it extends, but *never* shortens the period for filing a notice of appeal. The ambiguity in the old rule arose because an order denying a JNOV motion is an appealable order under section 904.1(a)(4) of the Code of Civil Procedure. Under rule 2, a party has at least 60 days to file notice of appeal from an appealable order or judgment. But under one construction of old rule 3, it was unclear whether a party had 30 or 60 days to appeal from the denial of the JNOV motion, even if he or she only had 30 days after the motion's denial to appeal from the judgment. The new rule solves this ambiguity and trap for the unwary by explicitly saying that "the time to appeal from an order denying a motion for [JNOV] is governed by rule 2, unless *extended* by rule 3(e)(2). Rule 3(c)(2).

Designating the Record

The rules concerning the record on appeal have some new features as well. Now, if a party does not want to have a reporter's transcript on appeal, the designation must say so, as opposed to remaining silent on that point. Rule 4(a)(1). The designation is now required to specify the date of each proceeding to be transcribed and further, to identify the portions of each date's proceedings, if any, that should not be transcribed. For example, if voir dire and opening statements occurred on April 1, a designation for April 1 would yield all the proceedings. So, if you don't need voir dire, say so in the designation. Similarly, rule 5 dealing with the clerk's transcript was also rewritten. Importantly, it now authorizes a party to designate *portions* of a document that are *not* to be copied for inclusion in the record. Rule 5(a)(4). You know that contract that's attached to eight different declarations? Now if you need the declarations, you can tell the clerk to omit seven copies of the same contract. Rule 5 also deals with the common problem when a court has returned exhibits to the parties at the end of the trial. If an exhibit is designated for inclusion in the clerk's transcript, the "party in possession of the exhibit must promptly deliver it to the superior court clerk." In a similar vein, if the exhibits returned by the superior court are not to be included in the clerk's transcript, but are to be transmitted to the court of appeal later, new rule 18(b)(2) requires the party to put them into numerical order, make a list of them, and send them on to the court of appeal.

The appendix in lieu of a clerk's transcript under rule 5.1 has not escaped substantive change, either. Among them are three relatively major ones. First, an appendix may not include

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motion to strike the plaintiff's complaint within 60 days of service of the complaint. Cal. Civ. Proc. Code § 425.16(f). The filing of such a motion has the immediate effect of staying all discovery until a ruling on the motion, although the court may, for good cause, order that specific discovery be permitted. *Id*. § 425.16(g). The initial burden falls on the defendant to establish that the statute applies, meaning the defendant must show that "the plaintiff's suit arises 'from any act of [defendant] in furtherance of [defendant's] right of petition or free speech . . . in connection with a public issue.'" *Wilcox* at 820 (alterations in original). This burden can be met by showing that the acts or statements alleged in the plaintiff's complaint were: (1) statements made before or in connection with an issue under consideration in "a legislative, executive, or judicial proceeding, or any other official proceeding"; (2) statements "made in a place open to the public or a public forum in connection with an issue of public interest"; or (3) "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Cal. Civ. Proc. Code § 425.16(f).

If the defendant meets its burden of showing that the statute facially applies, the burden then shifts to the plaintiff to establish a "reasonable probability" of prevailing on its claims. *Wilcox* at 824-25. The plaintiff must also establish that the defendant's "purported constitutional defenses are not applicable to the case as a matter of law or by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses." *Id*. These are significant burdens and can only be met by presenting "competent and admissible evidence," usually in the form of declarations. *Wilcox* at 830; *Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 14 (1995). Plaintiffs often lose special motions to strike because the evidence they present is not admissible. *See*, *e.g.*, *Evans v. Unkow*, 38 Cal. App. 4th 1490, 1498-99 (1995); *Church of Scientology of California v. Wollersheim*, 42 Cal. App. 4th 628, 656 (1996).

If the plaintiff cannot make the required showing with respect to a particular claim, the claim must be dismissed. Cal. Civ. Proc. Code § 425.16(b)(1). Under the statute, a defendant who prevails on a special motion to strike "shall be entitled to recover his or her attorney's fees and costs." *Id.* § 425.16(c). A prevailing plaintiff, however, is only entitled to such an award if it prevails on the motion and shows that the "special motion to strike is frivolous or is solely intended to cause unnecessary delay." *Id*. Moreover, under a recent amendment to the statute, if the defendant's special motion to strike is denied, the order denying the motion is immediately appealable under Code of Civil Procedure section 904.1. *Id.* § 425.16(j).

The Broad Reach Of Section 425.16

It might seem that section 425.16 would apply in practice only to egregious cases of abusive litigation - true cases of malicious prosecution. This is not the case. California's anti-SLAPP law has been interpreted and applied broadly.

The statute, of course, has been applied in many cases resembling the prototypical SLAPP described by the Court of Appeal in *Wilcox*. In *Briggs v. Eden Council for Hope and Opportunity*, for example, a landlord sued a tenant rights nonprofit organization for defamation and the trial court granted the nonprofit organization's special motion to strike. 19 Cal. 4th 1106 (1999). Section 425.16 also has been applied successfully to a lawsuit seeking to vacate a prior judgment on the grounds of fraud. *Church of Scientology*, 42 Cal. App. 4th 628. It has been applied to cases alleging trade libel, intentional interference with economic advantage, and unfair business practices. *Wilcox*, 27 Cal. App. 4th 809; *Coltrain v. Shewalter*, 66 Cal. App. 4th 94 (1998); *Dixon v. Superior Court*, 30 Cal. App. 4th 733 (1994). It has been found to apply to a class action complaint against a drug company for alleged false statements to regulatory bodies and the public about the efficacy of a medicine. *DuPont Merck Pharmaceutical Co. v. Superior Court*, 78 Cal. App. 4th 562 (2000). And, recently, the statute was applied to a complaint filed by two oil companies seeking declaratory relief that the defendant's notices of intent to sue under Proposition 65 were legally inadequate. *Equilon Enterprises v. Consumer Cause, Inc.*, 85 Cal. App. 4th 654 (2000) (this decision was recently depublished). Finally, section 425.16 has even been applied in federal court. *United States ex rel. Newsham v. Lockheed Missiles & Space Company*, 190 F.3d 963, 970-71 (9th Cir. 1999) (applying section 425.16 to state law claims in a federal diversity case).

A Four-Year Long Brush With The Statute

Because of the statute's expanding application, business litigators are becoming ever more likely to encounter a lawsuit in which section 425.16 is utilized. We, for example, recently resolved such a case after four years of trial and appellate court litigation for a client. The case is instructive about the issues and pitfalls that may arise in connection with litigation involving section 425.16.

Our client had been the victim of on-going defamation by a would-be lobbyist in an Inland Empire city, where the company had a public contract. The perpetrator was, at times, a political ally of the company's major competitor in the city.

Shortly after our client won the city's contract, the individual began making false statements about how the company obtained the contract. Indeed, he soon created a website on which he began publishing his false statements about the company. He also began using a weekly radio show (for which he purchased the air time) for the same purpose. The individual's defamatory statements in these various media typically included such statements as: our client was managed by "bribing, conniving, mobster crooks," and our client was controlled by "mobsters," "organized crime," and "mafia godfathers."

In July 1997, our client filed its initial complaint in San Bernardino Superior Court against the individual for libel, slander and intentional interference. In November 1997, the

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defendant filed a special motion to strike under section 425.16. Fortunately, because we anticipated that a special motion to strike might be made, we had, even prior to filing the action, already accumulated voluminous material supporting our client's claims. As such, our client was able to oppose the defendant's motion with substantial evidence, including 20 separate declarations from, among others, two assistant district attorneys, two city council members, a former mayor of the city, six managers in the industry who testified to their negative reactions upon reading the defendant's defamatory statements, and a prominent religious leader who testified to the slanderous statements spoken to him. As the Court of Appeal would later determine, these declarations together with website print outs, audio tapes, and even a video tape established the various elements of our client's legal claims.

Despite the evidence submitted with our client's opposition, however, the trial court hearing the matter granted the defendant's special motion to strike. It did so because it misapplied the evidentiary standard under section 425.16 by choosing to credit the limited evidence presented by the defendant over the evidence presented by our client. Under section 425.16(c), the defendant was then automatically entitled to an award of his fees and filed a motion for such fees. The defendant's fee demand rose to as much as $412,000, with the application of a "multiplier." The resolution of this motion involved nearly as much briefing as the special motion to strike itself. In the end, the trial court awarded the defendant less than $40,000.

Our client then appealed from the judgment to the Fourth District Court of Appeal. After oral argument, the Court of Appeal issued an unpublished opinion reversing the judgment. The Court found that the trial court judge had incorrectly applied the standard. The Court concluded that the company had submitted sufficient evidence of its legal claims to go forward with its case and specifically found that plaintiff "presented sufficient evidence to establish a prima facie case of malice" against the defendant. Such a reversal based on a *de novo* review of a granted special motion to strike is extremely uncommon in the appellate case law.[2]

Practical Guidance

The four-year long litigation of the defamation case described above provides useful guidance for the handling of any case that might implicate a special motion to strike under section 425.16.

Carefully Evaluate Your Client's Claims

Accepting a plaintiff's case that may be subject to the statute can be a difficult and potentially expensive undertaking, for both attorney and client. Any proposed complaint that relates to a defendant's exercise of free speech and petition rights should be evaluated carefully. The typical claims that may be subject to section 425.16 include, as mentioned above, not only claims for libel, slander and interference with contract but also claims for unfair business practices and for certain kinds of declaratory relief. A client should be advised of the potential negative consequences of losing a motion under section 425.16. Moreover, just opposing a special motion to strike can be very expensive and, under the recently amended version of the statute, a defendant who does not prevail has the immediate right to appeal, further compounding the plaintiff's potential expense.

Marshal Supporting Admissible Evidence Before A Motion Is Filed

A defendant ordinarily must file a special motion to strike within 60 days of service of the complaint, and the filing of the "notice of motion" automatically stays all discovery until a ruling is made. Cal. Civ. Proc. Code § 425.16(f), (g). It is, thus, critically important to have gathered the evidence supporting each of the elements of your client's causes of action before filing the complaint, if possible, and to conduct any necessary discovery as soon as possible in the litigation. It is also important to keep in mind that a case subject to section 425.16 often will involve difficult evidentiary showings. For example, a plaintiff suing for defamation based on statements about a public figure or a matter of public concern may have to show with clear and convincing evidence that the defendant made the statements with "actual malice." *See Mosesian v. McClatchy Newspapers*, 233 Cal. App. 3d 1685, 1693-1701 (1991). Moreover, as discussed above, all of the evidence presented by the plaintiff must be both competent and admissible.

Many plaintiffs have made the mistake of treating a special motion to strike like any routine motion. In most cases, however, there simply is not enough time after the motion is filed to marshal all of the supporting evidence needed to support the claims in the complaint. Thus, efforts should be made even before the case is filed to interview witnesses and obtain detailed declarations. In the case discussed above, it took 20 separate declarations to show the elements of our client's claims.

Educate The Trial Court Judge

Even the best evidence, however, will not mean anything if the trial court does not understand or apply the correct standard in evaluating the special motion to strike. Litigation relating to issues that are potentially subject to section 425.16 is often contentious and on a fast track. Accordingly, it is very important that the opposition papers carefully explain and emphasize that section 425.16 is not a blanket immunity for statements and conduct but rather is a procedural test of the plaintiff's allegations. If the plaintiff can show that it has evidence supporting the elements of its claims, the court has no grounds for dismissing the complaint under the statute. In this regard, when opposing a special motion to strike, it can be persuasive and helpful to compare the plaintiff's burden in opposing the motion to the same burden in connection with motions for summary judgment, nonsuit, and directed verdict. Several decisions have made this comparison, and it may help the court to understand the less familiar procedural process associated with section 425.16. *See*, *e.g.*, *Wilcox* at 823 ("[t]he standard is much like that used in determining a motion for

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nonsuit or directed verdict . . . section 425.16, subdivision (b) should be given a similar construction"). It should also be made very clear to the court that "[i]n order to preserve the plaintiff's right to a jury trial, the court's determination of the motion cannot involve a weighing of the evidence." *Wilcox* at 823; *Dixon* at 746 ("the court does not weigh the evidence in ruling on the motion; instead, it accepts as true all evidence favorable to the plaintiff").

In our case, although we briefed the issue extensively, it was still the trial court's erroneous understanding and application of the burden that caused two years of expensive appellate litigation. An emphasis in the opposition papers and during oral argument on the nature of the plaintiff's burden (together with detailed, admissible evidence in the record), however, may help you avoid similar brushes with the statute. When your client wins the motion, it will enjoy a tremendously strong position in the case.

Footnote

1. The fee award, of course, was reversed as well. Several months later, the trial court awarded our client approximately $30,000 in attorneys' fees against the defendant, finding that the defendant's initial "special motion to strike . . . was frivolous and filed for the purpose of delay."

► Andra Barmash Greene is a partner in the Newport Beach office of Irell &Manella LLP. She specializes in complex business litigation.

► Peter Christensen is a senior counsel with Irell & Manella LLP.

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Perceptions are indeed crucial to our courts, and perceptions are affected by appearances. Throughout the history of this great country, courthouses have provided communities far and wide with inspiring visual evidence of the importance of the Third Branch of government. I still remember the awe and inspiration I felt entering the United States Supreme Court for the first time, feelings I have also felt on entering other inspiring courthouses. Impressive, dignified courthouses give a public perception that helps the courts do their important public work.

Related to public perception are the subtleties of comparative symbolism in our society. Some say that a society's values are reflected in its buildings. In places like Orange County, this might lead to the frightening conclusion that our highest values reside in shopping malls and sports stadiums. We need our courthouses to be symbols of the comparative importance of our Third Branch in our Constitutional Democracy.

Pragmatically, I believe formal, dignified courthouses might also discourage untruthful testimony. First, there are some who will be more inclined to tell the truth in respected institutions, and as noted, buildings can promote respect. Further, I believe some people find it more difficult to lie in formal, unfamiliar places. Putting a witness up on an elevated witness stand in an impressive courtroom might just be enough to turn an uncomfortable liar to a reluctant honest witness. Maybe this should make us pause before sending so many cases to binding arbitrations in informal settings. For sure this should inspire us to make our courthouses temples of justice.

Thus, the focus of our September 12, 2001, dinner program on our new courtrooms in the Civil Complex Center was appropriate, providing a time for exploring and celebrating where we do justice.

► Andrew Guilford, Sheppard, Mullin, Richter & Hampton, LLP.

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a document or a *substantial portion* of a document not necessary to the issues on appeal. Second, an appendix may not include transcripts of oral proceedings that may be made part of the reporter's transcript under rule 4. Finally, the rule explicitly authorizes an appellant's *reply* appendix.

Electronic transcripts.

Though most, if not all, court reporters will supply the transcript on disk upon request, new rule 4(f)(4) *requires* a reporter to do so "unless the superior court orders otherwise."

Briefs.

A number of changes here. First, no more page limits. Taking a page, so to speak, from the Federal Rules of Appellate Procedure, the rule substitutes a word count for a page limit. Briefs other than combined briefs get 14,000 words. Rule 14(c)(1).

Second, though some districts already permit attachments to briefs (others frown on the practice), new rule 14(d) expressly authorizes a party to attach copies of exhibits or other materials — not exceeding 10 pages in length — to a brief. So, if two key pages of a document would help the court understand the issues raised on appeal, go ahead and attach them.

Third, new rule 15(b)(1) continues to authorize the parties to stipulate to extensions of up to 60 days for the filing of briefs. Importantly, the revised rule explicitly states that the "reviewing court may not shorten a stipulated extension." So, cooperate when you need more time, and the court can't take it away from you.

Fourth, rule 16 adopts entirely new rules when any party is "both an appellant and a respondent," *i.e.,* when there is an appeal and a cross-appeal, or and appeal from the judgment and a postjudgment order. In that event, the parties are required — on a short string — to submit a proposed briefing *sequence*" to the court of appeal within 20 days after the second notice of appeal is filed. The point of this is give the reviewing court the

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benefit of the parties' views on the order in which the parties' briefs should be filed. The court is not bound by the parties' proposal, but is required to consider it, after which the court must order both a sequence and a briefing period. Happily, the period prescribed by the court may be extended by stipulation (the same one the court can't shorten) or by application for more time.

Rule 16 also requires a party who is both an appellant and a respondent to combine its respondent's brief with its opening brief or its reply brief, whichever is appropriate in the sequence the court of appeal orders. So, for instance, if there is an appeal and a cross-appeal, and the ordinary sequence is used, the appellant's opening brief would be followed by a combined respondent's and (cross)-appellant's opening brief, which in turn would be followed by a combined appellant's reply and (cross)-respondent's brief, and finally by the (cross)-appellant's reply brief. And oh, yes, in a combined brief, you do get double the word count. Rule 14(c)(4).

Transmitting Exhibits to the Court of Appeal

Under current rule 10(d) exhibits are not normally transmitted to the court of appeal until after an argument has already been set, and presumably court staff has been working up the case. New rule 18 accelerates the time the exhibits may be sent to the court of appeal, in the hope that they will be considered earlier in the process. Under the new rule, the notice to the clerk to transmit the exhibits to the court of appeal is required to be filed within 10 days after the last respondent's brief has been filed. While the rule does get the exhibits to the court sooner, one has to wonder whether in courts with significant backlogs, the new rule does more than simply change the location in which the exhibits gather dust.

Well, this is a highlight article only, and that's about it. My hope, of course, is to convince you that the new rules are so complicated that you must, simply must, hire an appellate specialist to handle your appeal. While naturally I think that is a good idea, the new rules are much more clear than the old rules in terms of the mechanics of the appeal. A thorough reading or two should put you in good stead from that standpoint. But as for brief-writing, that's another matter. *See In re Marriage of Shaban*, 88 Cal. App. 4th 398, 105 Cal. Rptr. 2d 863 (2001).

► Richard A. Derevan, Snell & Wilmer LLP is a certified specialist in appellate law by the State Bar Board of Legal Specialization and is this year's President of the California Academy of Appellate Lawyers.

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was truly worth the wait. Every day when I walk into my chambers and courtroom, I feel very fortunate and grateful to be one of the original occupants in our fabulous courthouse.

► Honorable Arthur Nakazato, Magistrate Judge, United States District Court

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All that the future shall bring cannot be predicted with certainty, but some changes are reasonably foreseeable. Smart board technology is improving rapidly and soon smart boards will be large enough and bright enough for courtroom use. Smart boards will replace the projectors and screens for evidence viewing by the jury. In the not too distant future, holographic imaging systems will be used for presenting video taped depositions and computer generated simulations and images simulated images.

HOTROD shall change to use the technology of the future.

► Honorable William F. McDonald, Orange County Superior Court, Supervising Judge of the Complex Civil Panel.

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We are amazed at how frequently economic experts fail to gather and consider readily available economic and industry data that may have a direct bearing on the financial performance of the subject business. This type of information can be obtained from a variety of sources, including government and private economic reports, trade associations and journals, newspapers and magazines, and SEC filings of similar companies or companies in the same industry. Websites of the litigating companies, or those of competitors, customers or suppliers, may contain valuable information or links to more authoritative sources. A favorite technique is to identify an industry expert and simply call to ask for his or her help.

Discovery Assistance

Liability issues are normally the primary focus of litigation counsel, particularly early in the case. Consequently, it is important for the CPA to ensure that the required information regarding economic damages is obtained through discovery. It is normally not enough to limit requests to financial statements and tax returns.

With a little preparation and research, the damages expert is

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able to draw out more subtle information regarding such issues as the chronology of key financial events, alternative causation, record-keeping methods, business practices, key economic influences, and major customers, suppliers, and competitors.

Evaluation of Opposing Economic Expert's Analysis

When evaluating the work of opposing experts, the first thing we look for is relevant information that was not considered. Cost considerations, inadequate discovery, or a lack of experience may result in a less-than-thorough analysis. Diligent analysis will frequently reveal inconsistencies between the assumptions and methodology employed by the opposing expert, and the factual information available. On several occasions, we have identified inconsistencies between the assumptions used by opposing experts and the deposition testimony of their own clients.

Summary

CPA's can provide more than just an expert opinion regarding economic damages. From an initial cost/benefit analysis, through discovery, and into the trial phase, experienced forensic accountants can provide valuable insights regarding the financial and economic aspects of a case.

David L. Hahn is a partner, and Robert R. Lovret a senior manager, with the Litigation and Financial Recovery Services practice of Stonefield Josephson, Inc. With offices in Irvine, Santa Monica, San Francisco, and Walnut Creek, Stonefield Josephson is an accounting and business consulting firm serving publicly held and private companies and their principals. Mr. Hahn and Mr. Lovret can be reached at (949) 653-9400, or by e-mail at dhahn@sjaccounting.com and rlovret@sjaccounting.com.

Note:

In the May 2001 Issue, we misspelled the name of that issue's sponsor, Stephen M. Zamucen of Zamucen & Holmes, LLP. We regret the error.

ASSOCIATION OF BUSINESS TRIAL LAWYERS
abtl
ORANGE COUNTY

P.O. Box 28557
Santa Ana, CA
92799