ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

ORANGE COUNTY

Volume I No. 4 December 1999

Q&A with the Honorable Kathleen O'Leary

[Editor's Note: This month we caught up with Orange County Superior Court Judge the Honorable Kathleen O'Leary]

Q: What effect has consolidation of the municipal and superior courts had, both positively and negatively, on the administration of cases by the court?

A: I think that the most significant positive effect of unification is the court's increased ability to provide open courts for trial ready cases. Unification has significantly improved the court's ability to provide trial date certainty which hopefully has reduced costs related to continuances. Obviously there were fiscal consequences to the court such as a great deal of staff training and increased need for court reporters and this could be viewed as a negative in these days of limited fiscal resources.

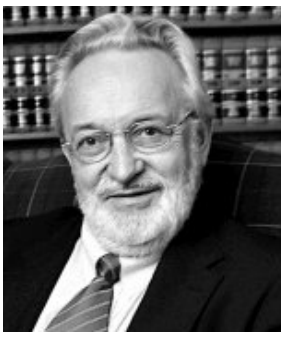
Q: What changes, if any, would you like to see implemented in the Orange County trial courts? What about statewide?

A: I think, rather than changes, I would just like to see greater emphasis on innovation in a variety

(Continued on page 8)

TABLE OF CONTENTS

STATE-WIDE PRE-TRIAL RULES
by the Honorable William Rylaarsdam



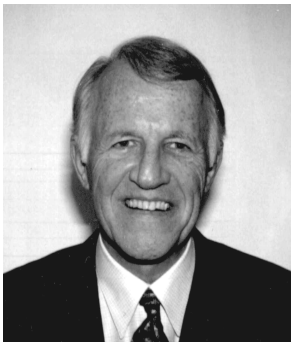
An apocryphical story relates that at one time there was a large sign near the counter in the clerk's office of the Orange County Superior Court which read: "We don't care HOW they do it in Los Angeles." Allegedly the clerk merely needed to point to the sign in response to the frequent lament which started with the phrase "But in Los Angeles, they . . . " Trial lawyers, most of whom practice in several different counties have long complained about inconsistent and obscure local rules. Rules, such as former Orange County Rule 504, requiring the lawyers meet and confer after a motion was filed and to file a declaration indicating compliance, constituted a trap for all out-of-county practitioners. The problem was particularly acute for Northern California lawyers who appear in a larger number of different counties than their Southern California colleagues. When still in practice, I once made an unnecessary and unbillable trip to Oakland for a law and motion matter. I was unaware of an Alameda Superior Court rule which required a phone call to the court, a day before the hearing, or oral argument was deemed waived.

The Litigation Section of the California State Bar has long sought to remedy these problems. Almost ten years ago, the executive committee of that section was about to propose a bill to the Legislature which would impose an outright ban on the adoption and enforcement of all local rules. Upon becoming aware

(Continued on page 6)

UPCOMING EVENTS

Letter from the President
by Thomas R. Malcolm



The decline in civility among lawyers, a topic which should be important to us all, was recently featured in several national legal publications. More and more business trial lawyers complain that the law business is a lot less enjoyable than it used to be. One of the most often cited reasons is the lack of civility – the way we treat one another. They define civility as encompassing more than just appropriate social graces and common courtesy, but also attention to professionalism and ethical conduct. The concern expressed by many of these publications is that incivility, like a highly contagious disease, is wreaking havoc throughout the country and causing the profession irreparable harm.

In an article for the Valparaiso University Law Review, United States District Judge Marvin E. Aspen quoted an exchange between two veteran trial lawyers during a deposition for a multi-million dollar lawsuit. The exchange was reported in the *Chicago Tribune*. Attorney V had just asked Attorney A for a copy of a document he was using to question the witness:

Mr. V: Please don't throw it at me.
Mr. A: Take it.
Mr. V: Don't throw it at me.
Mr. A: Don't be a child, Mr. V. You look like a slob the way you're dressed, but you don't have to act like a slob...
Mr. V: Stop yelling at me. Let's get on with it.
Mr. A: Have you not? You deny I have given you a copy of every document?
Mr. V: You just refused to give it to me.
Mr. A: Do you deny it?
Mr. V: Eventually you threw it at me.
Mr. A: Oh, Mr. V, you're about as childish as you can get. You look like a slob, you act like a slob.
Mr. V: Keep it up.
Mr. A: Your mind belongs in the gutter.

This unfortunately is not an extreme example of incivility between adversaries. To quote a statement from an article in the American College of Trial Lawyers, "*The Bulletin*," recent studies on the increased concern over such matters indicate that incivility between and among lawyers is growing to an extent that it is interfering with the effective administration of civil and criminal justice.

For many years, the law practice in Orange County appeared to be immune from many of the problems that plague large metropolitan areas. Aside from the occasional isolated incident, the county appeared to possess certain built-in immunities within its bench and bar which blocked the incivility virus. Unfortunately, many business trial lawyers attest to mounting evidence that proves this is no longer true.

If those lawyers are correct, as I suspect they may be, the first step to reverse this process is to recognize that a problem exists. Secondly, we, collectively as a bench and bar, must decide what action steps we

(Continued on page 10)

ASSOCIATION OF BUSINESS TRIAL LAWYERS
abtl

P.O. Box 28557, Santa Ana, CA 92799
Phone & Fax (949) 623-8280; E-mail abtl@mediaone.net
www.abtl.org

Officers
Thomas R. Malcolm, *President*
Robert E. Palmer, *Vice President*
Andrew J. Guilford, *Secretary*
Jeffrey W. Shields, *Treasurer*

Board of Governors
Wylie A. Aitken • Richard A. Derevan
Robert E. Gooding, Jr. • Richard C. Goodman
Andra Barmash Greene • Howard F. Harrison
Vernon W. Hunt, Jr. • John B. Hurlbut
Don W. Martens • Hon. William F. McDonald
Hon. William F. Rylaarsdam • Glenda Sanders
Hon. Nancy Wieben Stock • Hon. Alicemarie H. Stotler
Hon. Gary L. Taylor • Hon. Thomas N. Thrasher, Sr.
Hon. Stuart T. Waldrip • Gary A. Waldron
Michael G. Yoder • Dean J. Zipser

Past President
Donald L. Morrow

Editor
Dean J. Zipser, Morrison & Foerster

Editorial Board
Justice William Rylaarsdam, Court of Appeal
Todd A. Green, O'Melveny & Myers
Carole E. Reagan, Morrison & Foerster
Jeffrey H. Reeves, Gibson, Dunn & Crutcher
Sean M. Sherlock, Snell & Wilmer
Vikki L. Vander Woude, Morrison & Foerster

Executive Director
Rebecca Lee Cien, (323) 939.1999

"Effective Use of Themes in the Courtroom" - Another ABTL Annual Seminar Success

by Andra Greene & Richard Goodman

This year's ABTL annual meeting, "Effective Use of Themes in the Courtroom," held at the Ritz-Carlton in Phoenix, Arizona, presented what was universally acclaimed as the best legal seminar most attendees had ever experienced. The program was first rate, from start to finish. The meeting started on Friday night with a "Radio Play" performed by the Buffalo Nights Theater Company, a group of very talented actors who dramatically presented us with the facts and became the witnesses involved in the case study of Duncan Feinman vs. Softsync Corporation, et al. We watched with our own eyes as the story unfolded. The case involved industrial espionage, software piracy, extortion, bribery, wrongful imprisonment, unfair competition and breach of employment contract.

Not only did we witness the underlying events; we also saw how the case was shaped pretrial. We received a 3-inch thick trial notebook containing pleadings, deposition testimony, key documents, expert witness reports and jury instructions.

Over the next two days, we were privileged to sit as "jurors" in a trial showcasing the unique techniques of some of the most talented lawyers in America, including Max Blecher, James Brosnahan, Raoul Kennedy, Eugene Majeski and many many others. Many noted jurists also moderated the sessions, including our own board member Hon. William McDonald and U.S. Magistrate Judge Arthur Nakazato.

The seminar followed the format of an actual trial. We heard opening statements for the plaintiff, the defendant and the third party defendant. In the openings, each lawyer attempted to develop the theme for his case. We then observed actual direct and cross-examinations of some of the key percipient witnesses from the Radio Play. The following day we watched direct and cross-examinations of actual expert witnesses, courtesy of Ernst & Young; and, finally, we were privileged to enjoy some of the most effective and dramatic closing arguments most of us had ever heard. With each closing argument we were able to experience how our perceptions about the case changed. In fact, when a straw vote poll of the "jury" was taken, the very mixed results showed how effectively each of the presenters was able to appeal to a significant group of their target audience.

In the end, there was an unexpected treat. The

(Continued on page 7)

Litigator Alert: Changes in Civil Procedure

by Deborah Mallgrave

Beginning January 1, 2000, at least three important changes take effect to the Code of Civil Procedure that warrant the attention of all litigators.

First, the time requirements for filing and responding to motions under CCP 1005 have been increased. The new time requirements are as follows: (1) moving papers are to be served and filed 21 calendar days before the hearing; (2) responding papers are to be served and filed 10 calendar days before the hearing; and (3) reply papers are to be served and filed 5 calendar days before the hearing. While new statutes ordinarily do not take effect until January 1, 2000, it is not clear whether these new time requirements apply to motions scheduled for hearing in 2000 (but for which notice is served and filed in 1999), or whether the new requirements only apply to motions served and filed after January 1, 2000. The most cautious approach is thus to file and serve all papers according to the new time requirements for any hearing set in the year 2000.

The second notable change concerns the definition of personal records in connection with a subpoena for personal records under CCP 1985.3(a)(1). The definition of personal records, which previously included books, documents and other writings pertaining to a consumer, now includes electronic data. Additionally, the list of witnesses whose records are considered to be "consumer records" has been expanded to include dentists, ophthalmologists, optometrists, physical therapists, acupuncturists, podiatrists, medical centers, clinics, radiology or MRI centers, clinical or diagnostic laboratories, or postsecondary schools as described in Section 76244 of the Education Code.

Third, under certain conditions, new subdivision (e) to CCP 2031 allows parties to serve supplemental inspection demands for later acquired or discovered documents. Basically, as long as an inspection demand was previously served, the demanding party may serve a supplemental demand twice before, and once after, the initial setting of a trial date. The court may allow additional supplemental inspection demands on a motion for good cause.

The full text of these changes can be found in the following chapters of West's 1999 California Legislative Service: chapter 43 (amendments to CCP section 1005); chapter 48 (amendments to CCP section 2031); and chapter 444 (amendments to CCP section 1985.3).

- **Deborah Mallgrave of Snell & Wilmer LLP**

PLEADING FRAUD ALLEGATIONS UNDER THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995

by Paul J. Collins

In December 1995, Congress enacted the Private Securities Litigation Reform Act of 1995 ("Reform Act") — landmark legislation that was "prompted by significant evidence of abuse in private securities lawsuits" and designed to deter "unwarranted securities fraud claims." The Reform Act promised to end many of the most abusive practices utilized by securities class action plaintiffs' lawyers by, among other things, "creating a new, uniform, and higher minimum pleading standard required for all fraud allegations." By creating a new and heightened pleading standard, Congress intended to "establish uniform and more stringent pleading requirements to curtail the filing of meritless lawsuits."

In the four years since its passage, however, courts have been sharply divided in interpreting key provisions of the Reform Act, including (1) how high Congress intended to raise the hurdle for pleading securities fraud claims, and (2) whether allegations that a defendant acted recklessly remains a sufficient basis after the Reform Act to plead a claim for securities fraud. Like the trial court decisions that preceded them, the first decisions handed down by the federal courts of appeals demonstrate that there remains significant dispute on both issues. That the courts of appeals are sharply divided on these issues is nowhere more apparent than in the Ninth Circuit's recent decision in *In re Silicon Graphics, Inc. Securities Litigation* and the decisions that have been decided since. As a result, there currently is no "uniform" national pleading standard — in some jurisdictions there is no heightened standard at all — and only a decision by the Supreme Court is likely to resolve the conflict.

The New Pleading Standard

Under the Reform Act, in order to plead a securities fraud claim under Section 10(b) of the Securities Exchange Act of 1934, and SEC Rule 10b-5 promulgated thereunder, a plaintiff now must plead "with particularity facts giving rise to a *strong inference* that the defendant acted with the required state of mind." If this heightened pleading standard is not met, the Reform Act mandates that the court dismiss the complaint. In addition, with respect to claims alleging that a defendant made a false or misleading forward-looking statement, *e.g.,* an earnings projection, the Reform Act requires the plaintiff to plead facts that, if true, would demonstrate that the defendant actually knew that the statement was materially false or misleading at the time it was made.

This pleading standard stands in stark contrast to Rule 9(b) of the Federal Rules of Civil Procedure, under which a plaintiff must allege "the circumstances constituting fraud . . . with particularity," but may plead "[m]alice, intent, knowledge, and other condition of mind of a person . . . generally." Indeed, it was because the federal courts had interpreted Rule 9(b) in conflicting ways — and because the courts' conflicting application of Rule 9(b) had "not prevented abuse of the securities laws" — that Congress was prompted to adopt the Reform Act's higher uniform national pleading standard.

For example, in pre-Reform Act cases such as *Shields v. Citytrust Bancorp, Inc.* and *Acito v. IMCERA Group, Inc.*, the Second Circuit had held that Rule 9(b) required plaintiffs to "allege facts that give rise to a strong inference of fraudulent intent." According to the Second Circuit, the "requisite 'strong inference' of fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." In contrast, the Ninth Circuit, in *In re GlenFed, Inc. Securities Litigation,* rejected the notion that Rule 9(b) required plaintiffs to plead a strong inference that a defendant acted with scienter, holding instead that Rule 9(b) permitted plaintiffs to plead scienter "simply by saying that scienter existed."

There is no question that the Reform Act effected a substantial change in the pleading requirements within the Ninth Circuit. No longer may a plaintiff allege scienter simply by saying that scienter existed. However, there currently exists a split of authority within the federal courts on the precise meaning of the Reform Act's scienter standard. The courts have been divided on whether the Reform Act adopted or "codified" the scienter pleading standard previously in force in the Second Circuit. The courts similarly have been divided on the question of whether the Reform Act raised the substantive requirements for scienter by eliminating liability for unintentional or "objectively" reckless conduct. Thus, judicial interpretations of the Reform Act's pleading standard have not been "uniform" and have not created a single "national standard" for pleading securities fraud claims.

The Debate Over "Motive And Opportunity" Allegations

Although the Ninth Circuit's pre-Reform Act

(Continued on page 5)

(Collins: Continued from page 4)
decision in the *GlenFed* case set forth the most permissive pleading standard of any in the pre-Reform Act case law, the Ninth Circuit's decision in *Silicon Graphics* adopted the most rigorous pleading standard of any post-Reform Act case. The court in *Silicon Graphics* held that the Reform Act's "strong inference" pleading standard cannot be met simply by pleading that a defendant had both a motive and the opportunity to commit the alleged fraud. It also held that the Reform Act "requires plaintiffs to plead, at a minimum, particular facts giving rise to a strong inference of *deliberate or conscious recklessness*."

With respect to the pleading standard, the Ninth Circuit held that "Congress intended for the [Reform Act] to raise the pleading standard even beyond the most stringent existing standard" — that is, above the pre-Reform Act two-prong standard adopted by the Second Circuit. In support of its conclusion, the court noted that:

(1) Congress had considered, but rejected, an amendment that would have adopted the Second Circuit's pleading standard;

(2) the Conference Committee that reconciled the Senate and House versions of the legislation specifically stated that although "[t]he Conference Committee language is based in part on the pleading standard of the Second Circuit," which is "[r]egarded as the most stringent pleading standard," it did "not codify the Second Circuit's case law" interpreting the "strong inference" standard "[b]ecause the Conference Committee intends to strengthen existing pleading requirements"; and

(3) although President Clinton had vetoed the Reform Act on the grounds that "the conferees make crystal clear . . . their intent to raise the standard even beyond" the Second Circuit's pre-Reform Act standard, Congress overwhelmingly overrode that veto.

The First, Fourth, Sixth, and Eleventh Circuits all agree that the Second Circuit's pre-Reform Act "motive and opportunity" standard no longer is a sufficient basis upon which a court may infer that a securities fraud defendant acted with the requisite degree of scienter.

The Second and Third Circuits disagree. In *Press v. Chemical Investment Services Corp.,* the Second Circuit simply assumed, without discussion, that its pre-Reform Act pleading standard survived the Reform Act. In *In re Advanta Corp. Securities Litigation,* the Third Circuit found that "the legislative history on this point is contradictory and inconclusive" and, thus, refused to consider anything other than the text of the statute. The Third Circuit stated that because Congress borrowed the "strong inference" language from the Second Circuit's pre-Reform Act pleading standard, Congress must have intended to "establish[ ] a pleading standard approximately equal in stringency to that of the Second Circuit." However, unlike the Second Circuit, the Third Circuit in *Advanta* also held that the Reform Act's "additional requirement that plaintiffs state facts 'with particularity' represents a heightening of the standard."

The difference in approaches is more than a matter of semantics. Under the Second Circuit's pleading standard, plaintiffs were (and still are) able to overcome the requirement that they plead facts demonstrating scienter with respect to an issuer and the issuer's corporate executives if the plaintiff alleges that (1) one or more executives sold some portion of their stock in the issuer at or about the time the allegedly false and misleading statements were made, and (2) the executive who sold the stock participated in some way in making or influencing the issuer's public statements. In practice, such allegations have proved to be easily made and, therefore, represent little substantive value in weeding out at the pleading stage claims based on merit. This is particularly true with respect to companies that pay a large portion of executive compensation in the form of stock options, such as is the case in California's high technology community. In the Second Circuit, such bare allegations remain sufficient to withstand a defendant's motion to dismiss. In the First, Fourth, Sixth, Ninth, and Eleventh Circuits — and perhaps even in the Third Circuit — those simple allegations may be regarded as evidence of scienter, but they are not in and of themselves sufficient to meet the Reform Act's heightened pleading requirement.

The Debate Over Recklessness

Another issue raised by the recent Courts of Appeals decisions is whether allegations that a defendant acted recklessly — as opposed to knowingly or intentionally — is sufficient to meet the scienter element of a Section 10(b) and Rule 10b-5 claim. Whether allegations and proof that a defendant acted recklessly are sufficient to satisfy the scienter element of a Section 10 (b)/Rule 10b-5 claim, and what is meant by the term "recklessness," are issues with which the federal courts have wrestled since the Supreme Court first raised the issue — and then declined to decide it — over 20 years ago in *Ernst & Ernst v. Hochfelder*.

Prior to the Reform Act, every federal appellate court to address the issue held that *objective* recklessness was a sufficient basis to impose liability under Section 10b-5 and Rule 10b-5. In this regard, most

(Continued on page 6)

(Collins: Continued from page 5)

courts defined "recklessness" to mean "a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an *extreme departure from the standards of ordinary care,* and which presents a danger of misleading buyers or sellers that is either known to the defendant or is *so obvious that the actor must have been aware of it.*" In practice, however, this objective recklessness standard proved very difficult to apply and led to trial and appellate court decisions that appeared to apply a standard of recklessness that was much more a heightened form of negligence, rather than the lesser form of intent envisioned by the Supreme Court in *Hochfelder*.

The Reform Act did not explicitly resolve the scienter issue. Nevertheless, the Ninth Circuit, in its *Silicon Graphics* opinion, found support in the Reform Act's legislative history for holding that only a showing of "deliberate recklessness" would suffice to state a securities fraud claim under Section 10(b) and Rule 10b-5. According to the Ninth Circuit, under *Hochfelder* and prior Ninth Circuit case law, "recklessness only satisfies scienter under § 10(b) to the extent that it reflects some degree of intentional or conscious misconduct." The Ninth Circuit thus held that "we read the [Reform Act] language that the particular facts must give rise to a 'strong inference . . . [of] the required state of mind' to mean that the evidence must create a strong inference of, at a minimum, 'deliberate recklessness.'" In so holding, the court reignited a long-standing debate as to whether evidence of *objective* recklessness is sufficient to impose liability for securities fraud or, instead, whether *subjective* recklessness must be shown. The *Silicon Graphics* opinion strongly suggests that the standard in the Ninth Circuit is subjective recklessness. In response, a number of Courts of Appeal have stated that nothing in the Reform Act was intended to change the substantive scienter standard.

"Information and Belief" Allegations

The Ninth Circuit's *Silicon Graphics* opinion also is the only appellate court to date to have addressed the Reform Act's standard for pleading on "information and belief." The Reform Act expressly permits plaintiffs to plead fraud allegations on information and belief, but in such cases requires plaintiffs also to plead "with particularity all facts on which that belief is formed." Plaintiffs' lawyers typically have attempted to avoid this requirement by including in their securities fraud complaints boilerplate language stating that plaintiffs' fraud allegations are based on the "investigation of counsel" rather than on "information and belief." In this way,

(Continued on page 9)

(Rylaarsdam: Continued from page 1)

of this draconian proposal, the California Judges Association proposed the creation of a state-wide bench-bar committee to address these concerns. Such a committee was formed and, for several years was chaired by Orange County Superior Court Judge Thomas Thrasher.

The committee undertook to review all local pre-trial rules and synthesized these rules into a uniform set of rules which were proposed to the Judicial Council as a substitute for local rules on the designated subjects. The project moved slowly but, in 1997, resulted in the adoption and amendment of California Rules of Court, rules 301 – 360. The new rules stated the requirements for various types of pre-trial motions and provided, in Rule 302, that "By enacting the rules in this title, the Judicial Council intends to occupy the field of form and format of papers, motions, demurrers, discovery, and pleadings. No trial court, or any division or branch of a trial court, shall enact or enforce any local rule concerning the form of format of papers, motions, demurrers, discovery, or pleadings. The rules set forth in this title alone shall govern the form and format of papers, motions, demurrers, discovery, pleadings, preliminary injunctions and bonds, and ex parte applications and orders. All local rules concerning the form and format of papers, motions, demurrers, discovery, and pleadings are null and void as of the effective date of this rule."

Although it may have been the intent of the judicial council to preempt *all* local pre-trial rules, the reference to "form and format" caused considerable confusion. Rules requiring lawyers meet and confer or telephone the court prior to a hearing did not constitute "rules concerning the form and format of papers." Yet it was these kind of rules which created many of the problems for lawyers unfamiliar with local practice.

This year the Judicial Council made another attempt to solve the problem. It adopted new Rule 981.1 to replace Rule 302. The new rule, which will be effective July 1, 2000, "preempts local court rules relating to pleadings, demurrers, ex parte applications, motions, discovery, provisional remedies, and form and format of papers." It is the intent of this rule to make it clear that preemption is not limited to "form and format." The new rule does not apply to trials (including motions in limine) and post-trial motions. It also exempts criminal, family, and probate proceedings. Proceedings to prevent harassment are also excluded.

To address the criticism that the new rule may leave gaps in necessary rules, the Civil Advisory Committee of the Judicial Council will review

(Continued on page 7)

(Rylaarsdam: Continued from page 6)
proposals from local courts and other interested entities and persons for the adoption of additional state-wide rules during the period remaining before the effective date of Rule 981.1. The committee will recommend the adoption of additional rules to the Judicial Council in time for them to go into effect contemporaneously with the effective date of the new rule.

The goal of most trial lawyers to see a uniform set of pre-trial rules is about to come to fruition. However, once assigned to a particular department, lawyers should nevertheless be mindful that it is to their and their client's advantage to learn the judges preferences. Judge may no longer impose local or local-local pre-trial rules or sanction lawyers for failure to comply with such rules. Nevertheless, it is unavoidable that each judge will have some methods or approaches which, although not inconsistent with the uniform rules, will incline him or her to look favorably upon the lawyer who is sensitive to the judge's idiosyncrasies. Good lawyering requires counsel to be on the alert for such peculiarities; as in the past, courtroom personnel can be most helpful in advising lawyers how to be most effective in the particular court.

- **Hon. William Rylaarsdam of the California Court of Appeal, Fourth District, Division III**

(Greene/Goodman from page 3)
Buffalo Nights Theater Company presented a very entertaining epilog where we learned the true facts most jurors never hear. We discovered the case actually involved a murder and a pedophiliac. It was a great ending for an outstanding weekend.

The majority of attendees were experienced trial lawyers. But everyone agreed that he or she took home valuable insights on trial advocacy from some of the masters.

The Phoenix seminar was outstanding. Imagine how much more enjoyable it will be to attend the 2000 ABTL seminar – in Hawaii.

- **Andra Greene of Irell & Manella, and Richard Goodman of Stradling, Yocca, Carlson & Rauth**

ABTL - ORANGE COUNTY UPCOMING DINNER PROGRAM

Wednesday, February 2, 2000

"What Every Business Litigator Should Know About Criminal Prosecutions & Criminal Law"

Speakers:
Brad Brian, *Munger, Tolles & Olson*
Paul Meyer, *Law Offices of Paul Meyer*

Westin South Coast Plaza
6 p.m. Reception/7 p.m. Dinner & Program

ASSOCIATION OF BUSINESS TRIAL LAWYERS
abtl

27th ANNUAL SEMINAR

Save the Dates

October 12-15, 2000

KEA LANI HOTEL
MAUI, HAWAII

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, Rebecca Cien, at 323.939.1999, or submit your material directly to

Obtain court and courtroom information, important court rule changes and updated ABTL program information through the ABTL-Orange County e-mail network.

Submit your e-mail address today: abtl@mediaone.net

Note: please provide your name and lawfirm with each submission

(O'Leary: Continued from page 1)

of areas. As systems, courts traditionally have been very precedent oriented and that mindset sometimes inhibits development and implementation of new and creative ways to get the job done.

Q: What has been the biggest challenge for you in being Presiding Judge?

A: It would be difficult to say whether the transition to state trial court funding or the implement of unification has been the greatest challenge. The legislation which provided for state trial court funding failed to address many of the intricacies of revenue distribution, indemnity and liability issues and a variety of other significant issues so trial courts were left to negotiate with their individual counties on these matters. As the presiding judge I found myself, out of necessity, assuming responsibilities for which I had little formal training. Presiding judges do have the benefit of fine educational programs, but the training has to be somewhat of a crash course. Today's presiding judge acts in many ways as the CEO of a large company. I guess I wish I had an MBA in addition to my JD.

Q: What has been your most memorable experience(s) on the bench? What do you like best about being a judge?

A: I couldn't possibly tell you what my most memorable experience has been - there have been so many!! The ability to resolve conflicts is what I like best about being a judge. I have the luxury of not being required to be an advocate for either side. I sit back and listen. It's my job to seek a just resolution to conflicts whether it is through settlement or litigation. I derive a great deal of satisfaction from the resolution of cases, although, from time to time I do miss the adrenaline rush I would get from being an advocate.

Q: What is your biggest pet peeve(s) as a judge?

A: Probably not a big surprise - my pet peeve is unprepared lawyers. They do their clients a big disservice and they waste valuable court time. If lawyers and judges do their work to the best of their ability, the system works well. If somebody fails to competently perform, the system struggles and justice may not be served.

Q: What advice would you give lawyers to assist them in trying cases more effectively?

A: I think litigators need to remember that the trier of fact is rarely as conversant with the facts as the lawyer. Judges can do their best to be prepared, but we

(Continued on page 9)

(O'Leary: Continued from page 8)
don't live with one case in particular like the lawyers do. I think it is extremely effective when a lawyer at the outset presents a clear and concise version of the facts based on the evidence and applicable law. Many times lawyers get lost in rhetoric, don't take the time to "connect the dots" and they lose the impact of their argument.

Q: What do you think civil litigators and the criminal bar can learn from each other?

A: I know this is a generalization, but criminal lawyers tend to be strongest when it comes to oral presentations and civil litigators tend to be very skilled at written advocacy. It might be helpful, particularly for relatively new lawyers, to take a look at how lawyers in other areas of specialization practice. A civil lawyer might find it beneficial to watch a criminal attorney voir dire a jury. Criminal attorneys frequently find it necessary to inquire of jurors in some pretty delicate areas and many have, through practice, become very effective. I think that criminal attorneys might benefit from reviewing civil pleadings for tips on effective written expression. Good speakers aren't always as articulate when they need to put their words down on paper.

Q: And now for our standard closing question, if you could choose any job in the world other than a judge, what job would you choose and why?

A: I would love to have Katie Couric's job (and, of course, her talent). I think she has an opportunity to explore such a wide variety of topics. In a morning show she can cover everything from world economic conditions and politics to holiday decorations and makeup tips. I like the idea of being able to do it all. And then there are the incredibly interesting people with whom she talks.

▪ Hon. Kathleen O'Leary, Orange County Superior Court

The ABTL e-mail address
has changed.
Please note the new address:
abtl@mediaone.net

(Collins: Continued from page 6)
plaintiffs have attempted to avoid the necessity of revealing in their pleadings their confidential sources or, worse, that their fraud allegations are, at heart, nothing more than plaintiffs' counsel's guesswork.

Under *Silicon Graphics,* pleadings based on counsel's guesswork no longer are permitted. In *Silicon Graphics*, the court rejected plaintiffs' statement that pleadings based on "the investigation of their counsel" and on plaintiffs' stated belief that "substantial evidentiary support will exist for the allegations . . . after a reasonable opportunity for discovery" (language borrowed from Fed. R. Civ. P. 11) fails to meet the Reform Act's information and belief pleading requirements. The court explained that "plaintiff must provide, in great detail, all of the relevant facts forming the basis for her belief" and that "[i]t is not sufficient for a plaintiff's pleadings to set forth a belief that certain unspecified sources will reveal, after appropriate discovery, facts that will validate her claim." The court in *Silicon Graphics* concluded that, "[i]n the absence of such specifics, we cannot determine whether there is any basis for alleging that the [defendants] knew that their statements were false at the time they were made — a required element in pleading fraud."

Conclusion

Many of the pleading issues that have arisen under the Reform Act ultimately will have to be resolved by the Supreme Court. There currently exists a clear conflict among the circuits as to whether Congress intended to raise the pleading standard to the Second Circuit's pre-Reform Act pleading standard or whether Congress intended to raise the pleading standard beyond it. Similarly, since the Supreme Court in *Ernst & Ernst v. Hochfelder* raised, but did not decide, the issue of whether recklessness is sufficient to plead scienter under Section 10(b) and Rule 10b-5, trial courts and appellate courts have struggled to define precisely what level of culpability is required to impose securities fraud liability. The subjective recklessness standard adopted by the Ninth Circuit in *Silicon Graphics* may well encourage the Supreme Court to accept review in order to finally decide this important issue, which the Court has left open for over 20 years.

One practical effect of the Reform Act's heightened pleading standard to date has been to encourage companies and their insurers to more vigorously challenge complaints at the pleading stage. Towards that end, directors and officers liability insurance carriers already have introduced new policy provisions that encourage resolution of securities fraud claims on the

(Continued on page 11)

(Malcolm: Continued from page 2)
need to take towards rectification. Finally, we must formulate a solution to the problem and revisit the same ideals that established Orange County as a civil place to practice.

The first trial I observed here in 1970 made an indelible impression on me. Two well-known Orange County trial lawyers were engaged in a hard-fought fraud case, yet each treated the other with the utmost courtesy and professionalism. It soon became apparent that this is what you would typically expect from your adversaries in Orange County. This was a far cry from my experiences in the "rough and tumble" world of trial practice in downtown Los Angeles, where you were considered daft if you failed to memorialize every exchange with opposing counsel. Trust was a rare commodity. It was not uncommon for your opponent to refuse to accommodate even your simplest requests without first attempting to exact a pound of flesh.

After practicing here for several years, I soon learned why there was a dichotomy between Los Angeles and Orange County. One obvious explanation was the size difference in the respective bars. In a larger bar, a sense of collegiality and peer pressure are lacking, which both serve as a deterrent to incivility. There was a time that if an Orange County lawyer was treated shabbily by an opponent, everyone knew about it within 24 hours, and the abuser was immediately looked down upon. To further illustrate the point, when you are not familiar with your opponent, the natural tendency is to think the worst, misunderstand and unjustifiably attribute a sinister motive. Conversely, when you know your opponent, the inclination is to provide the person with the benefit of the doubt. As our bar has now approached the size of Los Angeles, we need to confront the increased challenge of anonymity acting as a shield to the abusive lawyer.

Our long tradition of civility here was due largely in part to the influence of highly visible leaders among the bench and bar, who, by their positive impression on their colleagues, seemed to instill civility and professionalism county wide.

One such example is William Wenke, former head of the law firm of Wenke, Burge & Taylor, president of the state bar and president of the Orange County Bar Association. Bill was an outstanding role model who was committed to speaking out frequently at bar events on the importance of civility and collegiality among attorneys. One of Bill's concerns was the practice's convergence to a competitive business rather than a noble profession, and that a lawyer's worth was measured by the bottom line rather than his values.

Another example is Garvin Shallenberger of Rutan & Tucker, the largest firm both then and now in the county. Garvin was an outstanding trial lawyer – probably one of the best the county has ever known. Like Bill, Garvin was a former president of the state bar and Orange County Bar Association. Even today when you interact with an attorney from his firm, you can sense that Garvin's mentoring has been instilled in his partners and associates. Garvin passed the civility baton to outstanding leaders in that firm who perpetuate his legacy today, specifically, Jim Moore, John Hurlbut, Milford Dahl, Jr. and Len Hampel, Jr., just to name a few.

Thirdly is Sam Barnes, my mentor and a respected president of the Orange County Bar Association. In 1970, Sam Barnes inspired the establishment of an award that would both remind us of our rich heritage of civility and professionalism, and, at the same time, create a role model for all of us to emulate. This honor is entitled "The Franklin G. West Award" – the most prestigious commendation the Orange County Bar Association presents.

For the uninitiated, Franklin G. West was one of our most beloved judges. As a sitting Superior Court judge for 26 years, Franklin sat in the same chair previously occupied by his father. To this day, this chair remains in Department 1 as a tribute to both father and son. Franklin was widely known as a brilliant legal scholar. More importantly, he possessed all of the seemingly rare qualities that made him an exceptional legal professional and human being: civility, warmth, integrity and honesty. In short, Franklin G. West set the very high standard of which all trial lawyers in Orange County should strive to meet.

It is no coincidence that the award is presented each year at the culmination of the annual Judges' Night, the most important event hosted by the Bar Association, attracting the largest attendance of judges and attorneys. As expected, the event's growth in attendance directly correlates to the growth of our bar. The award is presented to an honoree, either from the bench or the bar, who is universally respected and contributes greatly to the practice of law and administration of justice. The award is bestowed upon an honoree who embodies the admirable qualities of Judge West.

January 2000 will mark the thirtieth anniversary of presenting the Franklin G. West award. Many of the recipients are still active throughout the county, serve in leadership capacities, act as role models as they conduct their courtrooms, and actively practice as attorneys.

To resolve the apparent problem that Orange County has with an increase in incivility, we must first commit to emulating the standards set by the recipients

(Continued on page 11)

(Malcolm: Continued from page 10)
of the Franklin G. West award. Renewing this commitment empowers us to positively influence our partners and associates who have been yet to fully accept the importance of civility in our practice. Just as civility in the top leadership of a law firm filters down through the ranks, the reverse is true if leadership in the firm is lacking this value.

While lawyers should assume the first line of defense in reversing the incivility trend, judges should be second. If the judge takes control of a courtroom proceeding early and forcefully, lawyers who are tempted to take advantage will be controlled. Recently in Orange County Bankruptcy Court, a judge admonished four attorneys in her courtroom for squabbling amongst themselves and failing to conduct themselves professionally. The judge sets the tone in the courtroom. If the judge refuses to tolerate personal attacks and incivility, an atmosphere conducive to a more orderly and civil trial will be established.

Finally, as a Bar Association and as the ABTL, we must continue to focus on the issue, discuss it and encourage the old adage of "treat others as you would expect to be treated."

I am proud of our current ABTL Board of Governors, which boasts four recipients of the Franklin G. West Award: U.S. District Court Judges Stotler and Taylor, Superior Court Judge Stuart Waldrip and attorney Don Martens. The ABTL Board is also enhanced by the current president of the State Bar and former president of the Orange County Bar Association, Andy Guilford – a destined recipient of the Franklin G. West Award.

In my last article as ABTL President, I urge all of us, as a bar, to focus and dedicate the energy and commitment to reestablishing Orange County's reputation as the model of civility and professionalism which is what Judge West would expect of us.

▪ **Thomas Malcolm of Jones, Day, Reavis & Pogue**

If you did not attended the December 1, 1999 ABTL Dinner Programs, you missed the opportunity to meet the following Judges:

HONORABLE
□□□□□□□□□□□□□□□□□□
HONORABLE DANIEL BRICE
□□□□□□□□□□□□□□□□□□□□□□□□□
HONORABLE MARJORIE CARTER
HONORABLE MARY F. ERICKSON
HONORABLE SHEILA FELL
HONORABLE RICHARD O. FRAZEE. SR.
HONORABLE RAYMOND IKOLA
□□□□□□□□□□□□□□□□□□□□□□□□□
□
HONORABLE RICHARD W. LUESEBRINK
HONORABLE JOY MARKMAN
HONORABLE WILLIAM F. MCDONALD
HONORABLE DAVID T. MCEACHEN
HONORABLE WILLIAM MONROE
HONORABLE GARY PAER
HONORABLE WILLIAM RYLAARSDAM
HONORABLE WARREN H. SIEGEL
HONORABLE ELAINE STREGER
HONORABLE STEVEN SUNDVOLD
HONORABLE GARY TAYLOR
HONORABLE DAVID THOMPSON
HONORABLE THOMAS THRASHER
HONORABLE STUART WALDRIP
HONORABLE EDWARD WALLIN

(Collins: Continued from page 9)
merits. Prior to the Reform Act, a typical D&O policy provided for coverage, including for coverage of the costs of defense, only after a specified self-insured retention was exhausted (usually hundreds of thousands of dollars). Issuers (and their officers and directors) had incentive to settle claims at an early stage of the litigation, and without regard to the merits of the claims, because they knew that the issuer was likely to incur non-trivial costs of defense even if the claims were dismissed at the pleading stage. Understanding this, insurance carriers with increasing frequency are offering policy provisions that waive the self-insured retention if the insured successfully defends the claims at the pleading stage.

▪ **Paul J. Collins of Gibson, Dunn & Crutcher**

ASSOCIATION OF BUSINESS TRIAL LAWYERS
abtl
ORANGE COUNTY

P.O. Box 28557
Santa Ana, CA
92799