ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

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Judge Ronald L. Styn: A Brown Bag Conversation

By Charles Berwanger, Esq. Gordon & Rees LLP

Picture: A file room containing pleadings from 500 cases. The files range from simple one-inch thick files to files filling many file drawers. There is but one judge and one research attorney in Department 62 to deal with this mountain of paper and the recurring paper wars it generates.

Hon. Ronald L. Styn

This is the world of Independent Calendar Judge Ronald L. Styn, who provided insights on how counsel can persuade a judge – specifically Judge Styn – given this context, and how counsel must prepare for trial.

This article will recount the themes Judge Styn identified; the constraints that counsel must respect; and highlights of Judge Styn's biography and court staff contact information.

I. Law and Motion

Before filing a discovery motion or a demurrer, call or write to opposing counsel – in other words, "meet and confer." The motion may not be necessary or it may be tailored to an actual dispute that subsists after counsel talk. Although not required by court rule, this is the best practice and is strongly encouraged by Judge Styn. In fact, Judge Styn by his "Department 62 Policies and Procedures" is available during *ex parte* hours to attempt to resolve these disputes without the

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The U.S. Supreme Court Takes On Patent Law

By Craig Countryman, Fish & Richardson P.C.

After a relatively long hiatus from patent cases, the Supreme Court has taken a new interest in them, hearing six patent cases in the past two years. Two recent decisions stand out: *KSR v. Teleflex*, 127 S. Ct. 1727 (2007), and *MedImmune v. Genentech*, 127 S. Ct. 764 (2007). They are notable not only for the profound effect they will have—both involve frequently recurring questions in patent law—but the way in which the Court decided them. The Court eschewed clear rules, emphasizing the need for flexibility. It identified where the Federal Circuit went astray, flagged other issues not before it that deserve scrutiny by the lower courts, and then left the Federal Circuit and District Courts to work out the details. This

Craig Countryman

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Inside

President's Column

By the Hon. Jan M. Adler, President ABTL

As we reach and pass mid-year, our chapter can look back with a feeling of accomplishment and forward with a sense of anticipation. Since our last ABTL Report, we presented an exceptional dinner program featuring Harvard Law School Professor Charles Ogletree that was attended by over 300 people, making it one of the most successful programs in our history. Professor Ogletree's eloquent speech about Charles Hamilton Houston, "America's Greatest Unknown Lawyer," was truly inspiring. We thank Judge Yvonne Campos for suggesting that we co-sponsor this program with the Harvard Law School Alumni Association and for making it possible to bring Professor Ogletree to San Diego.

Hon. Jan M. Adler

We presented two more outstanding Brown Bag lunch programs, featuring Superior Court Judge Ronald Styn and Fourth District Court of Appeal Justice Cynthia Aaron. Our chapter also recently co-sponsored the 23rd Annual Red Boudreau Dinner, at which Cynthia Chihak was recognized as this year's Broderick Award winner.

Last, but far from least, we congratulate Maureen Hallahan, our immediate past president, on her appointment as a Superior Court judge, and long-time ABTL member Harvey Levine for his induction into the California Bar Association Trial Lawyer Hall of Fame, in which he joins the Honorable Rudi M. Brewster as the second member of our legal community to be so honored.

Looking forward, we will present two more exceptional dinner programs this year. On September 10, we will present Lieutenant Commander Charles Swift and Seattle attorney Harry Schneider, Jr., who successfully and courageously represented Guantanamo detainee Salim Ahmed Hamdan before the United States Supreme Court. This program will be unlike any our chapter has previously presented. Not only is the subject matter of the program fascinating and compelling, but as you listen to Commander Swift and Mr. Schneider speak about the case, you will be reminded why we should all be proud to be members of the legal profession and why what we do is so important to ensure that we have the finest and fairest system of justice in the world.

We will end the year with a program on December 3 featuring Duke Law School Professor Erwin Chemerinsky, who is nationally recognized as one of the foremost experts on the Supreme Court. Professor Chemerinsky will speak about the first two years of the Roberts Court and what we might expect from the Court in the future. Both of these programs will be truly outstanding, and our goal is to equal or exceed the audience we had for Professor Ogletree.

Meanwhile, planning continues for the ABTL Annual Program in the Napa Valley, which will take place on October 5-7, 2007. The program, which is entitled "Security & Privacy Actions: The Changing Landscape For Business Litigators," will cover a host of cutting-edge issues in this burgeoning field that you will not want to miss, and will feature an all-star lineup of lawyers and judges from across the state. We are delighted and honored to present former Supreme Court Justice Sandra Day O'Connor as the keynote speaker, as well as a special address by Kathleen Sullivan, the former Dean of Stanford Law School. And, as if all this is not reason enough to attend the program, the planning committee has arranged for a private wine tasting at the home and vineyard of Mary Jo and Art Shartsis. Registration information can be found at www.abtl.org.

You better act fast, however, as rooms at the Silverado Resort and the Meritage Resort are nearly gone. We thank our chapter' representatives on the planning committee, Marisa Janine-Page, Monty McIntyre, Katherine Bacal and Frank Tobin, for their hard work and major contributions to this year's Annual Program.

We are also pleased to report that ABTL will be working with the San Diego County Bar Association on a joint Civility and Professionalism Campaign in 2008. We thank Board member Chris Healey, who will be our representative on the committee in charge of this most worthy campaign, as well as Heather Rosing, the incoming President of the County Bar, for inviting us to participate. Also, please be sure to look for the feature article on our chapter in the September issue of

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Should California Adopt Class Action Reforms?

By Christopher J. Healey, Esq., Luce Forward Hamilton & Scripps, LLP[1]

In some situations, class actions make a lot of sense. For example, if a defendant's conduct has actually injured a group of persons in the same way, or if liability can otherwise be uniformly resolved, class proceedings provide an efficient way to resolve the dispute. Injured parties get relief, the defendant gets finality and the court system is spared the burden of multiple lawsuits on the same issue.

However, for many large corporations and other deep pocket targets, class action procedures in California appear to be skewed in favor of class plaintiffs and the lawyers who represent them. Some view California class action litigation as a high stakes game of roulette, with the single most important factor being the judge assigned to decide the class certification motion. Inconsistent certification rulings fuel the perception that California's limited statutory scheme for class action procedures requires an overhaul.

I. The Perceived Problem: Class Certification is a Crap Shoot

The primary problem cited with California class actions — and chief grist for the tort reformers' mill — is the lack of consistency in class certification decisions.[2] Every litigant in complex litigation faces the risk that reasonable minds can differ on tough issues. But the stakes are higher in class actions, both for the defendants who face bet-the-company exposure if class certification is granted and the absent plaintiffs whose rights are being litigated by strangers. Given the due process risks for both sides, the perceived lack of predictability in the process is a concern.

The "inconsistent results" problem is perhaps best illustrated by the recent conflict in certification rulings issued in wage and hour class actions following the California Supreme Court's decision in *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319. *Sav-On* holds that a trial court has the discretion to grant class treatment for overtime pay claims, notwithstanding the arguably individualized inquiry required to determine whether particular employees are exempt from the overtime requirement.

Faced with similar facts, courts after *Sav-On* have split on whether to certify class overtime claims. *Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422, 1432-1433 (class certification denied in overtime case; plaintiffs fail to demonstrate that their individual claims can be "extrapolated" to the class); *Alba v. Papa John's USA* (C.D. Cal. Feb. 7, 2007) 2007 U.S. Dist. LEXIS 28079 (granting class certification; existence of centralized policies and procedures satisfy commonality requirement, despite individual questions raised as to how specific managers spend their time).

Christopher J. Healey

II. Proposed Improvements To Class Action Procedures in California

At present, California class action procedures exist in a hodgepodge of statutes (C.C.P. § 382 and Civil Code § 1781), court rules (C.R.C. 3.760-3.771) and case law. With an eye toward addressing the "inconsistent results" problem — whether real or perceived — here are four suggested changes that could enhance the certification analysis and management of California class actions.

1. Require Class Proponents to Provide Realistic Trial Plans

One simple but important step would be to require the class proponent to submit a trial plan detailing how the class claims can be fairly tried on a class-wide basis. Presently, class certification decisions are often based on the plaintiff's case "theory," with little or no practical consideration given to how the class claims will actually be tried.

That can lead to big headaches for trial courts and litigants, as the *Sav-On* case illustrates. *Sav-On* upheld class treatment for the plaintiffs' theory of "deliberate misclassification," but provided

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Class Actions: There Is No Reason to Fix What Isn't Broken

By Rachele R. Rickert, Esq., Wolf Haldenstein Adler Freeman & Herz LLP

Class action lawsuits, when appropriately used, are an important and valuable part of California's legal system. Class actions have been used to battle some of the nation's most serious social problems and to redress significant injuries. Because of this, California has a strong public policy favoring class actions. California class action law is also well-developed and the standards for class certification are clear. Moreover, enactment of the Class Action Fairness Act has resulted an increase in the number of class actions being litigated in federal courts—a forum generally perceived by defendants to be more favorable to their interests. While no changes to current class action procedures are needed, if any future changes to California's class action procedure are considered they need to be structured in such a way that they support and not destroy the underlying purpose and utility of class action procedure in California.

Rachele R. Rickert

I. California Has A Strong Public Policy Favoring Class Actions

California's judicial policy favors class actions. *Richmond v. Dart Insudstries, Inc.*, 29 Cal.3d 462, 473 (1981). ("[T]his state has a public policy which encourages the use of the class action device"). The California Supreme Court has long recognized that class actions help deter fraudulent

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Do We Really Need Civility Guidelines?

By Daniel Lawton, Esq.[1]

I am personally sick and tired of hearing about the lack of civility in our profession. Numerous speeches, reports, letters, and law review articles have abounded for at least ten years on the issue of decreased civility and the need to do something about it. Multiple jurisdictions and organizations have drafted codes and creeds to combat this problem. *See* Comment, "A Critique of the Civility Movement: Why Rambo Will Not Go Away," 77 Marq. L. Rev. 751, 752 (Summer 1994).

In the past, these codes and creeds resemble papal encyclicals: scarcely read, even more scarcely heeded, and viewed as irrelevant by the faithful. No empirical study links civility codes to better behavior. Indeed, because many of these guidelines are aspirational, they may send the exact opposite message if we don't care enough about the values embodied in them to enforce them or take them seriously.

Daniel Lawton

The late Sam Dash had no use for such civility codes. His reasoning was simple: "If you're a professional, you don't need a Boy Scout oath. If you're not a professional, a Boy Scout oath is flim-flam." *See* A. Mashburn, "Professionalism in the Practice of Law: A Symposium on Civility and Judicial Ethics in the 1990s," 28 Val. U.L. Rev. 657, 685 (Winter 1994).

As long as twelve years ago, there were at least

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necessity of a motion.

If a motion must be filed think brevity, clarity and good English, admonishes Judge Styn. Remember those 500 cases on Judge Styn's docket. Verbosity and flaccid writing is not persuasive. It indicates slopping thinking and unfairly burdens the reader. Edit, edit and edit again.

II. Judge Styn's Pet Peeves

Footnotes. If it is important – put it in the text. If not, delete it. A footnote suggests that the writer wants to make a point but cannot figure out where or how to make it.

Mystery titles. Imagine a pleading where the title makes a mystery of what its purpose is. Try "Reply to Opposition to Motion…" not "Defendants and Cross-Complainants Washington, Jefferson and Lincoln's Reply…."

Acco fastening a document to ensure it cannot be read. Don't!

Redundancies. "Plaintiff's Complaint in this matter…." Don't!

Two or more "Exhibit No. 1's." The sin of multiple lodgments. *See* Cal. R. of Ct. 2.10, 2.11, 2.114 and 3.113 regarding exhibits.

Know and follow the court rules and Judge Styn's policies and procedures.

III. The Trial

Courts stress that jurors' time not be wasted; that their comprehension be maximized; and that they be satisfied by their jury experience. These elements thread their way through court rules generally and Judge Styn's policies and procedures specifically.

Judge Styn's policies and procedures and trial requirements give emphasis to the need for counsel to plan for trial to avoid wasting jurors' time. For example:

The Court expects counsel to put on a continual flow of witnesses.

If an evidence issue is anticipated, raise it in a motion *in limine* or before trial. Sidebars waste jurors' time and are to be avoided.

If a deposition is to be used in lieu of testimony, provide excerpts to other counsel and Court before trial so the Court can rule on objections before the trial starts.

If an exhibit or demonstrative evidence creates an issue raise it before trial.

Jury questionnaires are usually a waste of time.

Provide instructions to Court before trial.

Keep closing argument to 20 minutes or less – otherwise you lose jurors' attention.

Judge Styn also commented on various best practices for trial counsel. For example:

Do not use first names with witnesses.

Dress professionally. Jurors notice.

Yes, you can lead an expert witness. Understand, however, that may dilute the expert's persuasiveness.

Consider the value of having the judge ask a *voir dire* question rather than you asking.

Do not say before the jury – "We're willing to stipulate…" unless you already have other counsel's agreement.

Lawyers tend to talk too much.

Do not read your closing argument.

Technology. Jurors expect it. However, beware. Know how to use it or have somebody available who does.

Finally, Judge Styn is available for trial post mortems. However, he is not available for settlement conferences of his own cases – even with a waiver.

SHORT BIOGRAPHY

Education

B.A. University of Redlands, 1963, with distinction
LLB, Stanford Law School, 1965
Member, Board of Editors, Stanford Law Review

Employment

Law Clerk: The Honorable James M. Carter
United States District Judge
1965-1966

Trial Attorney: Department of Health, Education and Welfare
1966-1967

Assistant Professor: University of Kentucky College of Law,1967-1969

Adjunct Professor of Law: Cal. Western Law School, 1970-1980

Private Practice: 1969-2000

Appointed to Superior Court April 10, 2000
2000-present

Selected Activities

Member, Board of Governors, The Association of Business Trial Lawyers – San Diego;
President 1998
Master, American Inn of Court – Louis Welsh

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Chapter; President 2002 - 2007
Consultant – "Making a Claim on a Title Insurance Policy," C.E.B. Action Guide (1992)
Consultant – "Title Insurance Practice," 2d Ed. C.E.B. (1997)
Judicial Consultant – "Real Property Remedies and Damages," 2d Ed. C.E.B. (2002)
Member, Board of Directors San Diego Judges Association 2001-2002

Civic Activities

Member, Board of Directors, Blackfriars Theatre (formerly Bowery Theater) 1989-1995
President 1991-95
President, San Diego Club – University of Redlands Alumni Association, 1985-1995
Member, Gifted Education Committee, San Diego City School, 1986
Member, Board of Directors, Playwrights Project, President 1997-98
Star Award, San Diego Theatre Guild, 1994

Department 62 Staff and Contact Information

Court Clerk:	Kimberly Mulligan
Calendar Clerk:	Lorinda Jones
Reporter:	Susan Holthaus
Staff Attorney:	Kerry Kawamura

Phone Numbers

Courtroom:	(619) 685-6055
Calendar	(619) 685-6117

Patent Law

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article examines these two decisions, then explores some of those unresolved details.

I. *KSR v. Teleflex*

Patent protection ensures that companies who invest substantial sums into developing new products are able to recover those costs. When a new product is merely an obvious extension of what is

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known, however, patent protection is unnecessary because the development cost is likely minimal, and may even deprive an earlier patentee, who invented part of the existing technology, the full value of his contribution. *See* 127 S. Ct. at 1741.

KSR dealt with a specific "obviousness" problem: if technology A is known and technology B is also known, when is the combination of A and B patentable? Is patent protection forbidden only when the prior art contains some "teaching, suggestion or motivation" to combine A and B?

Teleflex patented an automobile pedal that (1) sends electrical signals to communicate its position to the engine throttle, (2) sends the signals from a sensor located on a fixed pivot point on the pedal apparatus, and (3) can be adjusted to pivot closer to or further from the driver. Pedals with features (1) and (2) were known in the art, as were pedals with features (1) and (3), with the sensor on the pedal's footpad rather than the pivot point. But while each feature was known in the art, as were various combinations, no single device had yet combined all three. *Id.* at 1735-37. Was Teleflex's device patentable?

The Court began by cautioning against patents that merely combine known features, for such patents risk withdrawing ideas from the public domain. Combination patents are appropriate if the prior art discourages combination because it is thought likely to fail or to present safety risks, or if the combination provides an unexpected result or "new synergy." However, a combination that is simply a "predictable use of prior art elements according to their established functions" is obvious. *Id.* at 1740. Although a specific suggestion to combine the prior art may reveal what is "predictable," it is unnecessary; "in many fields" market demand may drive design trends, while publications may contain little discussion of obvious techniques. *Id.* at 1741.

The standard in this circumstance has historically been whether the combination would be obvious to a hypothetical person of ordinary skill in the art—patent law's analog to tort law's reasonable person. But the Court added new substance to it, explaining that the skilled artisan will find a combination obvious if it is an obvious solution to ***any*** problem in the field, not just the particular problem the patentee set out to solve. Relatedly, the skilled artisan will examine any art it "makes sense" to look at to determine whether an element is known, not just art designed to solve the same problem. "[F]amiliar items may have obvious uses beyond their primary purposes." *Id.* at 1742.

The Court came closest to offering a new test by stating that "[w]hen there is a design need or market pressure to solve a particular problem and there are a finite number of identified, predictable solutions," if one of those solutions succeeds and was "obvious to try," it is unpatentable. By indiscriminately rejecting an "obvious to try" standard and restricting the relevant art to that aimed at the same problem the patentee solved, the Federal Circuit had gone beyond guarding against hindsight bias, instead "deny[ing] factfinders recourse to common sense." *Id.*

Applying these principles to Teleflex's patent, the Court found that prior art the Federal Circuit had dismissed was relevant, despite being directed at different problems than Teleflex's patent. That art, coupled with the strong market incentive to convert mechanical pedals to electronic pedals, rendered Teleflex's combination obvious. The Court closed by stressing that obviousness is ultimately a legal determination, and summary judgment is appropriate when the scope of the prior art and the claims, along with the level of ordinary skill in the art, are not in material dispute. *Id.* at 1745-46.

As may already be apparent, *KSR* leaves many unanswered questions. If the skilled artisan's inquiry doesn't stop at art directed at the same problem, where does it stop? What types of evidence are probative of "market pressure" or "design need"? In what technology areas is such evidence most appropriate? How many solutions is a "finite number," justifying application of the previously disapproved "obvious to try" test?

These questions defy concrete answers, for the Court repeatedly stressed the importance of flexibility. As to the first question, litigants must ensure their technical experts specifically articulate why the person of ordinary skill would or would not consider a piece of art, while taking care not to focus solely on the art's explicit teachings at the expense of background about the type of inferences and creative steps the skilled artisan would be expected to employ. *Id.* at 1740-41.

The "market pressure" language may well be

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the most interesting aspect of *KSR* because it provides a new weapon to show obviousness. Until now, market evidence has primarily been used by patentees to show their invention is commercially successful, an indicator of non-obviousness. After *KSR*, expert testimony from an economist examining market trends in the years preceding the patent application may help demonstrate obviousness. In *KSR*, for example, testimony on the rate at which automobile manufacturers were shifting from mechanical to electronic pedals and when the shift began would have been useful. Also, technical experts should now opine on the extent to which published articles accurately represent the true state of the art: the more complete a picture published articles paint, the less important market evidence will be. Patentees may find such evidence a useful way to minimize the importance of market evidence.

Given the flexibility of the standard, precedents will be much more fact-bound, leaving district courts as the most important players in giving life to *KSR*'s sweeping language.

II. *MedImmune v. Genentech*

MedImmune addressed the issue of when a potential infringer, not yet accused of infringement, may seek a declaration that a patent is invalid. Timing matters because often any district court in the United States will have jurisdiction to hear a patent case. Who chooses the forum, then, determines whether the time to trial is under a year or closer to 3-5 years, and also determines whether the case will be brought in a District with Patent Local Rules that impose additional disclosure requirements during discovery. The stakes in *MedImmune* were even higher, involving not just forum selection, but whether either party had standing to sue at all.

MedImmune entered into a license agreement with Genentech, agreeing to pay royalties until either certain patents expired or a court invalidated them. The licensed products were those "whose sale would infringe" one of Genentech's patents or

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pending patent applications. Four years later, Genentech demanded that MedImmune begin paying royalties on a product that Genentech believed infringed its recently issued patent. MedImmune paid the royalties "under protest and with reservation of its rights," and promptly filed suit seeking a declaration that Genentech's patent was invalid and not infringed.

Everyone agreed that MedImmune would have standing to seek declaratory relief if it had refused to pay royalties. But was there an actual controversy between the parties while MedImmune was still paying? The Federal Circuit held there was not, but the Supreme Court reversed.

The Court pointed to cases where, when a potentially unconstitutional law is involved, a plaintiff is not required to risk criminal prosecution in order to challenge the law's validity. *See, e.g., Steffel v. Thompson*, 415 U.S. 452, 459-60 (1974). In such cases, individuals "choose" not to engage in the proscribed conduct, eliminating their imminent risk of prosecution, but that choice does not eliminate jurisdiction because it is "effectively coerced."

Although *MedImmune* involved two private parties, the Court extended *Steffel* and held that MedImmune's choice to pay royalties was also effectively coerced. If it did not pay, yet continued to sell its product, it would face a suit for infringement, triple damages, attorneys' fees, and an injunction that would prevent it from selling a product that accounts for 80% of its yearly revenues. Therefore, MedImmune's on-going royalty payments did not eliminate the actual controversy between the parties, even though it eliminated the imminent risk MedImmune would be sued for infringement, nor did its contractual promise to pay royalties also contain an implied promise not to challenge the validity of the patents.

MedImmune puts licensors in an awkward position. They are now subject to invalidity suits, but cannot counter-claim for infringement because the licensee's sales are under authority of the license. Nor can they repudiate the license by claiming an anticipatory breach, for the licensee is still performing. The license itself may allow the licensor to terminate it, after which the licensor could counterclaim for infringement (the license in *MedImmune* permitted either party to terminate it on 60 days after giving written notice.) But there is nothing current licensors can do to avoid suit altogether.

More significant, the Court also addressed an issue not before it, remarking that the Federal Circuit's general requirement that a declaratory judgment plaintiff have a "reasonable apprehension of imminent suit" was inconsistent with prior Supreme Court precedent. 127 S. Ct. at 774 n.11. The Federal Circuit has since jettisoned the test, extending *MedImmune* to all patent declaratory judgment cases, not just those involving a pre-existing license between the parties. *SanDisk v. STMicroelectronics*, 480 F.3d 1372 (Fed. Cir. 2007); *Teva v. Novartis*, 482 F.3d 1330 (Fed. Cir. 2007).

One question after *MedImmunue* is what contractual language should prospective licensors insist on in the future? A provision prohibiting the licensee from challenging the validity of the patent under any circumstances is unenforceable. *See Lear v. Adkins*, 395 U.S. 653, 673-74 (1969). Contractual language automatically terminating the license if the licensee sues, on the other hand, should be enforceable and would essentially restore the pre-*MedImmune* rule. Extracting written admissions of validity and infringement could be beneficial, as would a provision requiring the licensee to pay attorneys' fees should it later challenge validity and lose. An alternative is a provision automatically stepping up the royalty rate if the licensee sues and wants to continue paying royalties. Finally, a forum selection clause could ensure that if the licensor must litigate, it will be in a patentee-friendly district.

On a wider application, it now seems under *MedImmune* that any time a patentee approaches another party about a potential license, it may open the door to a declaratory judgment suit. One way the patentee may protect itself is by only proceeding after a suitable confidentiality agreement is in place, preventing disclosure of the negotiations as the basis for a declaratory relief action. *SanDisk*, 482 F.3d at 1375 n.1. *MedImmune* thus represents a significant expansion of declaratory judgment jurisdiction, and will inject even more uncertainty into an already murky area of the law. ▲

Class Action Reforms

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little guidance as to how those claims could be effectively managed with a class of approximately 1,500 employees. Issues such as whether the class-wide overtime claims can be proven through survey or statistical evidence, and how to accommodate the defendant's right to cross-examine individual employees at trial were left unresolved. As we approach the three-year anniversary of the California Supreme Court's decision, the post-remand trial court in *Sav-On* still continues to wrestle with these issues.

In other jurisdictions, a "rigorous analysis" of trial plan issues is a mandatory prerequisite to obtaining class certification. *See e.g., Castano v. American Tobacco Co.* (5th Cir. 1996) 84 F.3d 734, 744 (improper to certify class without knowing how the class claims can and will be tried); *Southwestern Ref. Co. et al v. Bernal et al.* (Tex. 2000) 22 S.W.3d 425, 435 ("We reject the approach of certify now and worry later").[3]

Increasingly, some California trial courts are requiring trial plans as a condition of the initial certification order or continued class treatment. *See e.g., Dunbar*, 141 Cal.App.4th at 1432-1433 (class action trial plan must demonstrate how the claims asserted by the individual named representatives can be extrapolated to the class as a whole); *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 757 (class trial management plan must not "restrict [defendant's] right to present evidence against the claims").

Current California procedures contain no specific trial plan requirement, and not all trial courts require them as a prerequisite to class certification. Making trial plans a mandatory part of the class certification process would force a more careful consideration of the downstream ramifications of class treatment. That may lead courts to deny certification in some cases, but those that survive the "trial plan" screen would be less vulnerable to attack through motions to decertify or on appeal.

2. Clarify The Extent To Which Trial Courts May Consider The "Merits" At The Class Certification Stage

Historically, California appellate courts have sent conflicting signals on the extent which the "merits" of asserted claims or defenses should be considered at the class certification stage. Some courts have suggested that no consideration of the merits is proper. *See e.g., Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1271-1272 ("at the certification stage, [the] trial court is not to examine the merits of the case.").

That position appears to derive from a misreading of the U.S. Supreme Court's decision in *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156. *Eisen* states that trial courts are not to undertake a "preliminary inquiry into the merits" at the class certification stage. *Id.* at 177. But as clarified later in the opinion, this statement was intended only to preclude courts from deciding which party would "prevail on the merits" in the context of a class certification motion. *Id.* at 178.

This interpretation of *Eisen* is consistent with the California Supreme Court's decision in *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429. In *Linder*, the Court held that the trial court could not deny class certification based on a finding that the plaintiff's claims lacked merit. But the Court did not preclude any merits consideration at the class certification stage. Rather, the *Linder* court stated that "issues affecting the merits of a case may be enmeshed with class action requirements," such as predominance of common issues and typicality. *Id.* at 443.

The Court's recent decision in *Fireside Thrift & Loan v. Superior Court* (2007) 40 Cal. 4th 1069, makes clear that the merits can and should be considered at the class certification stage. As the Court explained, this analysis is "intertwined" with the overall issue of whether the class certification is proper:

> … [P]laintiff need not establish a likelihood of success on the merits in order to obtain class certification. It does not follow [however] that … a trial or appellate court is precluded from considering how various claims and defenses relate and may affect the course of the litigation, considerations that may overlap the case's merits. … Indeed, in *Linder* we expressly recognized that "whether the claims or defenses of the representative plaintiffs are typical of class claims or defenses" was an issue that might necessarily be intertwined with the merits of the case, *but which the court considering certification could and should consider*.

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Fireside, 40 Cal.4th at 1091-92 (emphasis added).

3. Clarify The Extent To Which Class Treatment is Proper If Liability Issues Require Individualized Proof

One of the most difficult issues in class action management is whether certification should be granted or maintained, even though the resolution of some liability issues requires individualized proof.

Class proponents argue that *Sav-On* answers the question. *See Sav-On*, 34 Cal.4th at 334 ("Individual issues do not render class certification inappropriate so long as such issues may be effectively managed."). But that may not be the case if the individual issues affect liability. In *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, the Court held that a claim for punitive damages could not be justified as disgorgement of profits obtained from absent third parties, absent evidence that the defendants' conduct with respect to the absent parties was tortious. Citing *Sav-On*, the Court noted by analogy that in a class action, if individual issues remain after the common questions have been tried, "each plaintiff must still by some means prove up his or her claim, allowing the defendant an opportunity to contest each individual claim on any ground not resolved in the trial of common issues." *Id.* at 1210. Significantly, Justice Werdegar authored both *Johnson* and the majority opinion in *Sav-On*.

Although the issue in *Johnson* was punitive damages (not class certification), the Court's statement strongly suggests that the defendant's right to present individualized liability evidence cannot be ignored in class actions. Indeed, several post *Sav-On* cases have denied class certification of overtime claims, due to the class plaintiffs' failure to accommodate the employer's due process right to cross-examine each class member on individual issues at trial. *See e.g., Jiminez v. Domino's Pizza* (C.D. Cal. 2006) 238 F.R.D. 241, 253 (employer defendant in overtime class action has the "right to cross-examine each general manager to determine whether there is liability as to that specific person"); *Sepulveda v. Wal-Mart Stores, Inc.* (C.D. Cal. 2006) 237 F.R.D. 229, 249 (defendant is entitled to present evidence showing that each employee actually did perform primarily exempt tasks).

There are no easy answers to this question. A blanket rule that precludes class treatment whenever any liability issues require individualized proof may unduly restrict trial courts' discretion to "promote justice," one of the underlying justifications for class actions in the first place. However, given the legitimate due process concerns (and the manageability challenges) arising from certain types of class actions, some guidance to trial courts on this issue would seem appropriate.

Consistent with *Johnson*, one possible approach is to create a rebuttable presumption that class certification should be denied if material issues affecting liability require individualized proof at trial. Trial courts could still grant certification, but only if the class proponent provided competent evidence sufficient to rebut the presumption. For example, class treatment might still be appropriate if the resolution of important common issues would benefit litigants and the court system, with the defendant's right to litigate the remaining issues with individualized proof preserved in some manageable proceeding.

4. Grant A Direct Right of Appeal Whether Class Certification Is Granted or Denied

Generally speaking, an order denying a motion for class certification will trigger a direct right of appeal. *See Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 698-699. In contrast, an order granting class certification is reviewable only through a discretionary writ. *Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 387.

But most writ petitions are denied with a postcard. That leaves defendants with the Hobson's choice of risking "ruinous" liability in order to obtain appellate relief after trial, or accepting settlement terms that are grossly inflated given the exponential liability exposure from a class trial. In some cases, defendants may literally be unable to bond around an adverse trial judgment and thus effectively have no ability to seek appellate review.

The solution is to level the playing field so that both sides have a direct right of appeal whether class certification is granted or denied. That approach is fair, given the potentially outcome-determinative nature of the certification decision. *See Carabini v. Superior Court* (1994) 269 Cal.App.4th 239, 243-244 (appellate review appropriate given that an "order granting or denying class certification frequently determines whether the case has continuing viability.").

(See "Class Action Reforms" on page 13)

Class Action Reforms

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III. Conclusion

In summary, being a creature of equity the linchpin for class litigation is fairness. Improvements in California's class action procedures would further that underlying objective by making the certification process more transparent and hopefully more consistent. Whether the suggestions outlined in this article go too far or not far enough is a legitimate question for discussion. Let the debate begin. ▲

1 The author wishes to thank Erin Maysent for her research assistance on this article.

2 That sentiment prompted Assembly Bill 1505 (Parra), class action reform legislation that would have amended California class action procedure to largely mirror Fed. R. Civ. P Rule 23.

3 Several federal courts have recently taken the trial plan analysis even a step further, requiring plaintiffs asserting securities fraud claims to demonstrate "loss causation" by a preponderance of the evidence in order to obtain class certification. *See e.g., Oscar Private Equity Investments v. Allegiance Telcom* (5th Cir. May 16, 2007, No. 05-10791) 2007 U.S. App. LEXIS 11525.

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practices, aid legitimate business enterprises "by curtailing illegitimate competition," and avoid the burden to the judicial system of "multiple litigation involving identical claims." *Vasquez v. Superior Court*, 4 Cal.3d 800, 808 (1971). Furthermore, as the U.S. Supreme Court has recognized, a class action overcomes "the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). Class actions are utilized and encouraged to prevent a defendant from avoiding liability for wrongdoing because individual victims may lack the sophistication, financial motivation or resources to sue on their own. *Vasquez*, 4 Cal.3d at 808.

For example, where the amount in controversy is generally not sufficient to warrant individual litigation or to obtain legal assistance in prosecuting the claim, the class action device remains the only practicable way for consumers of such services to deter and redress wrongdoing. *See, e.g., Javor v. State Board of Equalization*, 12 Cal.3d 790, 797 (1974) (Where the small amount of sales tax overage involved "may discourage an individual action as economically impractical, the state would be unjustly enriched, if a class suit were not permitted."); *Cipro Cases I and II*, Nos. 4154, 4220, 2003 WL 23005275, *8 (Cal. Superior Nov. 25, 2003) ("Few of the present Class members could afford to undertake individual litigation against Bayer to recover the relatively modest damages at issue here. But the failure to recover such damages is a real hardship to people of average means.")

II. Class Action Law In California Is Well-Developed And Allows Courts The Flexibility They Need

California class action procedures are well-developed and include statutes (Cal. Code Civ. Proc. §382; Cal. Civ. Code §1781), a substantial body of case law law (just a small sample of which is mentioned herein), local rules for case management (Cal. Rules of Court 3.750, *et seq.*), and publications on case management issued by the Judicial Council of California and the Federal Judicial Center (*e.g.*, the Deskbook on the Management of Complex Civil Litigation).

The standards for class action certification are straightforward. Class certification requires the existence of both an ascertainable class and a well-defined community of interest among class members. *Sav-on Drug Stores, Inc. v. Sup. Ct.*, 34 Cal. 4th 319, 326 (2004); *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 435 (2000); Cal Code. Civ. Proc. §382; Cal. Civ. Code §1781. The Supreme Court of California has suggested that Civil Code §1781, like Fed. R. Civ. P. 23, may be used as a procedural guideline to ensure fairness in class action suits, even in non-consumer cases where §1781 is not directly applicable. *Thrifty Oil*, 23 Cal. 4th at 437-38 (citing *Vasquez*, 4 Cal.3d at 820-21); *Reyes v. San Diego County Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1270-71 (1987).

"The certification of a class is a discretionary decision that demands the weighing of many relevant considerations." *Sav-On*, 34 Cal. 4th at 336. While trial judges have been given considerable discretion in applying these criteria to particular cases, that fact does not make the class certification inquiry a "crap shoot." The same may be said about any significant pre-trial motion, from discovery to summary judgment – the judicial assignment may play a role in the outcome.

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However, no matter what the circumstance, the trial court needs to determine that the record contains substantial evidence that common issues of law and fact will predominate over individual issues if the claims are tried as a class action. *Id.* at 328-29. If it does not, defendants surely will seek immediate appellate relief, and appellate courts review such matters in writ proceedings. *Id.* Giving defendants a right to delay resolution of a class case for years simply by filing an appeal is not the correct solution.

The trial court is in the best position to determine whether the case is appropriate for class action treatment (*Thrifty Oil*, 23 Cal. 4th at 435), and no two cases are exactly the same. Thus, it is not surprising that different cases in the same general area of the law may have different outcomes. For example, one wage-and-hour case may be appropriate for class action treatment because the work performed by employees allegedly misclassified as exempt was virtually identical in all of the company's stores (as was the case in *Sav-On*). Another wage-and-hour case may be found to be inappropriate for class action treatment because the duties of the class members varied from store to store and would require individualized proof as to liability (as was the case in *Dunbar v. Albertson's, Inc.*, 141 Cal. App. 4th 1422 (2006)). In the latter situation, issues of liability required individualized proof and thus rendered the common issues of fact and law comparatively insubstantial.

These different outcomes are due to factual differences presented to the Court in a particular case, not due to any inherent defect in California's class action law. The same may be said for securities, anti-trust, consumer, civil rights and other types of class litigation – the results depend on the particular facts presented to the Court.

As a result, in those cases where class certification is appropriate, a detailed trial plan at the class certification stage may be unnecessary. For example, consider a securities case where the plaintiff is alleging that directors of a company's Board of Directors breached the fiduciary duties they owed to the company's shareholders by failing to maximize the value of their shares in the context of a merger or acquisition. The breach of fiduciary duty claim can be proven with facts applicable to the class as a whole (*i.e.*, defendant's conduct in entering into the merger agreement with the acquiring company), rather than by a series of facts relevant only to the shareholders. A requirement that the plaintiff prepare a detailed trial plan in every case would be unnecessary and would only result in a pointless expenditure of attorney time and expense, reducing the portion of the recovery that ends up with the shareholders. Thus, rather than requiring a trial plan in all cases or creating some unprecedented presumption against certification, attorneys should use the planning procedures set forth in the California Rules of Court to ensure flexibility for both the parties and the Court depending on the needs of a particular case.

Even in those cases where a trial plan may be helpful to demonstrate the predominance of common issues of law and fact, the trial court already has the discretion to require one. *See Fireside Bank v. Superior Court*, 40 Cal. 4th 1069, 1087 (2007) (a trial court has "broad discretion to structure and streamline class action proceedings"). But defendants should be careful what they ask for, since in order to create a fully developed trial plan the parties need to exchange merits discovery first to show how the case would be presented at trial the Court could also agree to certify a participation issue for class determination under Cal. R. of G. 3.765(b) which defendants typically are reluctant to do. The court could also agree to certify a particular issue for class determination under Cal. R. of Ct. 3.765(b).

Nor is there really any documented systemic confusion about the extent to which trial courts may consider the merits at the class certification stage. A plaintiff need not establish a likelihood of success on the merits in order to obtain class certification. *Thrifty Oil*, 23 Cal.4th at 439-443. A court may, however, in determining whether the criteria of Code of Civil Procedure §382 are met, consider "how various claims and defenses relate and may affect the course of the litigation, considerations that may overlap the case's merits." *Fireside Bank*, 40 Cal. 4th at 1091-92. Given these clear guidelines on class certification in California, reform is unnecessary.

III. Interstate Class Actions Are Being Litigated In Federal Court Since Passage of The Class Action Fairness Act

The "Class Action Fairness Act", 28 U.S.C. §1711; Pub.L. 109-2, Feb. 18, 2005, 119 Stat. 4

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("CAFA"), was signed into law and became effective on February 18, 2005. Congress declared the purpose of the law to be, among other things, to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." Pub.L. 109-2, §2 As a result, CAFA requires interstate class actions to be heard in federal court—a jurisdiction perceived by CAFA proponents as being more likely to "'deny certification in situations where a state judge might grant it improperly.'" John H. Beisner & Jessica Davidson Miller, They're Making a Federal Case of It … In State Court, 25 Harv. J.L. & Pub. Pol'y 143, 154 (2001) (citing Memorandum to Advisory Comm. On Civil Rules from Judge Lee Rosenthal, Professor Edward H. Cooper, and Professor Richard Marcus (Apr. 10, 2001) (quoting an ICJ/RAND study, Deborah R. Hensler *et al.*, Class Action Dilemmas: Pursuing Public Goals for Private Gain 28 (1999))).

CAFA, however, was enacted "on the basis of assumptions rather than empirically derived fact." Thomas E. Willging and Shannon R. Wheatman, Attorney Choice of Forum In Class Action Litigation: What Difference Does it Make? 81 Notre Dame L. Rev. 591, 597 (2006). "[D]espite the force with which conclusions have been asserted, there had been no quantitative empirical examination of the differences in the treatment of class actions in state and federal courts." *Id.*

This study actually concluded that federal and state judges are about equally likely to certify cases as class actions. *Id.* at 605. While federal judges were more likely than state judges to issue rulings denying class certification, state judges were more likely than federal judges to take no action regarding class certification due to, for example, termination by dismissal, summary judgment, voluntary dismissal, or settlement of class representatives' claims. *Id.* at 605, 607. Such a conclusion undermines the assertion California courts and the Legislature need to adopt or apply federal standards to ensure greater uniformity in resolving the issue of class certification.

Another recent study conducted by the Federal Judicial Center surveyed the number, frequency and types of class actions filed in or removed to 88 federal district courts from July 1, 2001, through June 30, 2006. The study found a 46% increase in class action activity in those district courts from January to June 2006 as compared with July to December 2001. Thomas E. Willging, Emery G. Lee III, The Impact of the Class Action Fairness Act of 2005: Third Interim Report to the Judicial Conference Advisory Committee on Civil Rights, Federal Judicial Center at 1 (April 2007)(located at www.fjc.gov). In the sixteen months since CAFA went into effect on February 18, 2005, the study found a substantial increase in class action activity based on diversity of citizenship jurisdiction. The report concluded that much of this observed increase is attributable to CAFA. *Id.* Thus, because of the adoption of CAFA, a significant amount of state court class action litigation is now being handled in federal court, with class certification determinations governed by Fed. R. Civ. Proc. Rule 23. This counters the unfounded concerns of class action reform proponents about class actions clogging the state court system.

IV. Conclusion

In light of California's strong public policy favoring class actions, while no reform is necessary, any reforms to California's class action procedures must be carefully crafted so that the benefits of class action litigation are not destroyed or significantly delayed. Recent attempts at reform have not been so fashioned.[1]

California's class action statutes, rules and well-developed case law render any Draconian changes unnecessary. Drastic reform could threaten the very utility of class actions in redressing and deterring fraudulent practices by large businesses, at the expense of consumers, employees, investors and other individuals. The tort reform groups advocating for change have already made significant in-roads in juror attitudes with their class action rhetoric, even though such claims have little evidentiary support. There is no reason to further tip the scale in favor of wrongdoers any more than it already is. ▲

1 For example, A.B.1505 (which went significantly beyond Rule 23 in its scope) recently died after Assemblyman Van Tran (R-Costa Mesa), vice-chair of Assembly Judiciary, made a motion for the committee to vote on approving A.B.1505. The motion did not even receive a second.

Guidelines

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100 courtesy codes and civility guidelines throughout the country. As long as ten years ago, 36 bar associations and supreme courts and 69 local bar associations had adopted similar creeds or codes, as well as thirteen federal district courts and one federal circuit court. Comment, "Civility Codes: the Newest Weapons in the 'Civil' War Over Proper Attorney Conduct Regulations Miss their Mark," 24 Dayton L. Rev. 151 (Fall 1998), 159 & nn. 65, 66. In 1988, two ABA sections adopted creeds for professional conduct. Yet complaints about lack of civility are greater than ever.

I submit we need to step back and look at this issue. Civility guidelines won't create civility. The empirical and anecdotal evidence shows such codes alone, without enforcement and a commitment to take them seriously, are not effective. If we want to take steps to improve in our on-going discussion on this issue, I have several suggestions. You may not like any of them, but at least they form the basis for a candid discussion of this issue.

I. The Evidence Is Dubious Whether Civility Codes Accomplish Anything

Civility codes have been around long enough for us to assess whether or not they work. Everyone agrees our bar is less civil than ever, yet we have had civility codes in place for years. People who've studied this issue more than I have concluded they don't work just by themselves. *See* Comment, "Civility Codes: the Newest Weapons in the 'Civil' War Over Proper Attorney Conduct Regulations Miss their Mark," 24 Dayton L. Rev. 151, 184-185 (Fall 1998); J. Cary, 'Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation,' 25 Hofstra L. Rev. 561, 597 & n.160 (Winter 1996).)

The inability of civility codes by themselves to affect civility is based on several factors. First, most civility codes lack any enforcement mechanism. M. Aronson, "Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism," 8 St. Thomas L. Rev. 113, 115 (Fall 1995).

Second, without clear standards, many judges understandably routinely refuse to sanction offending attorneys, even though no one doubts they have inherent and statutory authority to do so based on other, enforceable standards such as those provided by Business and Professions Code section 6068, the Rules of Professional Conduct, and local rules. Rather, they tell counsel to "work it out". Attorneys sense that there will be no sanctions for violating civility codes, and so they ignore them. Why shouldn't they? Our real lives are too full of meaningful things to pay attention to things than have no real force or effect.

Third, many times these codes lack clarity or use phrases containing loopholes that attorneys can cite to in justifying their uncivil conduct. Civility codes typi-

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cally brim with words like "integrity," "courtesy," "abusively," "discourteously," "professional manner," "offensive," "reasonably believes," "unnecessarily inflammatory", and so forth. These terms are highly indeterminate and context-dependent. Using them in an abstract way leaves the reader with no real information, just high-sounding incantations. Even attacking an opponent's or judge's integrity, motives, or conduct may be justified as the "rare circumstance" when such a matter is "legitimately in issue". In addition, many codes contain a caveat that they are not intended to inhibit a lawyer's "zealous representation" or affect the "legitimate interests" of his or her client, allowing a lawyer to claim that was all they were doing in undertaking the conduct in question.

Fourth, most of these codes are not intended to provide a basis for further litigation, sanctions or penalties. Many guidelines or codes use a voluntary inter-firm dispute resolution process. But what client or law firm will pay its lawyers to receive, investigate, and assist in the resolution of complaints of unprofessional or uncivil conduct? We scarcely have enough time to deal with our uncivil brethren as it is. Expecting law firm members to set aside more time to deal with them via such a process is unlikely. Moreover, the assumption that law firms are endowed with the ability to sit in judgment of others' incivility within their own firm is dubious, since some large national law firms are "very much part of the problem." See J. Frost, "The Topic Is Civility – You Got a Problem With That?" 71 Fla. Bar J. 6, 8 & n.6 (January 1997).

II. There Are Other Additional Ways to Fix The Incivility Issue

We all need and can do something to address this issue of civility (or the lack thereof).

Those considering the adoption of civility codes: if you're going to write civility codes, make them enforceable (as in the Northern District of Texas). The bogeyman of "satellite litigation" is not too high a price to pay to fix what everyone agrees is a chronic problem. Such litigation would wane as miscreants suffered pain and behavior improved. J. Cary, "Rambo Depositions", *supra*, at 593. Without the real threat of sanctions or satellite litigation, uncivil behavior has only worsened.

Attorneys: enroll in an Inn of Court or in ABTL, show up, and help put on programs. Firms and agencies, require membership in such groups for your attorneys. These groups foster community through regular meetings, social events, and training (on civility as well as other topics). Who would think of being rude to a friend with whom you'd enjoyed lunch at a monthly Inn of Court team meeting or at an ABTL dinner or brown bag lunch? You wouldn't.

Law schools: start teaching civility, both in the classroom and by example. No first year law student humiliated in a Socratic "dialogue" by a cranky law professor can forget it. Does any of us doubt that many students so treated wind up believing that such behavior is the norm for powerful attorneys? That shouldn't happen — Kingsfield is dead. An interest in civility must start at the earliest possible point in lawyers' socialization. M. Aronson, "Be Just to One Another" *supra*, at 116. Many of us teach at law schools. We need to make that point early on.

Senior lawyers, managing partners, and practice group leaders: teach civility to your lawyers. Imprint them. If you receive complaints of bad behavior by your lieutenants, don't insulate yourself from it – involve yourself in it, personally, and now. Are you too busy? We're all too busy. But the civility problem is too big and too insidious for you to say you're too busy to pay attention to it.

You and I: quit hiding behind our computers, fax machines, Blackberries, and secretaries. This is ever more the nature of our practice. As one author has commented, "[W]e don't need to see each other all that much, with our various modern devices. Armed with our machines, we function just fine as faceless paper-producers – something our predecessors could not be. We all too rarely see the faces behind the faxes and voice-mail messages." T. Gee and B. Garner, "The Uncivil Lawyer: A Scourge at the Bar," 15 Rev. Litig. 177, 183 (Univ. of Texas at Austin School of Law Winter 1996). We needn't let it be so. Let's solve our differences in person – let's meet and confer, not swap letters. Judge Haden once ordered me and an opponent to meet for coffee in front of the courthouse. We did it. It worked. Problems that had occupied multiple faxed letters melted away in a few minutes.

Judges: police incivility. If you don't do it, who will? Obviously we haven't done it for ourselves. Courts can and do sanction outrageous behavior when asked, and even punish offenders *sua sponte* when appropriate. *See Paramount Communications, Inc. v. QVC Network, Inc.*

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Guidelines

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(1999) 637 A.2d 32, 52, 53 & 56, n.23 and 38, where the court characterized an attorney's behavior as "extraordinarily rude, uncivil, and vulgar," ruled that "this kind of misconduct is not to be tolerated in any Delaware court proceeding," and ordered attorney thirty days to appear voluntarily to show cause why he should not be barred from future appearances in Delaware courts.

Magistrate Judge McCurine and many of our local magistrates makes themselves available by telephone to deal with discovery disputes, including on the spot during depositions. Despite a large caseload, they have found a way to deal with it. I have to believe other judges can do so too. And don't ignore the Guidelines put out by organizations such as the ABTL and the County Bar Association – invoke them in your decisions if necessary. See Starbrite Waterproofing Co., Inc. v. AIM Construction & Contracting Corp., 164 F.R.D. 378 (S.D.N.Y. 1996) (invoking New York State Bar voluntary Guidelines on Civility in Litigation in sanctioning counsel for misconduct at depositions).

And while no one may want to say it, we should no more tolerate rudeness from judges than rudeness from lawyers. Incivility is a problem even among judges. In 1991, half the judges interviewed in one survey complained of uncivil behavior *by other judges*. See T. Gee and B. Garner, *supra*, 15 Rev. Litig. at 180 & n. 16. It erodes respect and sets a horrible example. Fortunately virtually all of our local bench is a model of professionalism and civility. But if a judge has acted rudely to you or your client, don't let it go. Report it to the Commission on Judicial Performance. If judges can't have manners, how can they credibly police incivility among attorneys?

All of us: out offenders. Has someone taken a default without warning by running down to court after knowing you were being hired, then refused to set it aside? Out them. Let the news circulate about their tactics. Judges routinely remind us how they talk privately about us with their colleagues. You should do the same thing. Don't let uncivil behavior be a secret. Country clubs shame deadbeat members who don't pay their tabs on time by posting their names on a bulletin board. Why do you think they do it? Because it works. You can and should do the same thing when an opponent behaves badly.

Finally, let's all look in the mirror. It's a bitter pill to swallow, but we have met the enemy, and he is us. Tenth Circuit Judge Paul Kelly, Jr., noted this in his address concerning professionalism at Fordham University School of Law nearly ten years ago: "I believe we have to place the blame where it belongs – on our own shoulders." Hon. Paul J. Kelly, Jr., Remarks: A Return of Professionalism, 66 Fordham L. Rev. 2091, 2093 (May 1998). Jill Burkhardt, San Diego County Bar president, talks about this in a recent column: "Maybe it's time for closer self-examination." For once, stop blaming the jerk at the other end of the telephone. Instead, look at yourself, since "the sad truth is that we, or at least some of us, just might be part of the problem." Frost, *supra* at 8. It is we who are to blame for incivility in our bar, so it is up to us to fix it.

So here is my challenge to you: be a one-attorney army who lives by a new, unwritten creed. Lawyers like Jack Crumley and of his generation didn't need a creed on a wall to tell them what to do. They were the professionals Sam Dash talked about. Be like them. Until we drop the ineffectual formality of symbolic gestures like civility codes without more, we'll be talking and writing about the civility crisis for many more years – and kicking it down the road for our successors to handle after we're gone. In the meantime there is plenty we can do now. So let's do it! ▲

1 Dan Lawton is a member of ABTL San Diego. He is a trial and appellate lawyer who has practiced in downtown San Diego since 1987.

President's Column

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the *San Diego Lawyer*.

With all of the terrific programs and events ABTL is sponsoring this year, it is not surprising that our membership has now nearly reached the 800 mark. We hope all of you will encourage friends and colleagues who have not yet joined our chapter to do so in order that they, too, can benefit from the efforts of our talented and dedicated Board.

Please accept my best wishes for an enjoyable and rejuvenating summer, and as that hit of yesteryear goes (extra credit if you know the original artists), "See you in September, see you when the summer's through." ▲

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P.O. Box 16946
San Diego, CA 92176-6946

Editor: Alan M. Mansfield
(858) 348-1005

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