

ASSOCIATION OF BUSINESS TRIAL LAWYERS

# abt<sup>l</sup> REPORT

Volume XIX No. 3

May 1997

## Electronics in the Courtroom — You're Already Too Late!

**T**here is a rumor circulating through the finer law firms and cocktail lounges that I am in jail. I know this is true because I started the rumor myself. Whispering to a few trusted cronies to "pass it on," within days I was rewarded to hear that most of the local bar assumes I am a "goner;" even a federal judge believed he had caught a glimpse of me being shuffled into the new Twin Towers.



Thomas J. McDermott

This desire to convince the world that I am "on ice," so to speak, comes from no desire to avoid my familial, legal, partnership or social responsibilities. I'm hiding from editors.

Legal publications and their editors proliferate and each insists upon a special person to write for them. In the profession that person is known as a "sucker," a word of ichthyic origin connoting "one who will work for nothing while believing it to be an honor." To set the hook for the sucker, the editor has a shopworn but trusty tactic: The article will not be due for six months.

Six months! That is a long time. Or so it seems when the "honor" is bestowed. "Six months, six months, tell me, secretary, when is my six months up?"

"Tomorrow, sucker." (My secretary is overly familiar.)

Tomorrow! So, into hiding, into rumors, even into sucking the lifeblood out of my betters, since the idea for that introduction came from Benchley.

What does this have to do with our lesson for the day? First, it

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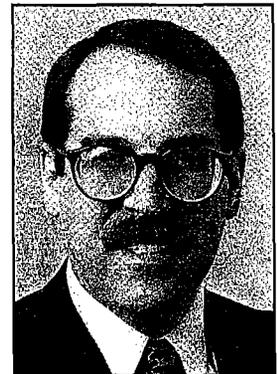
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## The Litigation Privilege: Protection for the Business Litigator

**L**earned Hand wrote: "As a litigant I should dread a law suit beyond almost anything else short of sickness and death." Lawyers are often accused of making life miserable for the rest of society (though not usually by a legendary judge), but what if a lawyer is the victim? In an increasingly popular retaliatory tactic, what if a litigator gets sued for just doing his job?

Fortunately, there are a number of statutes in California that provide effective defenses to claims commonly alleged against lawyers, including defamation, tortious interference with business relationships, and infliction of emotional distress. Venerated at common law, and codified in California for 125 years, the litigation privilege found in Section 47 of the Civil Code is one of the litigator's strongest defenses.



John W. Amberg

Section 47 of the Civil Code provides: "A privileged communication or broadcast is one made:...(b) In any...(2) judicial proceeding...." The usual formulation is that the privilege applies to any communications (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. *Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.

The litigation privilege in Section 47(b) reflects the public policy of protecting the attorney's exercise of independent judgment on behalf of his or her client, without fear of retaliation. As the California Supreme Court explained in the leading modern case, *Silberg v. Anderson, supra*, the litigation privilege is intended to encourage parties to feel free to exercise their fundamental right of resort to the courts for assistance in the resolution of disputes, to encourage open channels of communication and the presentation of evidence, to encourage attorneys to zealously protect their clients' interests, and to require litigants to expose the bias of witnesses or false evidence during trial, not in a subsidiary lawsuit. 50 Cal.3d at 213-214. In this way, the Supreme Court noted, the privilege enhances the finality of judgments and avoids "an unending roundelay of litigation, an evil far worse than an occasional unfair result." *Id.* at 214.

Traditionally, the litigation privilege existed to protect published communications in a pleading or during a trial from

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## **Electronics in the Courtroom**

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explains why you have not heard from me in this publication for some time on my favorite topic of electronics in the courtroom. My other commitments, also regularly missed, were simply too great. "Scribble, scribble, scribble," as they said of Gibbon; "too many notes," as they said of Mozart (although I do not altogether consider myself in a class with Gibbon and Mozart).

Second, it allows me to assure those writers of the thousands of cards and letters demanding: "What's new?" that there is nothing new. You will still want video depositions transferred in part to laser disk for impeachment, video and static graphics to illustrate testimony, particularly with experts, and electronic overhead projectors. DVD is not here yet. (See *infra*)

Third and most important, my introduction hopes to highlight, in a light-hearted way, I believe, the point that it is never too early to begin preparation for your electronic presentation at trial.

It's also never too early to start saving your money for your electronic presentation at trial.

A friend of mine just completed a case in a state court in Oklahoma. The parties went the whole nine yards in equipment — a 90" screen for the jury, video/computer projection equipment, smaller monitors for the court, the witness stand and counsel table, audio equipment, laser disks, electronic overhead projector. The equipment was so extensive it required rewiring the courtroom with a stepped-up power source. The cost? A mere \$500,000 with the plaintiff and defendant each contributing one-half. How did they split up the equipment after the trial? They didn't. They left it in the courtroom for future lucky plaintiffs and defendants who will reap the benefits without the cost.

### **The Basics Require Early Decisions**

I still feel the most effective use of electronics in the courtroom is the laser disk for impeachment and the laser disk to illustrate expert testimony. (The electronic overhead projector is wonderful and you will use it often and effectively if the courtroom is already wired; you'll hardly go to this expense just for the electronic overhead.)

To impeach, you require the video depositions of your adversaries. These are then edited to preserve just the areas where you suspect you may not get the same good answer in the courtroom when you ask the same question. If you don't get that answer, you'll immediately play back the deposition testimony.

This requires an early decision. You must start videotaping depositions from the beginning. Your deposition notice must state you are going to videotape it. Pressures at the beginning of a case to keep costs down (client: "Don't worry, they'll settle the minute you...") may militate against videotaping those initial depositions. If the case is important, give much thought to this decision. Miss the opportunity, and it's gone forever.

Editing these tapes is a major chore and requires an early beginning. Some form of selection should start right after the deposition is taken. At least, mark up the good parts in the typed transcript.

Try to get the best transcript-video synchronization you can. This is a function between the court reporter and the videographer and is seldom coordinated effectively. I have been told that there are electronic connects which allow the transcript to be precisely coordinated with the tape in real time — that is, while the deposition is being taken. I have never been able to hire a team with such a device. Some court reporting organizations will go back and sync the tape to the transcript by hand, but this is expensive. The best I've been able to do is to get a transcript with time codes that roughly match the time codes on the tape. Insist, at least, on this; it's a great help.

As the Federal Rules of Civil Procedure progress toward perfection (another ribaldry, of course) it seems expert reports may become due before the complaint is filed. In the Central District, they are now due by local rule eight weeks before the discovery

cutoff, which may be as much as six months before trial.

Do these reports require some reference, if contemplated, to the use of moving or static graphics to illustrate the proposed testimony? When do the actual graphics have to be exchanged and viewed by the court? Although there appears to be no specific timeframe, "early" is the most likely operative word.

Graphics to aid in expert testimony are usually among the last things done because issues need to be fine-tuned. Development of moving graphics (animations, motion pictures) can take a great deal of time, so very early attention to these matters is required and often overlooked.

I stretched it a bit when I said there was nothing new. There are new developments, but they may be premature for the lawyer.

### **DVD**

The Digital Versatile Disk (nee the Digital Video Disc) is, in its present commercial embodiment, a sort of souped-up laser disc. It does the same thing as a laser disc with a few additional bells and whistles. It's smaller than a laser disc, the size of a CD-ROM. DVD holds more information so movies can be subtitled in several languages and various high-end audio tracks can be more easily accommodated. It also gives a clearer picture than a laser disc, with no color bleeding. Even red is rock solid within the lines. It can accomplish these small miracles because it's a somewhat different technology than a laser disc. This difference probably makes it unusable by a lawyer today but opens up vast possibilities for the future.

All of the digital entertainment technologies, laser disc, CD-ROM (the music kind) and DVD use a laser beam to optically read small pits on the surface of the disc. These pits contain ones and zeros, which are scanned, decoded and eventually re-rendered back in their analog form. The pits on a DVD are smaller and closer together than on a laser disc. That's one reason for its extraordinary storage capacity. However, the second reason is more important to lawyers.

On a laser disc, every single frame of whatever you install resides as a complete image, whether picture or document. This allows you to show video and freeze on any frame, or display documents which are stored one frame at a time. DVD does not incorporate every part of every frame onto the disc. Rather, complex algorithms are applied which "interpret" each scene and eliminate "unnecessary" information: Thus, if in a movie scene, two characters are talking before a blue sky background, the coding will note the first frame in which the blue sky appears, and then instruct the rest of the sequence to incorporate a blue sky background through its conclusion. It's there in the algorithm but it's not there on every frame of the disc. Your freeze capabilities are limited.

These algorithms are quite complex and are custom to each motion picture DVD now being delivered. Thus, the algorithms controlling *The Wizard of Oz* do not control *Blade Runner*. Preparing a DVD movie is said to be a time-consuming, expensive, delicate process, and if the algorithms are not done with great care, the final result is disappointing.

This is not for lawyers yet.

Soon one will be able to write to a DVD (all current releases are "read-only"). A DVD can store information on both sides of a disc and in double layers. Initial capacity estimates are 17 gigabytes. Even without the algorithms, this is immense capacity and should accommodate all the visual information any lawyer might need in the largest trial. If you can write to it from your own computer, the ability to create valuable visuals at a reasonable cost on your own appears to be right around the corner. (However, for comparison, the Internet started in 1969. Feel slightly late?)

### **The Internet**

Several law firms with more advanced technology units are developing the "virtual desktop." This allows a user to access his/her office computer desktop from anyplace that has a phone

*(Continued next page)*

line by use of a laptop and a modem. It's done on the Internet. You plug in your modem, access a specific Internet site, and your laptop screen shows your office desktop screen with the exact capabilities, access to servers, etc., as if you were in your office. This is no small technological feat and may be available only to "power" users for a while. Slow transmission lines also currently tend to limit the usefulness.

But within three to four years it's possible to visualize a laptop in the courtroom that has access to a law firm's entire computer power. Everything in the office system is available in the court, so vast amounts of information can be accessed and displayed instantly to the trier of fact. When satellite connectivity to the Internet becomes commonplace and speed reaches satisfactory levels, this could be a courtroom tool. All your video, documents, etc. reside in your office's MIS Department. You sign on to the Internet and bring them into the courtroom.

It's really a race between the DVD and the Internet satellite connection for the next great courtroom application.

### Theatrical Motion Pictures

Recently, at a Ninth Circuit judicial conference, I chaired a panel on Electronic Presentations of Evidence in the Courtroom. My job was to round up and show some excellent and provocative video actually admitted at trial to develop and explain certain issues, and then to shut up while the federal judges opined. I had an airline catastrophe, a murder and a Fifth Amendment issue.

At the conclusion, I slipped in a 30-second shot of the Titanic sinking and asked how that would go over in closing argument. (Even this I stole, since I had heard that Tom Barr of Cravath, Swain & Moore had done something similar.)

I set the scene by stating that it was closing argument for the plaintiff in a securities fraud case against accountants. The argument was: "The accountants sink away while the shareholders go down with the ship." Flash to the Titanic going straight down with a roar while woebegone people paddle away in lifeboats. (This is the final 30 seconds of Titanic, a 20th Century-Fox picture starring Barbara Stanwyck and Clifton Webb, available on videotape.)

Believe me, it shows better than it reads. On a large screen, a surprise viewing of a spectacular 30 seconds from a theatrical motion picture explodes.

Two issues: (a) will it be allowed? and (b) does it work, i.e., persuade? The answer to (a) is "perhaps." Show it to the judge first. Of the some 300 judges at the presentation, none came up to me and said, "Not in my courtroom." Of course, I wasn't in their courtroom.

The answer to (b) is "perhaps." It certainly packs a wallop and will be remembered. But it may be remembered as just a "stunt," the wrong impression. The key is to pick the right 30 seconds that just precisely make the point. I am not recommending this — only giving you some ideas.

I don't see how we can push electronics in the courtroom much further than the use of theatrical motion pictures, which have the benefit of the greatest technical competence and the highest budgets of any graphic presentation anywhere.

Unless...at some future date, the trial generally follows current procedures but it's all on DVD. Just bring your 5 1/2" disc to court, empanel your jury, give each juror a copy of the disc and send them home to watch. Or for a bench trial, just mail the judge your disc. Every lawyer his own auteur.

Now that I think of that, perhaps artificial intelligence algorithms could be developed that would scan your disc, declare the winner, compute the damages, print the decision and mail it out.

Time no longer flies; it goes by at the speed of light. Start early with your electronics.

—Thomas J. McDermott

## The Extraterritorial Reach of U.S. Antitrust Law

In a decision with profound implications for companies either with a direct business presence in the U.S. or conducting commerce through U.S. subsidiaries or partners, the U.S. Court of Appeals for the First Circuit recently held that a Japanese corporation could be prosecuted for criminal antitrust violations **even though the underlying acts had occurred entirely outside the U.S.** *United States vs. Nippon Paper Industries Co., Ltd.* 1997 WL 109199 (1st Cir. March 17, 1997).

This case represents an important extension of the principle that overseas business activities which were meant to produce, and did in fact produce, a "substantial effect" on U.S. commerce will be subject to the U.S. antitrust laws, even if the offending conduct took place entirely outside the US. Although this principle was recently applied by the U.S. Supreme Court in 1993 with respect to civil antitrust actions in *Hartford Fire Ins. Co. v California*, 509 U.S. 764, 125 L.Ed.2d 612 (1993), the *Nippon Paper* decision is the first decision applying this principle to criminal prosecutions initiated by the U.S. government.



Peter S. Selvin

### The Facts

According to an indictment issued by a federal grand jury, representatives of Nippon Paper Industries Co., Ltd. ("Nippon") held a series of meetings in 1990 in Japan with other manufacturers of thermal fax paper. Those meetings allegedly led to an agreement to fix prices of thermal fax paper throughout North America.

Further according to the indictment, Nippon and its co-conspirators implemented this plan by selling the paper to unaffiliated trading houses on the condition that those trading houses would charge inflated prices for the paper to buyers in North America. In fact, the trading houses, through their respective U.S. subsidiaries, resold the paper in the U.S. market at the artificially high prices — all allegedly pursuant to the agreement involving Nippon and the other manufacturers.

The indictment alleged that Nippon had sold approximately \$ 6 million for import into the U.S. market and that by reason of the foregoing scheme Nippon's activities had a substantial adverse effect on commerce in the U.S. and unreasonably restrained trade in violation of Section One of the Sherman Act (15 U.S.C. § 1).

Nippon moved to dismiss the indictment on the ground that the conduct attributed to it had all allegedly occurred outside the U.S. and hence could not constitute an offense under Section One of the Sherman Act. The U.S. District Court agreed with Nippon and dismissed the indictment, but the First Circuit reversed, holding that Nippon could be prosecuted under Section One if its activities were intended to, and in fact did have, a "substantial effect" on U.S. commerce.

### The Holding of the Court

The Court's conclusion was fundamentally based on its construction of Section One itself. In this regard, the Court drew substantially on the U.S. Supreme Court's decision in the *Hartford Fire Ins.* case, which had determined that a civil action for damages by private parties under Section One could be maintained in

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*The Extraterritorial Reach of U.S. Antitrust Law* —  
Continued from page 3

respect to acts undertaken by foreign parties entirely outside the US, provided that those acts had meant to have, and did in fact have, a "substantial effect" on U.S. commerce.

For the Court in *Nippon* the key question was whether a different legal conclusion would follow from the fact that the case dealt with a criminal prosecution, as opposed to a civil action for damages. In this regard, the Court noted that Section One was the source for both the civil claim in *Hartford Fire Ins.* and the criminal claim in the case at bar.

The fact that both civil and criminal liability were created by Section One led the Court to conclude that Congressional intent regarding the extraterritorial reach of Section One would not have varied depending on whether the claim was civil or criminal. Moreover, the Court could not find persuasive policy reasons extraneous to the statute which would support *Nippon's* argument that the Court should be less willing to give extraterritorial effect to the statute in the context of a criminal proceeding. Accordingly, the Court, in reversing the District Court and reinstating the indictment, held that a criminal prosecution under Section One could be properly based on *Nippon's* wholly extraterritorial acts.

As one commentator has suggested, courts might feel less reluctant to apply U.S. antitrust law on an extraterritorial basis in the context of a criminal prosecution than in the context of a civil action for damages. This is so because a criminal prosecution under U.S. antitrust laws must be initiated through an agency of the Executive Branch, such as the Department of Justice. Since the Executive Branch has made the determination, in such a case to seek such an indictment, it has presumably weighed the foreign policy implications of such a decision and has proceeded in a knowing and deliberative fashion. The same cannot be said for a court applying the U.S. antitrust laws on an extraterritorial basis in the context of a civil action initiated by private parties. *Dam*, "Extraterritoriality in an Age of Globalization: the Hartford Fire Case", 1993 *Supreme Court Review* 289, 320 (1993) (criticizing the Court's decision in *Hartford Fire* on the ground that it constitutes "international economic policymaking by the Supreme Court").

#### International Commercial Implications

The notion that one country can criminally prosecute a foreign company for economic activities which occur wholly outside its borders — and which may be perfectly lawful in the country where the acts occur — seems sharply at odds with current notions of comity and the increasingly global nature of international trade. Indeed, both the dissenting opinion in *Hartford Fire Ins.*, and a number of commentators in this area, have challenged the propriety of U.S. courts applying domestic antitrust laws to such conduct. See, e.g., *Hartford Fire Ins. Co. vs. California*, *supra*, 125 L.Ed.2d at 648 *et seq.* (Scalia dissenting); See also *Dam*, *op. cit.* at 321.

The Court in *Nippon Paper* was not, however, persuaded that the doctrine of international comity required a different result. Characterizing comity as "more an aspiration than a fixed rule," the Court followed the view espoused by the majority in *Hartford Fire Ins.* that

"...comity concerns would operate to defeat the exercise of jurisdiction only in those few cases in which the law of the foreign sovereign required a defendant to act in a manner incompatible with the Sherman Act or in which full compliance with both statutory schemes was impossible."

This "stunted" view of international comity — wherein the court declines to exercise its jurisdiction over a foreign party only where the foreign party's offending conduct has been compelled by a foreign sovereign — seems inconsistent with the present day economic realities, especially the globalization of international

trade. Indeed, if all nations adopted the view espoused by the Court in *Nippon Paper*, companies engaged in international commerce might likely be subject to a conflicting and unpredictable set of imperatives. Such an outcome runs counter to the prevailing interests of nations in free trade.

One possible way to interpret the seeming incongruity between the *Nippon Paper* decision and the pro-free trade stance of the U.S. is to view it in the context of a heightened interest in antitrust enforcement on the part of the Clinton administration, especially as applied to foreign trade. As noted in the concurring opinion in *Nippon Paper*,

"[t]he present administration has promulgated new Antitrust Enforcement Guidelines for International Operations which 'focus primarily on situations in which the Sherman Act will grant jurisdiction and when the United States will exercise that jurisdiction' internationally. Brockbank, *The 1995 International Antitrust Guidelines: The Reach of U.S. Antitrust Law Continues to Expand*, 2 J. Int'l Legal Stud. 1, 22 (1996). The new Guidelines reflect a stronger enforcement stance than earlier versions of the Guidelines, and have been described as 'warning to foreign governments and enterprises that the [antitrust enforcement] Agencies intend to actively pursue restraints on trade occurring abroad that adversely affect American markets or damage American exporting opportunities.' *Id.* at 21. The instant case is likely a result of this policy."

Without doubt the decision in *Nippon Paper* will be subject to further appellate review probably by both the U.S. Court of Appeals, by way of a petition for rehearing, and the U.S. Supreme Court, by way of a petition for certiorari. Pending the results of such further review, however, companies doing business in or with the U.S. ought to be aware of both the changed legal and political environment in the U.S., as those trends relate to the extraterritorial application of U.S. antitrust enforcement.

—Peter S. Selvin

#### ABTL Technology Litigation Committee Looking for New Members

The Technology Litigation Committee is focused on increasing the membership's awareness of mature and emerging technology fields and business trial litigation. Formed last year, the Committee has hosted various dinner speakers, with topics ranging from the competitive landscape in the telecommunications field to a bird's eye view of the development of the microprocessor ship. The Committee seeks to increase awareness of its presence among ABTL's general membership and to make programs and information on technology-related topics available to ABTL members.

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defamation actions. *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1163. However, over the years, California courts have steadily extended the protection of the privilege to include protection from all torts, except for malicious prosecution. Courts have expressly held that the privilege bars actions for interference with contractual or other business relationships, *Rubin v. Green* (1993) 4 Cal.4th 1187; *Rosenthal v. Irell & Manella* (1982) 135 Cal.App.3d 121; intentional infliction of emotional distress, *Ribas v. Clark* (1985) 38 Cal.3d 355; *Pettit v. Levy* (1972) 28 Cal.App.3d 484; fraud or deceit, *Carden v. Getzoff* (1987) 190 Cal.App.3d 907; *Steiner v. Eikerling* (1986) 181 Cal.App.3d 639; negligence and negligent misrepresentation, *Portman v. George McDonald Law Corp.* (1979) 99 Cal.App.3d 988; *Pettit v. Levy*, supra; abuse of process, *Asia Investment Co., Ltd. v. Borowski* (1982) 133 Cal.App.3d 832; *Umansky v. Urquhart* (1978) 84 Cal.App.3d 368; invasion of privacy, *Ribas v. Clark, supra*; *Spira v. Superior Court* (1976) 62 Cal.App.3d 33; and civil conspiracy, *Steiner v. Eikerling, supra*. Attempts to circumvent the privilege by suing under a variety of exotic theories are routinely rebuffed by the courts. "The salutary purpose of the privilege should not be frustrated by putting a new label on the complaint." *Thornton v. Rhoden* (1966) 245 Cal.App.2d 80, 99. Injunctive relief is likewise barred. *Rubin v. Green, supra*. The privilege is absolute and protects communications made with actual malice, knowledge of their falsity, or an intent to harm.

The litigation privilege applies to published communications and not to conduct, although conduct that is essentially communicative in nature is covered. *Kupiec v. American Internat. Adjustment Co.* (1991) 235 Cal.App.3d 1326. Therefore, the Supreme Court held the privilege inapplicable to claimed damages arising from the unconsented taping of telephone conversations by clients and the transcription of the tapes by their attorney. *Kimmel v. Goland* (1990) 51 Cal.3d 202. The Court distinguished the non-communicative acts of taping and transcribing the conversations, which were not privileged, from the attorney's communicative act of advising the clients, which remained privileged. *Id.* at 208, n.6. Similarly, the privilege would bar recovery of damages for the testimonial use of the contents of overheard conversations, even though the act of eavesdropping was actionable. *Ribas v. Clark, supra*, 38 Cal.3d at 365.

What kinds of "communications" are covered by the litigation privilege? Section 586, comment a, of the *Restatement (2d) of Torts* makes it clear that privileged statements include all pleadings and affidavits necessary to set the judicial machinery in motion, oral and written arguments, and examination of witnesses at trial. In addition, it has long been recognized that the privilege will apply to a publication even though it is made outside the courtroom and no function of the court or its officers is involved. *Albertson v. Raboff* (1956) 46 Cal.2d 375, 381. Thus, California courts have considered the following different types of communications in the context of the privilege:

#### Solicitation of Clients and Investigation of Claims

Numerous decisions apply the litigation privilege to prelitigation communications. Solicitations to prospective clients by a law firm and its agents which contain allegedly false and malicious statements are absolutely privileged. "We can imagine few communicative acts more clearly within the scope of the privilege

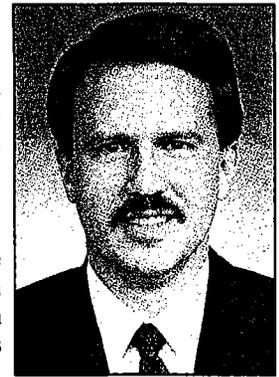
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## Section 998 Offers to Compromise: The Procedural Minefield

Section 998 of the Code of Civil Procedure provides that, not less than 10 days before commencement of trial, any party to an action "may serve an offer in writing upon any other party to the action to allow judgment to be taken in accordance with the terms and conditions stated at that time." The offer is deemed withdrawn if not accepted before trial commences or within 30 days, whichever occurs first.

If the offer is accepted, the accepted offer is filed with the court and judgment entered accordingly. If the offer is not accepted, and the person rejecting the offer does not obtain a trial result better than the offer, a number of cost-shifting mechanisms kick in. The prospect of such cost-shifting is designed to encourage settlement of lawsuits before trial. *T.M. Cobb Co. v. Superior Court* (1984) 36 Cal. 3d 273, 280.

This deceptively simple statute has existed in some form in California since 1851 and, although modified over the years, remains essentially unchanged in substance. *Taing v. Johnson Scaffolding Co.* (1992) 9 Cal. App. 4th 579, 585. However, the legal environment in which it operates has changed substantially in 146 years, and numerous court decisions have placed significant limitations on the plain language of the statute. Any lawyer who makes or receives a 998 offer must be aware of these limitations.



Geoffrey L. Bryan

#### The Statutory Scheme

The basic mechanism of Section 998 is straightforward, varying according to whether the offer comes from a defendant or a plaintiff.

**Defense Offers.** Under Section 998(c), if an offer made by a defendant is not accepted and plaintiff fails to obtain a more favorable judgment, the plaintiff

- (a) is not entitled to recover court costs (despite being a "prevailing party"), and
- (b) must pay the offering defendant's costs from the time of the offer.

In addition, the court has discretion to award all of defendant's costs from the date of filing of the complaint, and to award a "reasonable sum" to cover the incurred expenses for expert witnesses used by the defendant in the preparation and trial of the action.

Under Section 998(e), if these awarded costs actually exceed plaintiff's recovery, the court is directed to enter a judgment *against plaintiff* in favor of the defendant for the difference. Thus, the stakes for a plaintiff can be quite substantial when faced with a defense 998 offer.

**Plaintiff Offers.** On the flip side, Section 998(d) provides that if plaintiff's 998 offer is refused and defendant fails to obtain a more favorable judgment, then the court may award (in addition

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## Section 998 Offers to Compromise

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to the costs that plaintiff will already be eligible to recover as "prevailing party") a "reasonable sum" to cover plaintiff's incurred expenses for expert witnesses. In addition, Civil Code Section 3291 provides pre-judgment interest on plaintiff's judgment at the legal rate of 10 percent commencing on the date of plaintiff's first 998 offer which is exceeded by the trial judgment.

### Section 998 in the Real World

The statute seems straightforward enough in the context of a simple case involving a single plaintiff, a single defendant, and money damages. But what about cases with multiple plaintiffs or multiple defendants, differing theories of liability and resulting exposure, rights of contribution or indemnity among co-defendants, and separate allocation of non-economic damage under Proposition 51? And what about 998 offers that, while technically in compliance with Section 998, do not seem to be realistic settlement offers? These are the issues that have occupied courts in applying Section 998, and they can form traps for the unwary in practice.

Here are some key points that apply to 998 offers:

**The Offer Must Specifically Refer to Section 998.** A letter merely stating, "This letter is intended as an invitation to your clients to settle their disputes with my clients," while making no reference to Section 998, was rejected as insufficient to trigger the statutory cost-shifting in *Stell v. Jay Hales Development Co.* (1992) 11 Cal. App. 4th 1214, 1231-32.

**Only Reasonable Offers Are Eligible.** The decisions in *Pineda v. Los Angeles Turf Club, Inc.* (1980) 112 Cal. App. 3d 53, 63, and *Wear v. Calderon* (1981) 121 Cal. App. 3d 818, 820-21, have recognized a threshold requirement of "realism" or "good faith" for 998 offers. *Pineda* affirmed rejection of a \$2,500 defense offer in a \$10 million wrongful death case, and *Wear* reversed a Section 998 cost-shifting award following a defendant's offer of \$1 in a personal injury case. "[T]he pretrial offer of settlement required under section 998 must be realistically reasonable under the circumstances of the particular case. Normally, therefore, a token or nominal offer will not satisfy this good faith requirement...." *Wear*, 121 Cal. App. 3d at 821.

The decision in *Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal. App. 3d 692, 698-70, takes this principle farther, and states that whether a 998 offer is reasonable also

depends on whether the adverse party knows, or reasonably should know, the information that makes it reasonable. Thus, according to the *Elrod* court, even "dynamite" information contained in defense files that should lead to a defense verdict will not support a low-ball 998 offer unless the plaintiff knows about or has the opportunity to discover this information (whether or not the opportunity is actually used). In the same year, *Culbertson v. R.D. Werner Co.* (1987) 190 Cal. App. 3d 704, 708-11, upheld the validity of a \$5,000 defense 998 offer against a \$1.5 million demand in a personal injury case, even though workers compensation liens against plaintiff's recovery would have left the plaintiff with nothing if the offer was accepted. The court pointed to a number of factors that would lead to a reasonable expectation of a defense verdict. *Id.* at 707.

**Only Unqualified Acceptance Will Count.** Conditional acceptance of a Section 998 offer, containing terms or conditions materially different from the original offer, is viewed as a counteroffer that terminates the ability to accept the original offer. *Glende Motor Co. v. Superior Court* (1984) 159 Cal. App. 3d 389, 398.

**Relinquishment of Outside Claims Cannot Be Required.** A defense 998 offer that provided not only an end to the pending litigation but a release of all other potential claims against the defendant, its attorneys, and its insurers, was rejected by the court in *Valentino v. Elliott Sav-On Gas, Inc.* (1988) 201 Cal. App. 3d 692, 701. Although the court was troubled by the release on policy grounds, it also found that the value of the other released claims was sufficiently imponderable that the court could not realistically measure the value of the offer compared to the trial result.

**The 998 Offer Must Be Capable of Valuation by the Court.** A plaintiff's 998 offer of a structured settlement (lump sum together with annuity for the life of the plaintiff) was held inadequate to trigger Section 998 cost-shifting because there was no evidence of the present value of the annuity and therefore no means to compare the 998 offer to the trial result. *Hurlbut v. Sonora Community Hospital* (1989) 207 Cal. App. 3d 388, 408-09. The court suggested that expert testimony to establish present value might have solved the problem. *Id.* at 409.

### Special Rules for Multiple Parties

The cases applying Section 998 in multi-plaintiff or multi-defendant settings are confusing and inconsistent, and substantially limit the effectiveness of the statute in such cases. Careful reading of all relevant decisions is imperative in advising any client that receives, or wishes to make, a 998 offer in multiple party cases.

**In General, Separate Offers Must Be Made to Multiple Parties.** Case law makes 998 offers from or to multiple adverse parties vulnerable to challenge unless

- (a) they set out individual allocations of the proposed judgment to each party, and
- (b) they provide for individual acceptance without consent of the other parties affected.

These requirements can create enormous headaches in multi-party cases.

These doctrines find their origin in two early cases. *Randles v. Lowry* (1970) 4 Cal. App. 3d 68, 74, set the stage in its holding that a defense offer under Section 997 (the predecessor to Section 998) to three plaintiffs, with no designa-

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## Section 998 Offers to Compromise

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tion of how the proceeds should be divided among them, was a "nullity" because of the failure to make such allocation. *Accord, Meissner v. Paulson* (1989) 212 Cal. App. 3d 785, 790-91. A few years later, *Hutchins v. Waters* (1975) 51 Cal. App. 3d 69, invalidated a 998 offer by a defendant to two plaintiffs in which a precise allocation was given, but neither could accept the offer unless the other also accepted, holding that a valid offer could not require the consent of all parties before any could accept. *Accord, Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal. App. 4th 102, 112-114.

Subsequent decisions have addressed a variety of variations on this theme. Thus, for example, it has been held that a 998 offer made by multiple plaintiffs with severable causes of action must include an allocation among themselves in order to be valid. *Gilman v. Beverly California Corp.* (1991) 231 Cal. App. 3d 121, 126; *Huribut v. Sonora Community Hospital, supra*, 207 Cal. App. 3d at 410.

Joint offers by defendants without internal allocations of liability have been allowed to stand where the court believed the claim was joint and indivisible. *Stallman v. Bell* (1991) 235 Cal. App. 3d 740, 745-47; *Brown v. Nolan* (1979) 98 Cal. App. 3d 445, 451; cf. *Winston Square Homeowner's Assoc. v. Centex West, Inc.* (1989) 213 Cal. App. 3d 282, 294 (defendant found not liable on non-joint claim was entitled to rely on joint 998 offer by defendants even though not broken down). This is obviously an area of some danger, however, and defendants contemplating a joint offer should thoroughly review the relevant case law.

*It Is Not Necessary to Make Offers to All Adverse Parties.* A defense offer to only one plaintiff was upheld in *Stiles v. Estate of Ryan* (1985) 173 Cal. App. 3d 1057, 1064.

Where does this leave the practitioner in a modern, multi-party case? How likely is it that a 998 offer can be crafted that makes economic sense, on the one hand, and will survive judicial scrutiny, on the other?

Consider this example: a lawsuit is brought by two people who jointly buy a house and own it as tenants in common with undivided one-half interests. They sue the former owners (the sellers), an inspection company, and the real estate agents involved in the transaction, on the theory that the house contains material undisclosed defects that substantially diminish its value.

It would seem straightforward enough for a defendant to make a 998 offer to both plaintiffs, allocating one-half to each one. But must the offer, in order to be valid, permit one plaintiff to accept while the other proceeds to trial? The *Hutchins* case seems to require this, but it is a nonsensical requirement, given that the damage to the house is indivisible and it will cost the offering defendant just as much to litigate against one plaintiff as against two. In this case, an offer requiring acceptance by both plaintiffs makes the best sense (and indeed an offer permitting acceptance by only one plaintiff makes no sense), but it may not withstand post-trial challenge.

Unfortunately, therefore, in a number of contexts Section 998 may not prove effective to put settlement pressure on adverse parties, and an apparently valid 998 offer may prove inadequate to shift costs even where an apparently superior trial result has been reached. Offers to compromise under Section 998 nonetheless have an important role to play in today's litigation environment, and a thorough knowledge of the law in this area will best equip the litigator to obtain optimum benefit from the statute.

—Geoffrey L. Bryan

## Cases of Note

### Arbitration

In *Bonshire v. Thompson*, 97 Daily Journal D.A.R. 1368 (Court of Appeal, February 7, 1997), the Second District Court of Appeal held that an arbitrator exceeded his powers by relying on extrinsic evidence in rendering his award where the integration clause in the contract expressly precluded the introduction of extrinsic evidence.

### Discovery

In *Calcor Space Facility, Inc. v. Superior Court*, 97 Daily Journal D.A.R. 3023 (February 28, 1997), the Fourth Appellate District held that a subpoena under Code of Civil Procedure section 2020 directed to the Custodian of Records of a nonparty must describe the documents to be produced with reasonable particularity. It further held that generalized demands, unsupported by evidence showing the potential evidentiary value of the information sought, is not permitted.

### Insurance

In *Amato v. Mercury Casualty Co.*, 97 Daily Journal D.A.R. 3902 (March 24, 1997), the Second Appellate District held that where an insurer tortiously breaches the duty to defend and the insured suffers a default judgment because the insured is unable to defend, the insurer is liable for the default judgment even where the insurer has no duty to indemnify. The court further held that the insured is not required to conduct a trial of the underlying action to recover the amount of the default judgment.

In *Van Beurden Insurance Services, Inc. v. Customized Worldwide Weather Insurance Agency, Inc.*, 97 Daily Journal D.A.R. 3231 (March 6, 1997), the California Supreme Court resolved a serious and dangerous uncertainty regarding the jurisdictional time periods that govern the timeliness of post-trial motions and, in some cases, of notices of appeal. The Supreme Court rejected the approach that the appellate courts must presume that any notice of entry by a clerk was ordered by the court, holding instead that "when the clerk of the court mails a file-stamped copy of the judgment, it will shorten the time for ruling on the motion for a new trial only when the order itself indicates that the court directed the clerk to mail 'notice of entry' of judgment," except for the specific situations described in Code of Civil Procedure sections 664.5(a) and (b).

### Real Property

In *Fleck v. Bollinger Home Corporation, Inc.*, 97 Daily Journal D.A.R. 5565 (April 29, 1997), the Second Appellate District held that a builder of custom homes could assign to the plaintiff buyers its cause of action for equitable indemnity against the land developer where the 10-year statute of limitations prevented the buyer from suing the land developer directly. At the trial, the jury found the builder strictly liable even though the evidence showed that he only built and sold eleven homes to the general public in the general area during a five-year period in accord with the land developer's building plan. On appeal, it was determined that the trial court did not abuse its discretion in utilizing the term "substantial numbers" in giving the jury instruction that a mass producer for purposes of imposing strict liability "is one who produces residential properties in substantial numbers for a business purpose...."



Denise M. Parga

—Denise M. Parga

than...meeting and discussing with [prospective clients]...the merits of the proposed...lawsuit." *Rubin v. Green, supra*, 4 Cal.4th at 1195.

This principle was recently reaffirmed in *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777. The son of the late Audrey Hepburn discovered that royalties from an audio recording of poetry, which she had earmarked for charity, totalled a paltry \$100 so he hired Rosenfeld, Meyer & Susman to obtain the support of other celebrity recording artists and to complain to the State Attorney General. After the law firm wrote to the other celebrities, asking for their endorsement of the complaint, it was sued by Dove for libel and interference with economic relationship. Citing the broad protection of *Rubin v. Green*, the Court of Appeal held the letter to be privileged as a communication preliminary to an official proceeding, and therefore, within Section 47(b). *Id.* at 783.

Similarly, investigatory interviews with potential witnesses before a lawsuit or hearing are privileged. *Ascherman v. Natanson* (1972) 23 Cal.App.3d 861; *Lebbos v. State Bar of California* (1985) 165 Cal.App.3d 656.

#### Demand Letters

Another common prelitigation communication, the demand letter, is subject to the privilege. *Lerette v. Dean Witter Organization, Inc.* (1976) 60 Cal.App.3d 573, 578 (defamatory demand letter by in-house counsel "fully privileged"). Subsequent decisions qualified the privilege. "No public policy supports extending a privilege to persons who attempt to profit from hollow threats of litigation." *Fuhrman v. California Satellite Systems* (1986) 179 Cal.App.3d 408, 422 n.5. The demand letter's threat of future litigation must be contemplated in good faith and under serious consideration. Thus, in *Fuhrman*, the court refused to dismiss claims against an attorney for a satellite TV company who had sent a form letter to 8,700 local residents, demanding that they pay for the unauthorized receipt of microwave transmissions or be sued. The letter provided no factual support for the assertion that individual recipients were pirating TV signals. The court concluded that the demand letter raised a serious question whether it was published in serious contemplation of litigation. "The bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered." *Id.* at 421 (emphasis in original).

In a recent decision, *Edwards v. Centex Real Estate Corporation* (1997) 53 Cal.App.4th 15, the First District Court of Appeal considered the question: at what point on the continuum between the mere possibility of an action and the reality of a filed lawsuit does the privilege attach? At trial, the defendants had obtained an *in limine* order, barring all evidence of their fraudulent statements during prelitigation settlement negotiations, based on the litigation privilege. The Court of Appeal reversed, declining to extend the privilege to all settlement negotiations. It focused on the public policy justification for the litigation privilege of protecting access to the courts, and rejected the separate policy of encouraging settlement, in reaching its conclusion that the privilege would attach only at the point that "imminent access to the courts is seriously proposed by a party in good faith for the purpose of resolving a dispute, and not when a threat of litigation is made merely as a means of obtaining a settlement." *Id.* at 2153.

Because the attorney's good faith, serious contemplation of future litigation at the time the demand letter is written is relevant

to application of the litigation privilege, the issue is unlikely to be resolved by demurrer. *Fuhrman v. California Satellite Systems, supra*. Similarly, the attorney's intent probably creates triable issues of fact precluding summary judgment. *Laffer v. Levinson, Miller, Jacobs, & Phillips* (1995) 34 Cal.App.4th 117, 124.

#### Notices of Liens and Lis Pendens

Liens required to be filed as a first step in foreclosure actions are fully protected by the litigation privilege. In the 1956 case of *Albertson v. Raboff, supra*, the Supreme Court applied the privilege to the recordation of a lis pendens that the plaintiff claimed had disparaged her title to property. Justice Traynor explained that since the lis pendens merely gave notice of the pendency of the lawsuit, the disparagement claim arose from the pleadings as well as the lis pendens. "The publication of the pleadings is unquestionably clothed with absolute privilege, and we have concluded that the republication thereof by recording a notice of lis pendens is similarly privileged." *Id.* at 379. *Accord, Woodcourt II Limited v. McDonald Co.* (1981) 119 Cal.App.3d 245.

In *Frank Pisano & Associates v. Taggart* (1972) 29 Cal.App.3d 1, this rationale was extended to a mechanics lien, the recordation of which was a publication authorized by law in conjunction with an action to enforce the lien. In *Wilton v. Mountain Wood Homeowners Assn.* (1993) 18 Cal.App.4th 565, the privilege was extended to assessment liens filed by a condominium homeowners association. The court noted that the filing of the assessment lien was authorized by statute prior to foreclosure either by judicial process or by private sale, and concluded that it therefore met the *Silberg* test of being "required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation," even though the lien could equally have been in service of the non-judicial remedy. *Id.* at 569.

This line of precedent is not without limits. In December 1996, the California Supreme Court ordered republished an opinion in which the Second District Court of Appeal had held that the litigation privilege would shield a notice of violation of covenants, conditions, and restrictions ("CC & R's"), filed by a homeowners association. *California Riviera Homeowners Association v. Superior Court* (1996) 48 Cal.App.4th 1886. The Supreme Court's reasoning is not known, but it may have been moved to act by the fact that, unlike the assessment lien in *Wilton, supra*, no statute authorized recordation of the notice of violation and therefore, such recordation was not "permitted by law."

Furthermore, in another recent decision, *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, the Fourth District Court of Appeal distinguished privileged communications from non-privileged acts in refusing to extend the litigation privilege to the filing of a lien. LiMandri was an attorney representing clients in an environmental contamination case. Under his agreement with the clients, he was to receive an hourly fee and a percentage of any recovery. Unbeknownst to the lawyer, his clients had granted a lender a security interest in their share of any judgment or settlement from the same lawsuit. A lawyer for the lender, Judkins, filed a notice of lien in the action. After a multi-million dollar settlement was reached, LiMandri had to wait seven months and expend more than \$100,000 in a subsequent interpleader action to prove his superior right to the fees. The Court of Appeal held that a claim for interference with an existing contractual relationship would not be barred by the litigation privilege. The court reasoned that, while filing notice of the lien was a protected communicative act, it was only one act in the overall course of tortious conduct that included Judkin's original creation of the lien and refusal to concede the superiority of the lawyer's

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contractual lien. *Id.* at 345. Furthermore, the privilege would not apply because neither Judkins nor his client, the lender, were litigants or other participants in the original lawsuit, and because their conduct was not connected or logically related to that litigation or engaged in for the purpose of achieving its objects. *Id.* at 345-346. Distinguishing *Rubin* and *Wilton*, *supra*, the court noted that the fact that Judkins' actions had precipitated the interpleader action did not mean that they were undertaken in anticipation of such litigation. *Id.* at 348.

#### Communications With the Press

On January 1, 1997, Section 47(d) of the Civil Code was amended to embrace communications with the press, phrased as, "a fair and true report in, or a communication to, a public journal, of (A) a judicial, ... proceeding, or (D) of anything said in the course thereof. . . ." This amendment to the statute was intended to abrogate the holding in *Shahvar v. Superior Court* (1994) 25 Cal.App.4th 653, that faxing a copy of a complaint filed the same day to a newspaper, which then published an article on the lawsuit, was not a privileged communication under Section 47 because the news media were not participants in the action. *Id.* at 658. It remains to be seen how this amendment will affect the courts, which have been hostile towards communications with the press.

Thus, for example, the Second District Court of Appeal in *Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, specifically acknowledged the prospective change in the statute, but nevertheless found that statements at a press conference which the defendants claimed were made in anticipation of litigation (which, indeed, was later filed) were not "fair and true reports or communications of judicial proceedings," and so refused to apply the litigation privilege even in its newly expanded form. *Id.* at 1144, n.3. The case involved the sensational charges of child abuse leveled at entertainer Michael Jackson by an anonymous minor. Plaintiff, an attorney retained to represent the child, was engaged in confidential settlement discussions with Jackson's representatives before any suit had been filed, when a psychological evaluation of the alleged victim filed with the Los Angeles County Department of Children's Services was leaked. Jackson's lawyers immediately engaged in spin control by calling a press conference at which they denied the charges and accused the child's lawyer of fraud and extortion. As a result, the lawyer withdrew from the representation, and supposedly lost the opportunity to share in a reputed \$25 million settlement. The lawyer's subsequent lawsuit against Jackson and his lawyers for defamation, conspiracy to interfere with a business relationship, and intentional infliction of emotional distress was dismissed based on the litigation privilege. The Court of Appeal reversed.

The court noted that statements to nonparticipants in an action are generally not privileged and went on to consider several cases in which communications with journalists had been considered under the litigation privilege. In *Washer v. Bank of America* (1943) 21 Cal.2d 822, (disapproved on other grounds, *MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536), the Bank had discharged the plaintiff. When the National Labor Relations Board ordered him reinstated, a bank vice-president made a statement to the press, smearing the employee. The Supreme Court held the statement was not privileged because it was not made to one actually involved in the judicial proceeding. *Id.* at 832. While the Supreme Court subsequently broadened the privilege beyond the immediate circle of judge, attorney,

party and witness in *Albertson v. Raboff*, *supra*, the Court of Appeal in *Rothman* noted that it did not overrule *Washer's* exclusion of statements to the public at large through the press. 49 Cal.App.4th at 1142. It went on to consider *Bradley v. Hartford Acc. & Indem. Co.*, *supra* (disapproved on other grounds, *Silberg v. Anderson*), which held that the privilege did not apply to statements to strangers to the action such as the press, a holding that the *Rothman* court found had been "reaffirmed, albeit in dictum," by *Silberg*. *Id.* at 1143.

The last case relied upon by the *Rothman* court was *Susan A. v. County of Sonoma* (1991) 2 Cal.App.4th 88. In a decision authored by Justice Chin and joined by Justice Werdegar (before both were elevated to the Supreme Court), the First District Court of Appeal held that the litigation privilege did not apply to statements to the press by a forensic psychologist concerning his examination for the public defender of a 14-year-old minor accused of attempted murder. The court found that the press was not connected with the action so as to render Section 47(b) applicable, and concluded that an attorney (or his expert) who wishes to litigate his case in the press will do so at his own risk. *Id.* at 94-95. The court expressly rejected the psychiatrist's claim that the privilege applied because he spoke to the press to obtain a litigation advantage for the accused boy. "[A] contrary holding would open the door to the universally condemned 'trial by press,' a procedure forbidden to counsel and subversive of the fair and orderly conduct of judicial proceedings." *Id.* at 95-96 (quotes omitted).

The *Rothman* court seized upon these precedents to reverse the dismissal of the lawsuit and to condemn Jackson's lawyers for their statements at the press conference. It was not enough for the statements to have concerned the same subject matter as the anticipated litigation, the court ruled, they must have a "functional connection" - that is, they must function as a necessary or useful step in the litigation process and must serve its purposes. *Id.* at 1146. The test is not satisfied by communications which only serve interests that happen to parallel or complement a party's interests in the litigation. Jackson's interest in being vindicated in the eyes of the world, a result that the litigation may achieve, is not however, an object of the litigation. According to the court, a party's legitimate objectives in the litigation are limited to the remedies which can be awarded by the courts. *Id.* at 1147-1148. Therefore, the statements by his attorney at the press conference did not "further the objectives of the litigation," and were not privileged.

The court also rejected the attorney's argument that the existence of the privilege was supported by Rule 5-120(C) of the Rules of Professional Conduct, which permits a member of the State Bar to "make a statement that a reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client." Cutting its analysis exceedingly small, the court stated that just because statements permitted under Rule 5-120(C) would not subject the attorney to charges of attorney misconduct did not mean they were privileged; additionally, just because the amended statute would not protect statements that violated Rule 5-120(c) did not mean that statements that did not violate the Rule would be within the statute. *Id.* at 1149 n.5.

The *Rothman* court summed up by stating that extending the litigation privilege to "litigating in the press" would serve no purpose but to provide immunity "to those who would inflict upon our system of justice the damage which litigating in the press generally causes: poisoning of jury pools and bringing disrepute upon both the judiciary and the bar." *Id.* at 1149. It professed

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**Antitrust**

*Chroma Lighting v. GTE Products Corp.*, 97 Daily Journal D.A.R. 4630 (9th Cir. April 10, 1997). The Ninth Circuit held that in a secondary line Robinson-Patman Act price discrimination case, an inference that competitive injury to individual buyers harms competition may not be overcome by proof that competition in the relevant market was unharmed. The case represents a further development of an inference established in *FTC v. Morton Salt*, 334 U.S. 37 (1948), that competitive injury in a secondary line Robinson-Patman Act case may be inferred from evidence of injury to an individual competitor. The court addresses a split in the circuits on the issue of whether such an inference may be rebutted, finding persuasive the Third Circuit's decision in *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524 (3d Cir. 1990), cert. denied, 499 U.S. 921 (1991), and rejecting the D.C. Circuit's analysis in *Boise-Cascade Corp. v. FTC*, 837 F.2d 1127 (D.C. Cir. 1988).



Michael K. Grace

In reviewing the legislative history of the Robinson-Patman Act, the court concluded that Congress intended "to protect individual competitors, not just market competition, from the effects of price discrimination."

**Civil Procedure - Settlement**

*Ortolf v. Silver Bar Mines, Inc.*, 97 Daily Journal D.A.R. 4803 (9th Cir. April 14, 1997). The Ninth Circuit held that the United States District Court lacks jurisdiction to enforce a settlement arising from two federal diversity cases because the district court's stipulated orders of dismissal

did not retain jurisdiction to enforce the settlements. Citing *Kokkonen v. Guardian Life Ins. Co.*, 114 S.Ct. 1673 (1994), the court noted that enforcement of a settlement agreement "is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction." Ancillary jurisdiction to enforce the settlement did not exist because the court did not retain jurisdiction to do so, and original jurisdiction was lacking because the combined amount of the two settlements did not exceed \$50,000.

**Civil Procedure - Securities**

*Medhekar v. United States District Court*, 99 F. 3d 325 (9th Cir. 1996). The court held that the provisions of the Private Securities Litigation Reform Act of 1995 ("Reform Act") requiring a stay of all "discovery and other proceedings" during the pendency of a motion to dismiss apply to disclosures required by Rule 28 of the Federal Rules of Civil Procedure. Describing the question as "one of first impression not yet addressed by any circuit court in a published opinion," the court concluded that initial disclosures under Rule 28 are a subset of discovery. The court reasoned that

"Congress clearly intended that complaints in these securities actions should stand or fall based on the actual knowledge of the plaintiffs rather than information produced by the defendants after the action has been filed."

**Patent**

*Warner-Jenkinson Co., Inc. v. Hilton Davis Chemical Co.*, 97 Daily Journal D.A.R. 2249 (S. Ct. March 3, 1997). The United States Supreme Court upheld the continuing viability of the doctrine of equivalents as a test of patent infringement where there is no literal infringement. However, the court narrowed the scope of the doctrine by unanimously holding that the doctrine of equivalents "must be applied to the individual elements of the claim, not to the invention as a whole" in order to avoid expanding the scope of the patent. The Court also redefined "prosecution history estoppel" by providing that the patentee has the burden of explaining the reason for amending elements of a claim during prosecution to avoid estoppel to assert infringement by the doctrine of equivalents. Finally, in light of *Markman v. Westview Instruments, Inc.*, 134 L.Ed.2d 577, 116 S. Ct. 1384 (1996) (holding that construction of patent claims and terms of art in those claims is the exclusive province of the court and not the jury), the Court left unresolved the issue of whether the doctrine of equivalents also is a question for the court, as the issue had not been properly raised on appeal.



Jeffrey W. Kramer

**Trademark and Copyright**

*Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 1997 U.S. App. Lexis 5822 (9th Cir. March 27, 1997). The Ninth Circuit affirmed a preliminary injunction prohibiting the publication and distribution of *The Cat NOT in the Hat! A Parody by Dr. Juice*, a satire of the O.J. Simpson double murder trial using as a vehicle the characters and works of the late Theodor Geisel, author and illustrator of the Dr. Seuss series of children's books. Using such phrases as "One Knife? Two Knife Red Knife Dead Wife," the work pokes fun at the figures and events of the "Trial of the Century." Simpson is depicted in a shabby red and white striped stovepipe hat. The Court rejected defendant's parody defense to copyright infringement as "pure shtick," because the infringing work did not target the original work for ridicule but rather Simpson and the trial. Similarly, parody failed as an affirmative defense to federal trademark infringement following application of the eight factor test for likelihood of confusion set forth in *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979).

—Michael K. Grace and Jeffrey W. Kramer

**The Litigation Privilege**

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astonishment at Jackson's argument that celebrities and their lawyers must litigate in the press because the public expects it. Striking a blow for the publicity-shy plaintiffs' bar, the court concluded: "It would be anomalous if a celebrity's intentional and successful pursuit of public attention, which justifies affording him diminished protection from defamatory attacks, at the same time justified a license for the celebrity to use his extraordinary access to public attention to go beyond exercising his clear right to plead his own innocence, and to vilify others, including private

parties, who may be less able to attract an audience interested in their defenses." *Id.* at 1150. This ignores the fact, of course, that it was Jackson who was on the defensive.

The litigation privilege has provided broad protection for California attorneys and their clients for more than 100 years, but its scope is not without limits. Before you fax that copy of the complaint to CNN, or call that press conference, you might check your E & O coverage.

—John W. Amberg

## Highlights of Recent Changes to the Local Rules United States District Court For the Central District of California

This chart highlights recent changes to the Local Rules in the Central District of California, including those implementing the 1993 amendments to the discovery provisions of the Federal Rules of Civil Procedure. Key changes to note: The Central District has not adopted the duty to disclose "smoking guns" as in Fed. R. Civ. P. 26(a)(1)(A) and (B) (requiring disclosure of witnesses and identifying documents "relevant to disputed facts alleged with particularity in the pleadings"). See Local Rules (LR) 6.2.1 and 6.2.2. Counsel of record are required to certify compliance with the initial and supplemental disclosure provisions. LR 6.3.1.

**Local  
Rule No.**

**General Order No. 97-1  
1/17/97 (Effective 2/3/97)**

- 3.1 All documents except declarations must be signed by an attorney with the name of the person "clearly typed" below the signature line.
- 3.2 Copies of facsimile documents may be filed, with the original document as originally signed maintained by the filing party.

**Local  
Rule No.**

**General Order No. 96-13  
10/1/96 (Effective 11/4/96)**

- 6.1 Early meeting of counsel to occur within 30 days after service of answer; court approval needed for extension of time.
- 6.2 Initial Disclosures at Early Meeting:
- 6.2.1 A list of the names, last known addresses and telephone numbers of all witnesses with "knowledge of facts supporting the material allegations of the pleading by that party, or rebutting the material allegations of the pleadings filed by any opposing party." Continuing duty to disclose new witnesses "promptly."
- 6.2.2 Documents at the Early Meeting:  
 "[A]ll documents, data compilations and tangible things then reasonably available to a party" which are "then contemplated" to be used to support the "material allegations" of that party or to rebut the material allegations of the opposing party:  
 A list of all such documents, data compilations and tangible things being produced; and  
 A list of "such documents" not then reasonably available.  
 There is a continuing duty to supplement witness and document disclosures (and to produce such documents) as they become known.
- 6.2.3 A written computation of damages claimed by the disclosing party and production of all supporting unprivileged documents, including those used to show the "nature and extent of injuries suffered."
- 6.2.4 Copies of any insurance agreement under which an insurance company "may be liable" for all or part of a "judgment which may be entered in the action" or to indemnify or reimburse for payments to satisfy such a judgment.
- 6.3.1 All early meeting of counsel initial disclosures and supplemental disclosures must be signed by an attorney of record and served on all parties. "The signature constitutes a certification that to the best of the signer's knowledge, information and belief formed after a reasonable inquiry, the disclosure is complete and correct as to the time it is made, or supplemented."
- 6.3.2 Sanctions  
 (a) For certification in violation of rule, monetary sanctions under Local Rule 27 and Fed. R. Civ. P. 26(g)(3) may be imposed against signer, signer's firm, a party, or all of them.  
 (b) Exclusion at trial of witness, document or other item not disclosed as required.
- 6.5 Report to Court of all LR 6.4 issues in a Joint Report of Early Meeting must be filed within 14 days after the meeting. The Joint Report of Early Meeting supplants the former Joint Status Report. See LR 6.9.2.
- 6.7 Plaintiff discovery standstill until 20 days after service of summons and complaint upon defendant.
- 6.8 Initial disclosures must be supplemented as required by Fed. R. Civ. P. 26(e)(1).
- 6.9 The Joint Status Conference may be set for as early as 20 days after Joint Report of Early Meeting is due to be filed. The attorney "then contemplated to have charge of the conduct of the trial" must attend the Status Conference.

**Local  
Rule No.**

**General Order No. 96-15  
10/1/96 (Effective 11/4/96)**

- 9.2 The Pretrial Conference may be set for as early as 90 days after the Joint Report of Early Meeting is due to be filed.
- 9.4.6 Designation of Expert Witnesses and Production of Expert Witness Reports under Fed. R. Civ. P. 26(a)(2)(B).  
*By plaintiff:* Not later than eight weeks before discovery cutoff.  
*By defendant:* Not later than five weeks before discovery cutoff.  
 Disclosures must be supplemented pursuant to LR 6.8 and Fed. R. Civ. P. 26(e)(1).
- 9.48 Discovery cutoff. Unless otherwise set by the Court, the discovery cutoff (including the hearing of all discovery motions) is 21 days before the pretrial conference.
- 9.7 The joint exhibit list must be filed at least 21 days prior to the Pretrial Conference, but with a new twist:  
 "If any document is listed as an exhibit which was not previously disclosed pursuant to Local Rules 6.2.2 and 6.8, the exhibit list shall be accompanied by a statement of the reasons for such nondisclosure."

—Michael K. Grace

## Letter from the President

I received a lot of good feedback on the April program on "The Revolution in Litigation Management" featuring Dov Seidman of The Legal Research Network, Steve Nowlan of Prudential Insurance and Doug Kranwinkle of O'Melveny & Myers. I personally left the program with a clear agenda: to examine how my own law firm does business and whether we can innovate to improve the delivery and cost effectiveness of our work. The message from Dov Seidman and Steve Nowlan was plain: clients do not want to pay law firms to do inefficient work that other providers can deliver at higher quality and lower cost. I came away with a belief that those lawyers who do not identify their "core competencies," and figure out ways to deliver those core competencies without the baggage and expense of services which are outside their core competencies face a bleak future.



**Karen Kaplowitz**

The other message that was clear was that legal services are being viewed more like products. When clients want fixed fee arrangements for litigation, they are treating the prosecution or defense of a lawsuit as a product, or a series of products.

The other message that was clear was that legal services are being viewed more like products. When clients want fixed fee arrangements for litigation, they are treating the prosecution or defense of a lawsuit as a product, or a series of products.

Notwithstanding the aberrant "bet your company" case, in most litigation contexts, clients increasingly do not want to pay for an undefined, limitless process. As a result of the uncertainty of litigation costs and consequences, the ADR industry has mushroomed, using many non-lawyer personnel. The trend toward allocating legal budgets toward preventive law and ADR means that business trial lawyers whose main competencies are discovery, motions and trials may not be fully competitive.

I hope that the favorable reception the April program received will generate interest in more ABTL programs that focus on the business of law. We have to figure out how to be attractive to our clients in a changing marketplace.

This is the end of my tenure as ABTL president. I would like to publicly acknowledge my thanks to my fellow officers: David Stern, Dick Burdge and Jeff Briggs. I also want to thank our new Executive Director, Rebecca Lee, a highly resourceful, energetic and professional addition to our group. Special thanks also to the committee chairs who have done an outstanding job: Seth Aronson, Dinner Programs; Barbara Reeves, 1996 Seminar Chair; John Pennington, 1997 Seminar Chair; Miles Ruthberg and Richard Mainland, Lunch Programs; Eric Waxman, Developing Lawyers Committee; Pat Benson and Maggie Levy, Pro Bono Trial Project; Alan Friedman and Bill Wegner, Membership; Michael Grace, Federal Courts; Michael Bertz, Experts; Bob Fairbank, ABTL Expansion; Vivian Bloomberg, *ABTL Report*; Jeff Weinberger and Debra David, Board Retreat; Michael Sherman and Jeff Briggs, Technology. Special thanks also to Justice Norman Epstein and Judges Matt Byrne, Steven O'Neill and Paul Boland for consistent contributions to the organization.

This year has been marked by continuity of ABTL's tradition of excellence and collegiality. I hope I have added a bit of innovation in pushing for exploration of the less traditional issues affecting the business side of litigation. Thank you for your enthusiasm.

—Karen Kaplowitz

## 24th Annual Seminar Features Diverse Jury Theme

How to communicate effectively with jurors from diverse societies is the theme of the 24th Annual Seminar of the Association of Business Trial Lawyers October 24 to 26 at the Westin Mission Hills Resort in Rancho Mirage, California.

The seminar will feature California's leading trial attorneys and jury consultants demonstrating successful techniques for selecting and persuading today's multicultural juries.

Justice Janice R. Brown of the California Supreme Court will deliver the keynote address. The featured guest speaker will be James W. McElhaney.

Participants will meet numerous state and federal judges in addition to receiving eight hours of MCLE credit. Non-members of ABTL interested in this program may call the ABTL Executive Director at (310) 445-9555 for more information. Brochures and registration forms will be sent to ABTL members.

## abtl REPORT

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