

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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REPORT

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Letter from the President

The ABTL has been involved in efforts to develop specialized "business trial courts" within the California Superior Court for a number of years. Those efforts have resulted in various plans and proposals, which for a variety of reasons never have gotten very far off the ground. Now, however, thanks to the efforts of a number of state trial court and appellate judges, court administrators, attorneys involved in the ABTL and other bar organizations around the state, and others, at least a part of the goal behind the "business trial court" effort — the dedication of certain trial courts to the handling of business litigation and related educational efforts — has been accomplished. The fruition of a directive issued by the California Judicial Council in 1997, Rules 1800-1812 of the California Rules of Court concerning the special handling of "complex civil litigation" were adopted on January 1. On April 3, Los Angeles County joined Alameda, Contra Costa, Orange, San Francisco, and Santa Clara counties in a pilot project dedicated to implementation of these new rules.



Jeffrey C. Briggs

The Judicial Council Complex Civil Litigation Task Force's development of these new rules was born of the recognition that certain civil litigations impose a disproportionate burden on scarce judicial resources, and that such resources can be managed fairly for all litigants only by implementing special trial court management techniques with corresponding courthouse adminis-

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The Law of Legal Ethics and Your Practice

How can business trial lawyers best coordinate their law practices with the law of legal ethics? Often during the fast-paced work of a lawyer's day, it is not apparent to the practitioner that an issue of legal ethics has arisen. This article offers suggestions about how to effectively incorporate the law of legal ethics into the practice of a business trial lawyer.

A Capsulized Summary of the Law of Legal Ethics

The law of legal ethics can be thought to include statutes, rules, regulations, and decisional law that pertain to lawyer discipline, or to sanctions or liability for lawyers for their conduct as lawyers. (Some argue that legal ethics, even more broadly, includes extra-legal, moral principles.) The law of legal ethics includes at least the subjects in the following list, which is not exhaustive, but is useful in identifying issues of legal ethics in day-to-day practice:



Ira Spiro

- Duties not to disclose confidential information, and the similar but narrower attorney-client privilege. Business and Professions Code § 6068(e); Evidence Code §§ 950, *et seq.*
- Duties of loyalty to clients. *E.g., Flatt v. Superior Court* (1994) 9 Cal.4th 275, 289, 36 Cal.Rptr.2d 537, 545.
- The duty of loyalty includes the qualified duty not to represent adverse interests. Rule of Professional Conduct 3-310.
- It also includes the qualified duty not to have interests adverse to clients. Rule of Professional Conduct 3-300.
- Under a few somewhat controversial cases, the duty of loyalty also may include the duty not "to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any manner [probably meant to read "matter"] in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship." *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 156, 172 Cal.Rptr. 478, quoting *Whitchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 573-574, 15 P.2d 505.
- Possible disqualification from a representation, because of the duties of confidentiality and loyalty, either direct or vicarious. *E.g., H.F. Ahmanson & Co. v. Salomon Bros, Inc.* (1991) 229 Cal.App.3rd 1445, 280 Cal.Rptr. 614; *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3rd 572, 283 Cal.Rptr. 732.

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- Duties to perform legal services competently. Rule of Professional Conduct 3-110.
- Duties to keep clients reasonably informed of significant developments. In general, honest and adequate communications with clients. Rules of Professional Conduct 3-500 and 3-510; Business and Professions Code §§ 6068(m) and 6103.5.
- Limits on termination of legal services being provided to a client. Rule of Professional Conduct 3-700.
- Duties to act honestly, and consistently with the law, whether acting as lawyer or non-lawyer. Business and Professions Code § 6106.
- Duties to counsel and advocate for a client honestly, and consistently with the law. Rules of Professional Conduct 3-200, 5-200, 5-220; Business and Professions Code § 6068(c), 6128.
- Limits on and requirements for fees and fee agreements. Rule of Professional Conduct 4-200. Business and Professions Code §§ 6146 to 6149.
- Strict regulation of client trust accounts. Rule of Professional Conduct 4-100 and standards promulgated by the State Bar pursuant thereto.
- Limits on fee splitting and on other financial arrangements with lawyers and non-lawyers. Rules of Professional Conduct 1-310, 1-320, 2-200.
- Limits on soliciting, advertising and giving compensation for obtaining business. Rule of Professional Conduct 1-400 and its Standards; Business and Professions Code §§ 6151 to 6154, 6157.1 to 6159.2. See Penal Code § 549 and Insurance Code § 750.
- Duties not to engage in prohibited discrimination in the practice and business of law. Rule of Professional Conduct 2-400.
- Duties not to communicate with represented party. Rule of Professional Conduct 2-100.
- Limits on contacts with witnesses and jurors. Rules of Professional Conduct 5-310 and 5-320.
- Prohibition against threatening criminal, administrative or disciplinary charges. Rule of Professional Conduct 5-100; see Penal Code §§ 518, 519.
- The system of lawyer discipline.

Legal ethics and professional liability, *i.e.*, malpractice, are closely related. Under California Rule of Professional Conduct 1-100 (A), the Rules of Professional Conduct are not supposed to affect the duty and breach issues that are central to legal malpractice cases, but as a practical matter, the Rules do find their way into appellate opinions on duty, breach, and other aspects of legal malpractice cases. Also, Rule 1-100 (A) does not apply to statutes and other laws that deal with lawyers' duties to clients, some of which, particularly the State Bar Act, are very similar to the Rules of Professional Conduct.

A well-recognized subject in the law of legal ethics is the duty to act competently. Rule of Professional Conduct 3-110 makes it a disciplinable offense for a lawyer to "intentionally, recklessly, or repeatedly fail to perform legal services with competence." Of course, legal malpractice liability does not require proof of intentional, reckless, or repeated negligence. Still, the subjects are very close.

The Sources of the Law of Legal Ethics

California's Rules of Professional Conduct — The California Rules of Professional Conduct are promulgated by the State Bar of California, subject to approval by the California Supreme Court. The Rules were first promulgated in 1928, then revised effective January 1, 1975, and again effective May 27, 1989.

The rules are published in the commonly used annotated and

unannotated California codes, as well as various on-line research sources. They are also contained in a publication sent yearly by the State Bar to every active member of the Bar, *State Bar Publication 250*, discussed below. The Rules, and *Publication 250* itself, are also available on the State Bar's web site, www.cal-bar.org.

California's State Bar Act — Probably less familiar, but just as important, are the provisions of the State Bar Act, Business and Professions Code §§ 6000, *et seq.*, that bear on legal ethics. Aside from being available in the usual publications of California statutes, the Act is also available as part of *Publication 250*. Most of the important provisions of the Act, or the most important ones with which many lawyers are not readily familiar, are cited in the bullet-point list near the beginning of this article.

Section 6068 includes a number of duties that apply to a lawyer often in any given week of practicing law, particularly litigation, but are often overlooked. For instance, section 6068(e) imposes the duty "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." This duty not to disclose information is indisputably broader than the familiar attorney-client privilege. *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621, 120 Cal.Rptr. 253, 257, fn. 5; Cal. State Bar Formal Opinion Number 133 (1993), p. 3; Los Angeles County Bar Assn. Formal Opinion 436 (1985).

Consider also section 6068(d), the duty "To employ, for the purpose of maintaining the causes confided to him or her such means only as are consistent with the truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of law or fact."

Of course, section 6068 and most of the other provisions of the State Bar Act often are not precise. To varying degrees these statutes have been interpreted by the courts, some very sparsely. One provocative example is section 6068(f): "To abstain from all offensive personality..." In a decision not lacking in irony, but whose correctness is difficult to dispute, this quoted portion of section 6068(f) was declared unconstitutionally void for vagueness in *United States v. Wunsch* (9th Cir. 1996) 84 F.3d 1110, 1119-1120, perhaps a belated development in First Amendment law.

Rules of the Federal Courts in California — All four United States District Courts in California have adopted the California Rules of Professional Conduct as their standards for professional responsibility of the lawyers appearing in those courts. Some have also adopted the State Bar Act and appellate decisions interpreting both. Rule 1.2 of the Attorney Disciplinary Rules of the U.S. Dist. Ct. for the Central Dist. of Cal.; Local Rule 83-184(b) of the U.S. Dist. Ct. for the Eastern Dist. of Cal.; Local Rule 11-3 of the U.S. Dist. Ct. for the Northern Dist. of Cal.; Local Rule 83.4(b) of the U.S. Dist. Ct. for the Southern Dist. of Cal. Some of these rules add other broadly worded standards of professional conduct.

Other California Statutes, Rules and Orders — There are provisions in many other California codes, the California Rules of Court, and some orders of the California Supreme Court and rules of the State Bar of California that bear on legal ethics and on discipline, sanctions, and criminal prosecution against lawyers. *Publication 250* contains many of them.

Appellate Opinions of State and Federal Courts — Of course, there are many cases from the California appellate courts on issues of legal ethics. There are also decisions of the federal courts interpreting the California law of legal ethics. The older cases must be read with caution. Some are based on provisions of the Rules of Professional Conduct or the State Bar Act that have changed significantly. If very old, they will predate even the earliest versions of the Rules of Professional Conduct (1928) and the State Bar Act (1939).

Opinions of the California Supreme Court have a special status

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in legal ethics. In addition, the Supreme Court has inherent state constitutional power to discipline California lawyers, although it has delegated this power to the State Bar, which in turn has delegated the power to the State Bar Court, all subject to review by the Supreme Court. See Business and Professions Code § 6087. Opinions of the Review Department of the California State Bar Court are reviewable by the California Supreme Court. Also, before the Review Department was established, the Supreme Court was the court that reviewed lawyer disciplinary orders. Thus, there are many Supreme Court cases on discipline matters.

Opinions of California's State Bar Court — The State Bar Court is an administrative agency, to which the statutory power of the Board of Governors of the State Bar of California to discipline lawyers has been delegated by statute. Business and Professions Code § 6086.5. The Court has a Hearing Department, essentially its trial courts, and a Review Department, essentially its appellate court. The Review Department designates some of its opinions for publication. These opinions are binding on the Hearing Department, and from the point of view of lawyer discipline, they are law. They are also quite persuasive authority in other contexts.

The opinions of the Review Department have been published in the California State Bar Court Reporter, a publication similar in appearance to the case reporters of the California courts. They are also available on Westlaw and Lexis. The 1999 opinions have not yet been published in the State Bar Court Reporter, but it is planned that they will be. As for opinions after 1999, there are plans to publish them, and possibly the past opinions, on line, but not in the Reporter, although these plans are not yet definite.

Non-Binding Authorities on the Law of Legal Ethics

The field of legal ethics is one in which it is particularly difficult to obtain authoritative answers to difficult questions. Compared, for instance, to the law of contracts or real estate, there are very few statutes and appellate opinions. It is more akin to the California law of unfair competition, in which the cases are not so numerous.

Therefore, opinions of ethics committees of the State Bar of California, local bar associations, American Bar Association committees, treatises, law review articles, and even ethics committees from other states, although they have no binding effect and are not law, can often be quite persuasive. The opinions of the State Bar and local bar ethics committees are very often cited in judicial appellate opinions and opinions of the Review Department of the State Bar Court. Rule 1-100 of the California Rule of Professional Conduct provides: "Although not binding, opinions of ethics committees in California should be consulted by members [of the State Bar] for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered."

The American Bar Association's Ethics Rules — Although many states have adopted the American Bar Association's Model Rules of Professional Conduct, California has not. California has a reputation for independence from the views of the ABA in matters of legal ethics. It has been held repeatedly that the ABA rules are not binding for California purposes. (*E.g., State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 655-656, 82 Cal.Rptr.2d 799.)

Nevertheless, the ABA's Model Rules of Professional Conduct are often persuasive authority in California, at least when they do not conflict with a California rule or law on point. The ABA Model Rules are within the "may also be considered" language of Cal. Rule of Professional Conduct 1-100, quoted above. The Model Rules can be obtained from the ABA headquarters in Chicago, or from the ABA's web site, for a fee.

Lawyers will often come across citations to earlier versions of the ABA's ethics rules. In 1908 the ABA adopted the orig-

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The Five Most Important Rules for Winning Trials

All experienced trial lawyers have rules of thumb — conscious or unconscious — that guide them through the trial process. What I share here are five simple rules or principles of trial practice which have, for me, proven to be the most important ingredients for success. These are principles which I believe all lawyers can incorporate into their trial repertoire and, if adapted to whatever style is most comfortable for them, will help them try a winning case before either a judge or a jury.

Establish and Maintain Personal Credibility

The number one rule for any advocate is that your *personal credibility* with both the judge and the jury is of paramount importance. In trial work, there simply is nothing more important. Period. When you speak to the judge or jury, you obviously want them to listen to you and to believe you. But if they don't trust you, they won't listen and they certainly won't believe you. It is sad but true that many, if not most, jurors step into the box with the preconceived notion that lawyers, and especially trial lawyers, are smooth talking hucksters who talk out of both sides of their mouths and will say anything to get their way. A trial lawyer's first order of business is to establish his or her personal credibility with the jury despite this preconceived notion. The three simple steps for accomplishing this are: 1) demonstrate your personal conviction; 2) earn the judge's and the jury's respect; and 3) earn the judge's and the jury's trust.

Personal Conviction — Advocates are not allowed to vouch personally for witnesses or for the facts. But a trial lawyer who does not convey to the jury his personal conviction of the justness of his cause is not doing his job. You must make the jury believe that you believe. If they think that you are "just doing your job" or "going through the motions," you should expect to win only if you have a compelling case or are feeling lucky. You can demonstrate your personal conviction by the manner of your presentation as much as by its substance. Show passion; jurors have it in themselves and they recognize it in others. Your passion or enthusiasm does not have to be play acting; there are always pieces of a case about which we feel more strongly than others. You should emphasize those aspects of your case which genuinely stir your own blood.

Respect — You earn the jury's respect when they see that you are totally prepared on both the facts and the law, that you are a controlling force in the courtroom, that you are self confident but respectful of others, and that you do not "talk down" to the jury. While you should be deferential and respectful to the judge, you want the jury to have the impression that you are in charge — or at the minimum, it is you and the judge who are there to help the jury do the right thing. You want the jury to like you if they can. I work at being a regular guy with a sense of fairness, which my experience teaches me most juries respect.

Whether the trier of fact is the Court or a jury, enjoying the trust and respect of the judge is very important. Even in a jury



Ronald Hayes Malone

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Five Most Important Rules for Winning Trials

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trial, you are trying the case to the judge as well as the jury. You want the judge to believe in the justice of your client's cause. Don't forget that it is the judge who rules on the objections, decides the motions *in limine*, settles the instructions and rules on the outcome-determinative motions. Moreover, jurors want to look up to the judge and will do so every time unless the judge is totally out of hand. They look to the judge for subtle signals as to which lawyer the judge respects most. You want to be that lawyer.

In every trial, I always look for early opportunities to establish my credibility with the trial judge. Knowing the rules of evidence cold, knowing when and how to object (and when not to object), knowing the law and the facts like the back of your hand, and not overstating the facts or the law will all give confidence to the judge that you are to be trusted to help guide the court to the right result, *i.e.* one which does justice *and* which will not be overturned on appeal.

Trust — You must earn the judge's and jury's trust and, to do that, you must be straight with them. You earn the judge's trust when she sees that you are competent and don't overstate the facts or law. Similarly, you earn the jury's trust when they see that you are reliable: when you say something is so, it is. The jury sees this when the judge agrees with your legal positions. They see this when you acknowledge "bad facts" in your opening. If you do not over-promise what the evidence will show and the witnesses then take the stand and say what you told the jury they would say, your reliability is validated. Once the judge and the jury see that you are the "truth giver," that you can be counted on, you are on the way to winning your client's case.

Try the Case to the Truth

In every case there are certain core facts — or essential truths — which, whether or not you or your client like it — will almost certainly be established by the evidence and be believed by the jury. Some of those facts will be "bad facts" — ones which don't help you or even seem to hurt you. Don't run away from those facts and don't ignore them. Most importantly, don't squander your personal credibility trying to distort them or trying to con the jury into believing that black is white. Such "stretches" are rarely successful. They almost always backfire because you end up losing credibility with the finder of fact. Jurors figure the basics out pretty quickly, and they look for evidence, themes, arguments and advocates which are comfortable to them — usually the ones that appeal to their innate sense of fairness. If you get identified in the jury's eyes as the person who is trying to sell them something they "just know" doesn't seem right, you are well on your way to losing the jury and the case.

The key is to face reality early: identify those core facts which are harmful to you and which you believe the evidence will almost certainly establish in the jury's mind. Once you identify them, then you deal with them in a way which defuses them. Sometimes you explicitly concede them. Sometimes you give them the back of your hand. And sometimes you just nibble at the edges of credibility and invite the jurors to make their own judgments. But you never ignore those "bad" facts or pretend that they don't exist. In the best of circumstances, you work them into a winning argument. The most effective use of "bad facts" comes when you can bring them out before your adversary does and incorporate them into your theme and your proof. Take this simple example: you represent a plaintiff in a personal injury case where you seek substantial damages for pain and suffering. You know that within one week of the accident, your client was back at work. Rather than being defensive, you bring this "bad fact" out in your opening statement and weave it into your theme. "Ladies and Gentlemen, the evidence will show that within one week of the accident my client was back at work. The easy thing was to stay home like his doctors recommended. But Mr. Jones is

not that kind of man. He had a family to support and a job to do. So he went back to work, despite the pain. Mr. Jones' co-workers will tell you how he suffered, how he grinned and bore it, and how he didn't complain..." A jury can identify with this theme and respect your client for not being a "whiner." If the plaintiff's lawyer ignored this "bad fact" in his opening statement, the defense could pound on it during her opening and create a very bad first impression that your client could not have been hurt very badly if he went back to work so soon.

Common Sense Equities that Favor Your Client

The most effective themes are those which jurors relate to on a fundamental "common sense" level, *i.e.*, common sense things derived from every day life by ordinary people. A theme which humanizes your client and encourages the jury to empathize with her on a human level is essential to a winning trial strategy. Every defense case that I have tried and won had a simple, central theme: my client was an honorable person sincerely trying to do the right thing in a difficult situation. I am convinced that a jury that believes that theme will find a way to make the evidence and the law fit the right result — one which does not make your client suffer unfairly. In my experience, this is often the principle of trial practice which requires the most thought and creativity, but it is the one that is most often given short shrift.

In developing your own theme, you must remember to anticipate and counter the other side's themes. If the defense theme is that the defendant is a nice guy who tried to do the right thing and you believe that the jury will probably buy that theme, the plaintiff's theme cannot be that the defendant was an evil man who needs to be punished. Instead, a winning plaintiff's theme would be one that was consistent with the jury's likely belief that the defendant was not evil — one which demonstrates that, even if the defendant is an honorable person, the equities still favor the plaintiff and denying a recovery to the plaintiff would punish the more innocent of the parties.

My central point here is that, while jurors generally try to be conscientious in following the law, they always start with their own common sense notions of what "seems fair and right to them." They then work the facts and/or the court's instructions to get to the "right result." Your job is to make it easy for them to do the right thing for your client.

You must emphasize and reemphasize your themes throughout the trial — in your opening, direct, cross, & closing — with testimony, exhibits and visuals. You must also do the hard legal work necessary to get the jury instructions that support your themes. This is not something that can wait until the end of the case or even the commencement of trial. You must do everything that you can before the trial commences to make sure that you have the ammunition to convince the trial judge to give the jury the instructions you need to provide legal support for your theme. Then the last thing the jury hears is the judge giving them the instructions on the law that validate your theory of the case.

Push on Your Opponent's Soft Spots

You must find the soft spots in the other side's case and push on them continually and repeatedly. The "soft spot" in the other side's case — and all cases which go to trial have some soft spots — may be the inability of the plaintiff to prove a necessary element of a claim. It may be plaintiff's susceptibility to an affirmative defense. Or it may simply be the facts which show the jury that the equities favor your client. Whatever they are, you must identify them early and press on them continually. If you can do it in such a way that the jury "discovers" the significance of these "soft spots" on their own, rather than having it force fed to them, all the better.

Keep it Simple

KISS — "Keep it simple, stupid" — is the watchword of every good trial lawyer. Anyone with a law degree can show a jury how

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educated or smart or skillful they are. But that does not win lawsuits. What wins trials is the ability to present even a complex business dispute in such a way that the average man on the street not only understands what happened, but understands that the only "fair result" is for your client to prevail. If the jury cannot understand the transaction, it will be very difficult for them to understand that your client should win. A few, simple, common sense themes that appeal to the jury's basic sense of right and wrong are far more effective than elaborately spun and elegantly crafted syllogisms. If the jury thinks you are the smartest or the smoothest lawyer in the courtroom, but they don't identify personally with your client's plight and "feel in their gut" that fairness compels a verdict in your client's favor, you might get the "best lawyer" award, but the other side will get the verdict. An effective trial lawyer's goal is to win trials for his clients, not praise for his skills.

There will be some cases where even the best lawyer on earth cannot effectively follow these basic trial principles. My advice is to settle those kinds of cases.

— Ronald Hayes Malone

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Hon. Christina Snyder — *United States District Court, Central District of California*

*Scheduled to appear, schedules permitting.

Educating the Judge: The Applicable Foreign Law

Litigation involving foreign parties frequently may turn on questions to be decided under the law of another country. Because under U.S. practice, Federal Rule of Civil Procedure 44.1 directs that questions of foreign law are to be decided as legal and not factual issues, counsel involved in international litigation pending in U.S. courts must establish, through expert testimony or otherwise, the foreign law relevant to a particular controversy.

As reflected in Rule 44.1, U.S. practice emphasizes the role of counsel in identifying and establishing the pertinent foreign law. But the primacy of counsel in this process is by no means universal in other jurisdictions. For example, by contrast, the countries of Western Europe are parties to a multilateral treaty (commonly known as the London Convention) that provides a mechanism for member states to receive advice at a government-to-government level concerning the laws of other member states for use in pending judicial proceedings.

Because the U.S. is not a party to any such treaty, counsel must prove the substance of foreign law to the court's satisfaction. Indeed, several recent decisions from U.S. federal courts emphasize the need for practitioners to take the initiative in presenting information to the court concerning relevant foreign law. These decisions also underscore the fact that U.S. judges "expect adequate testimony on foreign law and the failure to produce it may be quite damaging to a litigant's case." 9 Charles Wright and Arthur Miller, "Federal Practice and Procedure" Section 2444 at 647 (2nd ed. 1995).

In *Pitway Corp. v. United States*, 88 F.3d 501 (7th Cir. 1996), Pitway sought an income tax refund in connection with a transaction involving its French subsidiary. The court had to address the timing of a dividend declaration by Pitway's French subsidiary for purposes of determining when the transaction could gain recognition under the U.S. tax laws.

Because neither Pitway nor the U.S. Treasury Department provided an adequate record of the governing French corporate law, the 7th U.S. Circuit Court of Appeals conducted its own research into the pertinent French law. In so doing, the court rejected Pitway's argument that the court should ignore the pertinent French corporate formalities and instead analyze the timing of the dividend declarations as if U.S. Corporate governance rules applied.

Even though Pitway was the plaintiff — and thus had the burden of proof concerning the timing of the dividend declaration — it apparently failed to establish when the dividend declaration had been made as a matter of French corporate law. By failing to meet its burden, Pitway left the court with no alternative but to do its own research and analysis of the issue. Indeed, Rule 44.1 authorizes a court in such circumstances to conduct its own independent research into foreign law. See, e.g., *In re Arbitration Between Trans Chemical Ltd. and China National Machinery Import and Export Corp.*, 978 F.Supp. 266 (S.D. Tex. 1997).

Noteworthy in the *Pitway* opinion is the court's expression of disappointment that "the parties had not seen fit to furnish us



Peter S. Selvin

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Educating the Judge

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with either the original, French-language version of the applicable code provision in their initial briefing, or with translations. In these times of ever increasing multinational business activity, parties must be prepared to inform the Court fully on questions of foreign law when they are pertinent to the case. Ideally, the parties should submit an agreed translation of any applicable statutes, regulations or decided cases on which they rely."

The decision in *Pitway* is also noteworthy because the court went out of its way to undertake its own independent research of foreign law. Most courts would not necessarily be so forgiving of a party's failure to establish foreign law. Indeed, where a party having the burden to prove foreign law fails to do so, the court may presume that foreign law is identical with the law of the forum. See, e.g., *Northlake Marketing & Supply Inc. v. Glaverbel*, 958 F.Supp. 373 (N.D.Ill. 1997).

This presumption is consistent with the practice in many civil-law countries (including Switzerland, Austria and France), whose courts also apply the law of the forum when they cannot establish the content of applicable foreign law.

A key lesson of the *Pitway* case is that, in determining the substance and application of foreign law, U.S. courts are not limited to considering only those materials presented by the parties. Indeed, "federal judges may reject even the uncontradicted conclusions of an expert witness and reach their own decisions on the basis of independent examination of foreign legal authorities." *Trans Chemical*.

While *Pitway* involved a situation in which neither party apparently put in evidence concerning the relevant foreign law, *Universe Sales Company Ltd. v. Silver Castle Ltd.*, 182 F.3d 1036 (9th Cir. 1999), involved a situation in which only one party apparently made the requisite showing.

In *Universe Sales*, plaintiff sought restitution for trademark royalties it had paid to Sportswear, a defendant. Universe based its claim for restitution on the ground that, at the time the parties entered into the license agreement, Sportswear did not own the pertinent trademarks.

After determining that Japanese law rendered the license agreement invalid and unenforceable, the district court granted judgment to Universe Sales. In reaching that conclusion, the district court declined to follow the interpretation of Japanese law set forth in an expert declaration submitted by the defendants.

Surprisingly, the 9th Circuit reversed. In a decision that could be subject to further review, the appellate court held that Universe Sales' failure to have rebutted the evidence concerning Japanese contract and trademark law submitted by the defendants required the district court to enter judgment in the defendants' favor: "Although Universe had numerous opportunities to present evidence that would rebut this portion of [the defendants' expert's] declaration regarding Japanese law, Universe introduced nothing. Also, the district court performed no independent research of Japanese law.

"The district court should have considered the fact that the [defendant's expert's] declaration states that Japanese contract law is controlling. The district court then could have instructed the parties to present further evidence regarding the interpretation of Japanese law on that point; or the district court may have performed its own research. Because the [defendant's expert's] declaration stands as an unrebutted presentation and interpretation of Japanese law, the district court erred in granting summary judgment to Universe."

As the dissent pointed out, the majority decision in *Universe Sales* appears to contradict the holding in *Trans Chemical* to the effect that, in deciding questions under foreign law, the court is not obligated to accept even the unrebutted conclusions of one party's expert. Indeed, the dissent characterized the majority opinion in *Universe Sales* as the court's "substitution of one

lawyer's statement of what the law is," thereby representing "a dangerous precedent for future cases involving determinations of foreign law."

While the ultimate fate of the *Universe Sales* decision is uncertain, it presents an important lesson for practitioners. In the first place, where foreign law is to be determined in U.S. litigation, counsel should not rely on the court to conduct its own research. Instead, counsel should by all means introduce evidence (generally in the form of expert declarations or extracts from treatises) concerning the pertinent foreign law. See, e.g., *Museum Boutique Intercontinental Ltd. v. Picasso*, 886 F.Supp. 1155 (S.D.N.Y. 1995) (Court resolves disputed question of French law on the basis of expert affidavits); *Twohy v. First Nat. Bank of Chicago*, 758 F.2d 1185 (7th Cir. 1985) (disputed question of Spanish law resolved by reference to pertinent treatises).

Only by providing this kind of information to the court will counsel ensure that the court correctly identifies and applies foreign law in U.S. litigation.

— Peter S. Selvin

The Law of Legal Ethics

Continued from page 3

inal Canons of Professional Ethics. The ABA replaced the Canons with its Model Code of Professional Responsibility in 1969. The Model Code was replaced by the Model Rules of Professional Conduct in 1983.

The ABA's "Ethics 2000" Commission and Its Study of Multidisciplinary Practices — The American Bar Association is engaged in a relatively long-term effort to revise its Model Rules of Professional Conduct. This effort is known as "Ethics 2000," and is organized by the ABA's Commission on Evaluation of the Rules of Professional Conduct, informally known as the "Ethics 2000 Commission." Its headquarters is the ABA's Chicago office. There is an Advisory Council of the Ethics 2000 Commission, to which many California lawyers belong.

Simultaneously, a commission of the ABA, in which many California lawyers have participated, is engaged in a study of multidisciplinary practices, including the ethical issues raised by them, such as confidentiality, loyalty, and fee sharing. Multidisciplinary practices can be thought of as organizations that are owned or controlled by non-lawyers and employ lawyers who perform services that might be characterized as the practice of law, for clients other than the organization itself. (Traditional in-house counsel are not included, because their client is the organization that employs them.) It is primarily transactional lawyers who are concerned with the subject of multidisciplinary practices, rather than business trial lawyers. Still, it is important for every California lawyer to be aware that California Rule of Professional Conduct 1-310 provides: "A member [of the State Bar of Cal.] shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership consist of the practice of law", and that this rule might be interpreted to apply not only to partnerships, but also to corporations, limited liability partnerships, limited liability companies, and other organizations.

Ethics Opinions of the State Bar — COPRAC — The official ethics opinions of the California State Bar are written by a State Bar committee, the Standing Committee on Professional Responsibility and Conduct, known as "COPRAC." Members of the committee form panels of drafters, assigned to research and write formal ethics opinions on inquiries received from lawyers and others, and sometimes on issues generated by the committee

(Continued on next page)

itself. Drafts of the opinions are discussed at meetings of the whole committee and then revised. The final draft is approved by the whole committee, published for public comment, and then possibly revised or even withdrawn following the comment. If the committee then gives final approval for issuance of the opinion, the final decision is with the State Bar Board of Governors. If the Board approves, the opinion is issued and published. The opinions are available at the State Bar's web site, www.calbar.org, in the *California Compendium on Professional Responsibility* (discussed below), and most recently in the Daily Appellate Report of the *Daily Journal* newspaper. In addition, the committee sometimes issues informal opinions and proposes new Rules of Professional Conduct.

Ethics Opinions of Local Bar Associations — Formal and informal ethics opinions are also written by the voluntary bar associations in Orange, San Diego, San Francisco, and Los Angeles Counties. The formal and informal opinions of these committees are published in the Compendium. These committees function a good deal like COPRAC, except that their opinions do not require approval of the State Bar Board of Governors.

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee issues formal and informal opinions, and informal letter responses to ethics inquiries from members. Of all bar association ethics committees in the nation that publish ethics opinions, the LACBA committee has been publishing them the longest, recently publishing its 500th formal opinion. The formal opinions are published in the *Compendium* and in LACBA's journal, *Los Angeles Lawyer*, which is available in hard copy, and on line at the LACBA web site, www.lacba.org. Through the *Los Angeles Lawyer* link at that web site, more than 25 of the most recent formal opinions of the committee are available, going back to 1994.

Other Publications and Services of the State Bar — *Publication 250* is available in hard copy from the State Bar's Office of Professional Competence, Planning and Development at the State Bar offices in San Francisco, and also on the State Bar's web site, www.calbar.org.

The *California Compendium on Professional Responsibility* is published by the State Bar's Office of Professional Competence, Planning and Development. It contains the ethics opinions of the State Bar and the four local bar associations mentioned above, as well as *Publication 250*, the procedural rules for COPRAC, other useful materials on ethics, and a very extensive index.

The State Bar also publishes a very detailed handbook on the subject of the trust accounts required to be maintained by lawyers for holding funds of clients (Rule of Professional Conduct 4-100 and its Standards), sometimes referred to as client trust accounts or attorney trust accounts. The handbook explains how to maintain proper bookkeeping for these accounts. These trust accounts are one of the chief subjects of complaints to the State Bar against lawyers and lawyer discipline.

The California Young Lawyers Association, in cooperation with the State Bar, has two very useful publications on line at the State Bar's web site: *Ethics Alert — Common Dilemmas Faced by Lawyers* and *A Guide to Attorney Advertising*.

Most lawyers know about the Ethics Hotline operated by the State Bar from its San Francisco headquarters. It is heavily used. The Hotline supplies lawyers with references to Rules of Professional Conduct, statutes, cases and other authorities that bear on a specific ethical issue about which a lawyer calls the Hotline. The Hotline number is (800) 238-4427.

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Individual Securities Fraud Cases: What Remains After PSLRA and *Silicon Graphics*

In an article in the October, 1999 *ABTL Report* entitled "Closing The Doors To Securities Fraud Lawsuits: The View After *Silicon Graphics*," discussing the heightened requirements for pleading fraud under the Private Securities Law Reform Act of 1995 ("PSLRA"), Michael Sherman concluded that:

"[I]f the *Silicon Graphics* decision remains the law of the Ninth Circuit, or is adopted as the law of the land by the Supreme Court, it is hard to imagine how any securities fraud class action alleging a fraud on the market claim under section 10(b) could proceed past the pleading stage." *ABTL Report*, Vol. XXII No.1, page 8.

In fact, the requirement for pleading "with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind," 15 U.S.C. § 78u-4(b)(2), enacted as a part of the PSLRA and the subject of the *Silicon Graphics* decision, applies to all Section 10(b) securities fraud litigation with equal force. This includes individual lawsuits as well as class actions, and all types of securities fraud in addition to "fraud on the market," despite the purpose of the PSLRA in restricting what was seen by Congress as abuses in securities class actions.

Therefore, Mr. Sherman's conclusion seemingly applies as well to this broader range of securities fraud litigation.



Michael A. Bertz

Basis for a Bleak Outlook

Mr. Sherman arrives at his conclusion by considering the Ninth Circuit's new definition in *Silicon Graphics* of "recklessness" as the "state of mind" for securities fraud, involving "consciousness or deliberateness" (183 F.3d at 977), which appears to replace the definition stated in *Hollinger v. Titan Capital Corp.*:

"[R]eckless conduct may be defined as a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it. [Citation.]" 914 F.2d 1564, 1569 (9th Cir. 1990).

Mr. Sherman also considers Congress' desire "to deter non-meritorious lawsuits by creating procedural barriers such as heightened pleading standards." In this regard, under this new definition of "recklessness," the Court rejected the pleading of facts known only to a defendant on information and belief by pleading facts showing "motive and opportunity" to engage in the charged fraudulent conduct. Instead, the Court required the pleading of facts which "corroborate" allegations of those internal facts. 183 F.3d at 985.

The Court looked to the lack of pleading of the "sources of [plaintiff's] information with respect to the reports, how she learned of the reports, who drafted them, or which officers received them," along with the lack of "an adequate description of the contents" and other "facts as may indicate their reliability" to provide a "strong inference" of "deliberate recklessness or intent." *Ibid.* In stating this illustrative list of facts to be pled, the Court

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characterized a lesser pleading as "facts giving rise to a mere speculative inference of deliberate recklessness," which are thereby insufficient to plead a "strong inference" of recklessness. *Ibid.*

Public Policy and Practical Reality

By focusing upon a need to plead corroborating facts — which are generally within the knowledge of the defendant and unavailable to an injured investor without use of court discovery process — the Court appears to have abandoned its earlier wisdom, that a complaint should not be defeated merely because a plaintiff is unable to plead facts within the knowledge of his or her adversary and not generally known. *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987).

In seeking to restrict abuses Congress perceived in securities fraud class actions, Congress nonetheless confirmed its understanding that private securities litigation is an "indispensable tool with which defrauded investors can recover their losses," which "promote public and global confidence in our markets and help to deter wrongdoing..." H.R. Conf. Rep. No. 104-369, at page 31. Citing that same page, the Court noted in *Silicon Graphics* that:

"[M]anagers from the House and Senate declared that 'Congress has been prompted by significant evidence of abuse in private securities lawsuits to enact reforms to protect investors and maintain confidence in our capital markets.'" 183 F.3d at 977-978. Emphasis added.

However, the requirements of the PSLRA as interpreted by the Ninth Circuit in *Silicon Graphics* would seem to pose insurmountable hurdles for individual Section 10(b) claims brought based upon inside information, unauthorized transactions, excessive trading and a myriad of other fraudulent conduct. A valid question then, is whether the PSLRA provides a circumstance where the better the concealment — and thereby the more difficult for the injured investor to know corroborating facts — the more likely that the wrongdoer will be rewarded by avoiding responsibility for his or her conduct?

Silicon Graphics cannot readily be reconciled with a long line of court decisions emphasizing the importance of private actions under Section 10(b) as a tool to protect the investors. *See, e.g., Basic, Inc. v. Levinson*, 485 U.S. 224, 230-231 (1988). ("This Court 'repeatedly has described the 'fundamental purpose' of

the Act as implementing a 'philosophy of full disclosure.'... "[A] private cause of action... for a violation of Section 10(b) and Rule 10b-5,... constitutes an essential tool for enforcement of the 1934 Act's requirements." (Emphasis added); *Herman & MacLean v. Huddleston*, 459 U.S. 319; 386-87 (1983) ("[W]e have repeatedly recognized that securities laws combating fraud should be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes'"). *See also Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310.

As a practical matter, a cost/benefit analysis of pursuing a modest six-figure claim relying upon Section 10(b) and Rule 10b-5, and the extra burden of meeting the anticipated PSLRA dismissal motion, no matter how particularly the pleading is drawn, along with other procedural requirements of the PSLRA, send a strong message to injured investors that Section 10(b) is no longer a viable tool. As a result, the Ninth Circuit decision in *Silicon Graphics* seriously erodes the role of individual investor actions as a means of enforcing the 1934 Act's anti-fraud requirements and deterring fraud.

Recent Developments

On October 27, 1999, the Ninth Circuit denied plaintiffs' Petition for rehearing, and rejected plaintiffs' suggestion for *en banc* hearing. 195 F.3d 521.

In his dissent, Justice Reinhardt, joined by Justices Pregerson, Tashima, Hawkins and Graber, stated:

"By failing to take this case *en banc*, this court appears to endorse a decision of a divided panel that ignores the plain directives of Congress, casts aside the prior decisions of this court, and creates a striking conflict with our fellow circuits. Because I believe that we have a duty to correct an opinion that ignores the authority of Congress's words, the dictates of *stare decisis*, and the uniform conclusion of other circuit courts, I dissent from the denial of rehearing *en banc*." *Id.* at 522.

Justice Reinhardt continued by noting that the Eleventh Circuit "explicitly rejected the [Ninth Circuit] panel's conclusion and followed the well-reasoned analyses of other circuits," citing *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1283 (1999).

In questioning why the Court, "in interpreting a statutory enactment that so clearly is limited to dealing with the particularity of pleadings, decided to change the substantive standard governing securities fraud liability," by "creat[ing] a new term — and with it a wholly new and untested standard [deliberate recklessness] — to replace a term commonly accepted and understood by all," Justice Reinhardt stated:

"After noting that '[e]very circuit to address the question before the passage of the Reform Act held that a showing of recklessness was sufficient to allege scienter,' and discussing some of the compelling evidence that demonstrates that Congress did not intend the PSLRA to alter the scienter requirement, the Eleventh Circuit concluded: 'We are persuaded that the plain text of the statute makes clear that recklessness was not eliminated as a basis for liability under the Reform Act.' *Bryant*, 187 F.3d at 1284. By siding with the Second, Third, and Sixth Circuits, the Eleventh Circuit left this court out in the cold, as the only circuit to conclude in the face of compelling evidence to the contrary that 'recklessness' is no longer sufficient to establish liability under § 10(b)." 195 F.3d at 523.

As this Edition of the *ABTL Report* goes to press the pleading standards of the PSLRA are again before the Ninth Circuit Court of Appeals in *Ronconi v. Larkin*, Docket No. 98-15993, upon briefing and argument completed on December 8, 1999, and a decision is anticipated at any moment.

— Michael A. Bertz

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trative support. Initially identifying the most administratively burdensome civil litigations only as being "complex," the Task Force undoubtedly spent most of its time trying to identify what makes a case "complex." The definition contained at CRC 1800, in particular subparts (b) and (c), will make many ABTL members happy in that it specifically delineates antitrust, securities, and class action claims, among others, as cases "provisionally designated" as being "complex" under the new rules. Cases involving multiple parties, numerous pretrial motions, and large numbers of witnesses and documents — all frequently encountered in business litigation — also can qualify for special handling under these new rules.

The Judicial Council Task Force did not stop with the rules themselves. Taking a page from the "business trial court" efforts of years past, the Task Force recognized that judicial training in techniques for handling "complex" civil cases is as important as the effort to identify those cases requiring special handling. Accordingly, while the new rules themselves are relatively brief and straightforward, the Judicial Council also has published the Task Force's extensive guidelines for managing complex cases in the form of its "Deskbook on the Management of Complex Civil Litigation" (Lexis Publishing, 2000). (See also, Section 19 of the Judicial Administration Standards.) Copies of this excellent resource are available by calling 800-833-9844, or by e-mailing "cal.custquest@bender.com." Even more important, judges involved in the pilot projects implementing these rules already are soliciting forms for protective orders, class certification orders, pretrial scheduling orders, and similar resource materials from practitioners in their respective counties, pledging to work not just with other judges, but also with business trial lawyers, in effecting techniques that actually have accomplished the goal of "just, timely, and efficient resolution of complex civil cases" in other venues.

The ABTL was proud to host the first local program discussing the manner in which the new complex litigation rules will be implemented in Los Angeles County. At the ABTL's April dinner meeting, Judge Harvey Schneider, who is overseeing the pilot project's implementation in Los Angeles, joined the Task Force's chair, Justice Richard Aldrich of the Second Appellate District, and Professor Clark Kelso, another task Force member, in this first presentation of the project to Los Angeles litigators. Judge Schneider announced that L.A. County Superior Court Judges Carolyn Kuhl, Ann Kough, Victoria Chaney, Charles McCoy, Peter Lichtman, and Wendell Mortimer, Jr., now have been assigned to hear only "complex" cases under the new rules, and that they are specifically tasked to work with each other and with Los Angeles business litigators to develop specific procedures within the framework of the new rules and the Deskbook's guidelines. On behalf of those six special assignment judges, Judge Schneider specifically requested ABTL members to submit forms and suggestions based on their own experience in techniques resulting in the efficient administration of "complex" cases. This outreach to business trial lawyers is a critical component of the pilot project and gives ABTL members a legitimate opportunity to help shape the courts' general procedures for handling complex business litigation in the future.

Judge Schneider emphasized that the handling of complex cases under the new rules is not necessarily limited to those cases designated for assignment to the six special assignment judges. At least half of the initial caseload of those six judges will consist of cases transferred from already pending cases selected by Judge Schneider in consultation with the judges

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Civil Procedure

In *First Nationwide Bank v. Mountain Cascade, Inc.*, 2000 Daily Journal D.A.R. 919 (Court of Appeal January 24, 2000), 77 Cal.App.4th 871 (2000) the First Appellate District held that expert witness fees cannot be recovered pursuant to a contract provision that provided for the recovery of attorneys' fees and all necessary expenses unless the fees are plead and proved in the main action.

In *Monarch Healthcare v. Superior Court*, 2000 Daily Journal D.A.R. 2736 (Court of Appeal March 13, 2000), 78 Cal.App.4th 1282 (2000) the Fourth District held that nonparty deponents do not need to file a motion to quash in order to challenge a "records only" subpoena that seeks privileged information. The Court held that it is sufficient to simply object to the discovery.

In *Jones v. Moore*, 2000 Daily Journal D.A.R. 4589 (Court of Appeal May 1, 2000), the Second Appellate District held that the trial court did not err in excluding at trial certain testimony of plaintiff's expert witness because the stricken opinion given, although encompassed within the expert witness declaration, was not provided during the expert's deposition and plaintiff's counsel gave no warning that the expert was going to state opinions at trial that were different or additional to the opinions expressed during deposition.



Denise M. Parga

Punitive Damages

In *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.*, 2000 Daily Journal D.A.R. 2141 (Court of Appeal February 28, 2000), 78 Cal. App. 4th 847 (2000), as modified on denial of rehearing, the First Appellate District reversed a judgment for punitive damages in a bad faith insurance action holding that the insurance company's unreasonable failure to assess first party coverage and stubborn persistence in an ill-advised position fell "within the common experience of human affairs" and did not rise to the level of contemptible conduct that could be called despicable.

Insurance

In *Old Republic Ins. Co. v. FSR Brokerage, Inc.*, 2000 Daily Journal D.A.R. 4794 (Court of Appeal, May 4, 2000), the Second Appellate District held that a bad faith claim against an insurer for initiating litigation against the insured fails as a matter of law when the insured does not contend that the insurer acted unreasonably in investigating or paying the underlying insurance claim.

In *Blossum Lum Jang v. State Farm Fire and Casualty Company*, 2000 Daily Journal D.A.R. 5469 (Court of Appeal May 24, 2000), the First Appellate District held that an additional insured's bad faith action against an insurance company resulting from the insurance company's agreement to arbitrate the primary insured's claim for benefits to the exclusion of the additional insured was an action "on the policy" and thus subject to the limitation period for filing suit set forth in the policy.

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Attorneys' Fees

In PLCM Group, Inc. v. Drexler, 2000 Daily Journal D.A.R. 4831 (Supreme Court, May 8, 2000), the California Supreme Court held that a company may recover reasonable attorneys' fees under Civil Code section 1717 for services provided by in-house counsel calculated at the prevailing market rate for similar work.

Arbitration

In Moore v. First Bank of San Luis Obispo, 2000 Daily Journal D.A.R. 3867 (Supreme Court, April 17, 2000), 22 Cal. 4th 782 (2000) the California Supreme Court held that a binding arbitration award may not be judicially corrected to award a party attorneys fees the arbitrator declined to provide.

In Moshonov v. Walsh, 2000 Daily Journal D.A.R. 3863 (Supreme Court April 17, 2000), 22 Cal. 4th 771 (2000) the California Supreme Court held that an arbitrator did not exceed his powers by denying attorneys' fees to the prevailing party based on his interpretation of the attorneys' fee contract provision.

Spoilation of Evidence

In Farmers Insurance Exchange v. Superior Court, 2000 Daily Journal D.A.R. 4121 (Court of Appeal April 20, 2000), 79 Cal.App. 4th 1400 (2000) the Fourth Appellate District held that a tort cause of action for negligent spoilation of evidence cannot be maintained.

In Coprich v. Superior Court, 2000 Daily Journal D.A.R. 5345 (Court of Appeal May 19, 2000), the Second Appellate District held that there is no tort remedy for first party or third party spoilation of evidence.

Contracts

In Jones v. Franchising, Inc., 2000 Daily Journal D.A.R. 4691 (U.S. Court of Appeals May 3, 2000), the Ninth Circuit Court of Appeals affirmed the District court's denial of a motion to dismiss or transfer an action to the Western District of Pennsylvania, holding that the forum selection clause in the parties' franchise agreement was unenforceable, concluding that it contravened California's strong public policy against enforcing such clauses in franchise agreements, as set forth in Business & Professions Code § 20040.5.

— Denise M. Parga

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Treatises, Law Reviews and other Materials — A commonly used authority is the California Practice Guide — Professional Responsibility (Rutter Group, 1999). The authors have long experience in the various organizations, courts, and committees that have had key roles in legal ethics and lawyer discipline in California.

The Lawyers Manual on Professional Conduct, published by the American Bar Association and the Bureau of National Affairs is an extensive compilation and treatise on legal ethics in California and the rest of the nation.

The American Legal Ethics Library, affiliated with the Legal Information Institute and Cornell Law School, is a web site and a cd-rom library with a great deal of information on ethics from California and most other states. Much of this information is available on line at www.law.cornell.edu/ethics.

There are law reviews dedicated to legal ethics. Perhaps the best known of them is the Georgetown Journal of Legal Ethics.

The American Law Institute's Restatements of the Law include a Restatement of the Law Governing Lawyers, which is undergoing revision and expected to be published in 2000. Proposed Final Drafts have already been published by the ALLI.

Partly because of the continuing legal education requirements of the State Bar, there have been dozens, perhaps hundreds, of continuing legal education seminars on legal ethics, many with very useful seminar materials that are still available. They can often be obtained from the continuing legal education providers that published them, such as the State Bar, Continuing Education of the Bar, the various county and other voluntary bar associations, and the various for-profit continuing legal education providers. If the continuing legal education providers no longer have the materials, sometimes they can be obtained from the authors.

To What Classes of Conduct Does the Law of Legal Ethics Apply?

Many of the California Rules of Professional Conduct by their terms apply to the conduct of a lawyer, even though not engaged in as a lawyer. For instance, Rules 3-300 and 4-300 impose restrictions on a member of the California Bar entering into business transactions and other financial arrangements with the member's clients. When a lawyer who, in the lawyer's personal capacity and for the lawyer's personal profit, enters into a business transaction with a client, the lawyer is not acting as a lawyer in the transaction, but as an individual like any other.

As another example, Rule of Professional Conduct 3-120 imposes certain prohibitions on sexual relations with clients. (We need not be technical as to the capacity in which a lawyer engages in such relations.)

California lawyers must also bear in mind that Business and Professions Code § 6106 provides that "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as attorney or otherwise...constitutes a cause for disbarment or suspension. [¶] If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to disbarment or suspension." (Emphasis added.)

As to the geographic reach of California ethics law, Rule of Professional Conduct 1-100 provides:

"(D) Geographic Scope of Rules.

"(1) As to members [of the State Bar of California]:

"These rules shall govern the activities of members in and out-

(Continued on next page)

side this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.

"(2) As to lawyers from other jurisdictions who are not members [of the State Bar of California]:

"These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state"

Of course, business trial lawyers who are practicing in other states, whether as members of the bar of those states or temporarily admitted to handle a case there, must consult the professional conduct rules and laws of the state and the court in which they are practicing. Those rules and law might impose additional requirements, but the California business trial lawyer must always keep in mind that, as a minimum, the California Rules of Professional Conduct, and to some extent other California ethics laws and rules (*e.g.*, Business and Professions Code § 6106) will also apply to the lawyers activities, even outside our state, unless the rules of the other jurisdiction or court specifically impose different requirements.

Tips on Coordinating Your Practice with the Law of Legal Ethics

Identifying Issues of Legal Ethics — Perhaps most important, and most difficult, is catching legal ethics issues as they arise during the day-to-day practice of law. Often they are not obvious. Many lawyers, particularly those with five-figure bar numbers, did not even have a course on legal ethics available in law school.

You receive a call from a former employee of a corporation against which you are pursuing a lawsuit. You might be aware of the rules regarding communications with employees and former employees of adverse corporate parties. (The reach of these rules is not the same as the corporate attorney-client privilege.) But before getting into the conversation, do you ask the caller if he or she is represented by counsel? Do you advise the caller not to disclose privileged communications he or she might have received from counsel for the corporation?

You are substituted out of a case. The new lawyer asks you to explain what you know about the case. Do you think about whether your duty not to disclose your former client's confidential information might limit what you can tell the new lawyer?

You refer a case to another lawyer, or receive a referral. If you expect to share fees, do you get the necessary consents from the client? Do you include consent to the amount of the fee split? Do you get the consent at the outset of the referral? If the case is multi-state, do you consult the law of the other jurisdiction? (California's rules on this subject are different from those of many states.)

You take on a case in which you know you must obtain a waiver of conflict of interest. But do you know how extensive you must make the warnings to the client about the possible consequences of the waiver, a very difficult task? Practitioners in legal ethics find that attempted "waivers" are commonly quite deficient in this respect.

Short of becoming an expert in the field yourself, how do you try to assure yourself that such issues are identified?

The first thing is to keep the subject in mind. Many good lawyers make it a practice, before taking a significant step in a case, to think about the reasons for and against doing it. Another routine thought should be, are there any issues of legal ethics involved?

Another strategy is to have a short checklist, such as the one at the start of this article, of legal ethics subjects to think about when a significant step must be taken in a case. A list can be devised from the Rules of Professional Conduct and the State Bar Act, or from a treatise on legal ethics.

Have an Adequate Ethics Library — That is not difficult. Most business trial lawyers keep a volume of the basic unannotated codes at their desks. State Bar *Publication 250* should receive the same honor, and it takes up much less space. Or, if you have ready access to the internet, it is easy to refer to *Publication 250* that way. Most of the other authorities mentioned above are also on line. Some are not, but many of those are not expensive.

Maintain Good Client Communications — If you communicate sufficiently, effectively and amicably with your clients, many problems can be avoided. And you are more likely to hear about problems from your client first, rather than from some lawyer who has substituted in your place, or from someone employed by the State Bar's disciplinary system.

Legal ethics problems can also arise from relations with opposing counsel and the courts. Although there are obvious differences, it is still true, as a general proposition, that a history of good communications with opposing counsel, judges, and their staffs, can be helpful if an ethics problem should arise. Professional courtesy to opposing counsel, of course, has become a matter of local rule in some courts in California, and discourtesy might even be sanctionable. *E.g.*, Los Angeles Superior Court Local Rule 7.12 and 7.12(d); Local Rule 83.4a.1.a of the U.S. Dist. Ct. for the Southern Dist. of Cal. But *cf. United States v. Wunsch, supra*. On the other hand, it cannot be denied that it is sometimes effective or necessary to be confrontational with opposing counsel, or even the court, although with delicate balance, even that approach can be handled with courtesy.

Get Good Preventive Advice, and Get it Quickly — That is not difficult either. The State Bar's Ethics Hotline does not give legal advice, but it can point you to the correct authorities.

The Hotline is rarely enough. There are many practitioners in the field of legal ethics whom a lawyer can call for a brief telephone consultation, or a long one. Even a 20 minute talk is almost certainly worth more than whatever it will cost in attorneys' fees. You can usually reach one of these lawyers the same day the problem arises.

It is usually best to obtain advice from outside your own law firm, even if your firm includes lawyers with a good deal of knowledge of legal ethics and related fields. Lawyers in your own firm may have a natural bias, perhaps unknowingly, to favor the course of action most beneficial to your law firm, or to see the picture more rosy than it might really be.

If a Crisis Develops, Get Representation Promptly, Not After You are Sued or Notified by the State Bar

If it becomes apparent that there is a problem you cannot easily resolve, or a threat of a lawsuit or disciplinary action, there are almost always things that can be done, and things that should not be done. Usually there are steps that should be taken promptly. The expense of attorneys' fees is, of course, an issue, but good representation at an early stage can prevent a problem from becoming much more expensive down the line in terms of money, stress, and lost productivity.

Do a Bit of Extra Continuing Legal Education and Housecleaning

That also is not difficult. Read the Rules of Professional Conduct again. They are short. Read Business and Professions Code § 6068, much shorter still. Read the introductory chapters

(Continued on page 12)

now handling those cases, and Judge Schneider anticipates that their caseload will soon be filled with new filings. The six special assignment judges are likely to have very full plates by the end of the year, if not before. Consequently, Judges Judith Chirlin and Frederick Lower, along with retired judges sitting on assignment, will continue to handle "long cause" cases in L.A. Superior Court, and any judge in L.A. can adopt the complex rules for a given case as he or she or the litigants may deem appropriate. These new complex case procedures also may be modified in cases not otherwise designated as being "complex" where such new rules nevertheless may prove useful. The new rules and the deskbook guidelines undoubtedly will become an important resource for case management efforts in many cases not officially designated as being "complex."

Education of the judiciary with regard to complex civil litigation management also will continue through the efforts of the Center for Judicial Education, which is working with the Task Force on Complex Civil Litigation to develop a specialized curriculum for the state's judges. The curriculum will include special education in substantive areas, such as antitrust and securities, that are common to many cases that will be designated as "complex" under the new rules. The ABTL, which in the past has worked with the L.A. Superior Court in conducting one-day "judicial colleges" covering substantive issues frequently encountered in business litigation in the past, has an opportunity to play an important role in this aspect of judicial "continuing education."

The special assignment judges also will be looking to business litigators for suggestions regarding technological improvements within the courthouse. Electronic filing is anticipated within the new rules, but that is only one method by which cases involving numerous parties and counsel can be managed efficiently by resort to technology that law firms and their business clients already are using routinely. Again, the court is eager to receive input from all practitioners, not just those involved in cases that have been designated "complex."

As noted in my first Message upon becoming President of the ABTL's Los Angeles Chapter, the ABTL's mission is to make the courtroom a more comfortable place for lawyers who try business cases. We accomplish this by bringing lawyers and judges together to learn from and with each other. ABTL members are active in court committees throughout the state's major urban centers, and have long advocated the need for the courts to devote greater resources to the efficient handling of civil business litigation. The adoption of the new Complex Civil Litigation Rules is a great leap toward this end, and the ABTL will continue to work with the courts to improve this aspect of the state's administration of justice. We thank and congratulate all of the members of the Task Force on Complex Civil Litigation for their work and pledge to continue to support this important effort, working hand-in-hand with the judges as we always do. This is an exciting time for the ABTL and its members, and we welcome our members' input and involvement.

It has been my privilege to serve as the ABTL Los Angeles Chapter President for this past year. Barbara Reeves, an experienced business trial lawyer who now is on the "client" side of things as Assistant General Counsel of Southern California Edison, takes over this month and will bring a terrific new perspective to the ABTL's efforts. I trust she will enjoy her time as President as much as I have. My thanks to all of the Board of Governors members, our Executive Director Becky Cien, Program Chair Jeff Westerman, and to all of our members for your work and support over the past year.

— Jeffrey C. Briggs

in the popular treatises on litigation, the chapters that deal with evaluating a new case and accepting (or declining) a new client.

Update your fee agreement. Update your conflict check system. If you have internal e-mail, you might do your checks that way, because you can obtain responses more quickly, rather than having to wait for a paper form to be circulated or returned. Have the person who handles your trust account re-read the rules on trust accounts.

As a parting bit of education, consider the following gem from the treasury of legal ethics writing, the case of *McClure v. Donovan* (1947) 82 Cal.App.2d 664, 666, remarks not overruled despite their age and the many changes in ethics law since then:

"An attorney has a constant and perpetual rendezvous with ethics. He stands as a trustee for his client's interests — a most sacred and confidential relationship."

— Ira Spiro

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