ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

Volume VI, No. 3 *March 1984*

The Business Litigator Meets the U.S. Magistrate

Notwithstanding the recent challenge to the authority of U.S. Magistrates in the Ninth Circuit, the federal magistrate system not only handles many federal court discovery disputes, but also can be a useful way for the business litigator seeking settlement conferences or even an expedited trial.

The District Court's power to refer civil cases to Magistrates was recently challenged by a three-judge panel of the Ninth Circuit Court of Appeals. *Pacemaker Diagnostic Clinic vs. Instromedix, Inc.*, 712 F.2d 1305 (9th Cir. 1983). It ruled that the entry of judgment by a Magistrate, appointed by the district court for an eight-year term, violated the tenure and salary provisions of Article III, § 1 of the United States Constitution, designed to ensure a wholly independent federal judiciary. The panel apparently did not attack the matter of consensual reference of jury or non-jury trials to a magistrate, but held that, following trial, the final judgment had to be entered by an Article III Judge. The *Pacemaker* decision has sent shock waves throughout the federal judicial system nationally.

Hon. Ralph J. Geffen

The Court of Appeals for the Ninth Circuit, sitting *en banc*, reversed (Nos. 82-3151, 82-3182, Opinion filed February 16, 1984). It held (8 to 3) that Article III protected two separate interests: (1) the right of litigants to adjudication by a judge with the independence guaranteed by life tenure and protection against diminution in salary; and (2) the freedom of the judicial branch from encroachment by the other branches of government, under the Separation of Powers Doctrine.

The Court held that the consent of the parties satisfied the first interest, and that the independence of the Article III Judiciary was preserved by its retention of administrative control over the magistrate system and of its authority to retake cases for adjudication where good cause existed. A similar conclusion was reached by the Third Circuit in *Wharton-Thomas v. United States*, 82-5555 (3d Cir., Nov. 23, 1983).

In the Central District, the principal functions of Magistrates during the first several years of experience

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The Defense of an Insurance Claim

The defense of lawsuits involving insured claims was historically the domain of a relative handful of lawyers selected and retained by insurance companies. Recent case law appears to require insurance companies to pay legal fees to lawyers selected by policyholders. As might be expected, insurance companies have encountered a number of problems in attempting to cope with the new mandate. Lawyers selected by unsophisticated policyholders may be relatively inexperienced in civil litigation. Lawyers who are experienced in business litigation may be less efficient or have higher billing rates, and this be more costly, than lawyers who routinely defend such claims for an insurance carrier.

Thomas W. Johnson, Jr.

A. *The Duty of Defense.* It is said that an insurance company's duty of defense under a policy of liability insurance is broader than its duty of indemnification.[1] An insurer is required (by the express terms of a standard policy of liability insurance) to defend an action in which any covered claim is asserted against its insured, even if the claim proves to be false or fraudulent. The California Supreme Court has expanded this obligation by holding that an insurer "bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy."[2] An insurance carrier must defend an entire action even if less than all of the claims against its insured are covered by the policy.[3] An insurer has a duty to defend any lawsuit against its insured which seeks "any potential recovery" within the scope of its insuring agreement even where the "majority of any recovery . . . will arise" from costs of repair which are expressly excluded from coverage.[4]

B. *The Reservation of Rights.* An insurance carrier is thus frequently confronted with a duty to defend an action which involves multiple claims against its insured, some of which fall within the policy coverage and some of which do not. Even cases involving a single claim or cause of action may seek compensatory damages which are covered and punitive damages which are not.

An insurer which unconditionally accepts and takes control of the defense of an action against its insured may be held to have waived, or to be estopped to assert, a cover-

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lay in the fields of criminal law, prisoner petitions (habeas corpus and civil rights) and the review of administrative decisions in social security disability cases.

Subsequently, the appointment of additional magistrates permitted the assignment of additional functions. Presently the "Local Rules Governing Duties of Magistrates" (all rule references herein are to those Rules, unless otherwise indicated) permit assignment of a large proportion of the many varieties of duties of the District Court. Notable exceptions are review of bankruptcy matters and felony criminal cases after indictment.

Jurisdiction of United States Magistrates is principally granted in Title 28 U.S.C. § 636. That section provides that notwithstanding any provision of law to the contrary, a District Judge may designate a Magistrate to hear and determine any pre-trial matter pending before the court (with certain exceptions). These exceptions include motions for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or permit maintenance of a class action, to dismiss for failure to state a claim and to involuntarily dismiss an action.

Discovery

The business litigator encounters a Magistrate most frequently in prosecution of discovery motions before the District Court, e.g., to compel the answering of deposition questions of interrogatories, to force production of documents, or to require physical examination or, on the other hand, to seek a protective order from discovery attempts made by opposing parties.

Magistrates are authorized to determine any type of civil discovery dispute. A majority of the District Judges refer some or all such discovery disputes to the Magistrates. The particular Magistrate is determined by selection of a card at random from a wheel maintained by the clerk, upon the filing of the case and at the same time a card is pulled for assignment to a District Judge.

The identity of the Judge so selected is designated by placing his initials immediately following the docket number (e.g., CV 83-0000-ABC). The designation of the Magistrate who will hear discovery disputes in the case (if the District Judge elects to refer discovery matters) is indicated by addition of the Magistrate's initials in parenthesis followed by a lower case "x" [e.g., CV 83-0000-ABC(Gx)]. (On the other hand, if the Magistrate's initials are not followed by an "x" [e.g., CV-83-0000-ABC (G)] this indicates that the case as a whole has been referred to the Magistrate for disposition and determination of all matters in the case excepting trial. If the docket number is followed only by a Magistrate's initials [e.g., CV 83-0000-G], the matter has been referred to the Magistrate for trial. Careful adherence by counsel to this numbering system can prevent delays in processing due to misrouting of documents by the clerk.

In handling discovery matters, the Magistrates are guided by the Federal Rules of Civil Procedure, as well as the procedural rules set forth in the Local Rules of Practice (note that these Rules were extensively amended effective October 1, 1983).

While Monday at 10:00 a.m. is the standard time for hearing motions before most of the District Judges (Local Rules of Practice 7.2), most of the Magistrates utilize different motion days and times (counsel should contact the Magistrate's clerk to determine when the motion should be set.) If the motion is set before a District Judge who then refers it to a Magistrate, the latter may issue an order rescheduling it on his calendar. Careful attention must be given to the notice requirement which is applicable to most motions, usually 21 days before the date of hearing. See Local Rules of Practice 7.4. On the other hand, discovery motions are covered by Rule 7.15 and its subdivisions, and can be heard on a little as 10 days notice.

Counsel should be familiar with the special requirements for presentation of discovery motions, which demand that counsel meet in person in a good faith effort to eliminate the necessity for seeking court intervention, or at least to reduce the areas of dispute. It is the responsibility of counsel for the moving party to arrange for the conference, and opposing counsel is required to meet in person within 10 days of service of a letter requesting such meeting and specifying the terms of the discovery order to be sought. Relief from this requirement is granted by the court only if good cause is shown; agreement of the parties does not itself suffice.

If counsel are unable to settle their differences, "they shall formulate a written stipulation specifying separately and with particularity each issue that remains to be determined at the hearing and the contentions and points and authorities of each party as to each issue." (Local Rules of Practice 7.15.2.) The stipulation must be in one document and cannot refer to other documents in the file. Counsel must set forth verbatim each interrogatory or other matter in issue and the reply or objection made by the opposing party. Each disputed point should be followed by the contentions of each party as to that issue. Points and authorities should follow immediately thereafter, unless embodied in the separate contentions.

The stipulation must accompany the notice of motion. In cases where counsel cannot procure cooperation of the opposing party in meeting and drawing the stipulation, the moving party may file a declaration of such non-cooperation. In such cases, both counsel are required to appear at the hearing on the motion and sanctions may be imposed on recalcitrant counsel. (Local Rules of Practice 7.15.4.)

In most cases rulings are made from the bench on discovery motions. Formal orders are frequently required. If the decision is made orally from the bench, the time for filing objections begins immediately. If a written order is indicated by the Magistrate, the time for filing objections begins ten days from the filing of the written order (See Rule 3.3.)

Pre-Trial Conferences

Magistrates are sometimes assigned to conduct pre-trial conferences. All of the proceedings are conducted as provided in the Local Rules of Practice and the Magistrate customarily enters the order.

Settlement

Magistrates may be employed by the District Court on an *ad hoc* basis for assistance in conducting settlement conferences in some civil cases. Availability of the Magistrate and a reference from the District Judge are required. Frequently counsel find that a frank discussion is easier with a judicial officer other than the Judge who is to try the case. Some District Judges will employ other District Judges for such purpose; United States Magis-

trates serve the same purpose and are sometimes more available.

Special Master

Section 636(b) (2) of Title 28 U.S.C. allows a Judge to designate a Magistrate to serve as a special master pursuant to the Federal Rules of Civil Procedure in any civil case, upon consent of the parties. The limitations imposed by Rule 53(h) of the Federal Rules of Civil Procedure upon designation of special master generally do not then apply.

There is, of course, no charge for the services of the Magistrate as special master. The Magistrate performs his services expeditiously, avoiding the long drawn out proceedings which led to criticism of the Special Master System in *La Buy vs. Howes Leather Co.*, 352 U.S. 249 (1957) and enactment of restrictions in present Rule 53(b), F.R.Civ.Pro. The provisions of Rule 53 other than the limitation on reference to a master are applicable when a Magistrate acts as a master, including the provisions that the standard of review of findings of fact in a non-jury matter is the "clearly erroneous" test. [The parties may stipulate that the master's findings of fact shall be final so that only questions of law are reviewed by the District Judge.]

Civil Trial

All of the Magistrates in the Central District have been certified by the Ninth Circuit Judicial Conference as competent to conduct civil trials of all kinds, jury and non-jury.

The statute [28 U.S.C. §636(c)] specifically requires consent of all parties and prohibits coercion in procuring that consent. Local Rules relating to assignment of duties to Magistrates are set forth in Local Rule 6.6. Such rules put the initial burden upon plaintiff's counsel to initiate consent by all counsel. The matter does not come to the court unless all counsel have signed a consent for reference to a Magistrate. The reference may come at the very initiation of a case as soon as counsel have filed their consents or it may come at anytime up to the pre-trial conference. Thereafter it may be approved only upon special application to the District Judge. The District Judges have indicated a willingness to refer cases upon consent of counsel; each District Judge nevertheless makes references on an *ad hoc* basis in his own discretion. Refusal to make a consented-to reference is rare. The Magistrate to whom reference is made has the authority to conduct any and all proceedings and to direct an entry of final judgment of the District Court. Appeal is ordinarily to the Ninth Circuit Court of Appeals but the parties can agree that the matter be appealed first to the District Judge.

Unless a case has already been assigned to a Magistrate for a report and recommendation pursuant to §636(b) (1) (B) and the Local Rules (for example, a motion for summary judgment or other matter referred for hearing before a Magistrate), the parties may stipulate to the designation of a particular Magistrate; otherwise the case will be referred to a Magistrate whose card is drawn by lot by the clerk.

One of the advantages of trial by a United States Magistrate is the more readily accessibility for such trials, due in large part to the fact that the Magistrates are not encumbered with the weighty load of felony trials conducted by District Judges. In addition, at least at the present time, the number of civil cases referred to Magis-

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Letter from the President

The age-old debate over whether our courts should award attorney fees to the prevailing party in civil litigation, like the English practice, or should leave the prevailing party to bear its own attorney fees, under the prevailing American practice, flares up anew in the light of a proposed revision to Rule 68 of the Federal Rules of Civil Procedure relating to offers of judgment.

English Rule v. American Rule

The U.S. Supreme Court's discussion of the American and English systems in its *Fleischmann* decision provides a background:

"As early as 1278, the courts of England were authorized to award counsel fees to successful plaintiffs in litigation. Similarly, since 1607 English courts have been empowered to award counsel fees to defendants in all actions where such awards might be made to plaintiffs. Rules governing administration of these and related provisions have developed over the years. It is now customary in England, after litigation of substantive claims has terminated, to conduct separate hearings before special 'taxing masters' in order to determine the appropriateness and the size of an award of counsel fees.

Laurence H. Pretty

"Although some American commentators have urged adoption of the English practice in this country [see Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif. L. Rev. 792 (1966)] our courts have generally resisted any movement in that direction. The rule here [the so-called American Rule] has long been that attorneys fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor . . ." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 366 U.S. 714, 87 S. Ct. 1404 (1967).

In support of the American rule, it is argued that since litigation is often uncertain, one should not be penalized for merely defending or prosecuting a lawsuit. Citizens might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponent's counsel.

Proposed Revision of Rule 68, Fed.R.Civ.P.

It is perhaps a manifestation of a tilt towards the English system that we see in a proposed amendment to Rule 68, Fed.R.Civ.P. As the rule presently stands, a party defending against a claim may make an offer of judgment against it in an amount specified in the offer. Moreover, if the offer is declined, the court may award the offeror its costs in the event that the judgment eventu-

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claims of a third party in the underlying action, but each involved primarily to protect conflicting interests, suggests problems which any insurance carrier should wish to avoid.

Picture the hapless counsel retained by an insurance carrier to protect its interests in the underlying action but doing so in the guise of the counsel for the insured. While charged with the duty of representing the insured in the underlying action, this counsel would be expected to employ tactics and objectives which might be different from, or even irreconcilable with, tactics and objectives employed by the independent counsel selected by the insured. Very few sophisticated defense counsel would want to find themselves in such a situation.

The rule in *Executive Aviation* which requires an insurance carrier to pay for an independent counsel selected by the insured may be sound, but the unnecessary dictum by the Court of Appeal as to the manner in which insurance carriers would respond to the new rule may be unrealistic. However, albeit with a bit of disputable foresight on the manner its new rule would work in practice, the Court of Appeal did hold unequivocally that an insurance carrier must pay for the services rendered by an independent counsel selected by the insured in a "conflict of interest situation."

One final note. The Court of Appeal observed that the insurer had recognized that its position on the coverage issue was inconsistent with and adverse to the position which would be asserted by the insured in the underlying wrongful death action. The insurance carrier was confronted, in the words of its own claims manager, "with the paradoxical position of having to prove the insured a common carrier to avoid coverage, while such proof will jeopardize the defense of the passengers' actions." 16 Cal.App.3d at 804, N.1.

Insurance carriers and their counsel frequently insist that the right to independent counsel does not exist in every case involving a "reservation of rights" and that there must also be a "conflict of interest" between the insured and the insurer. However, merely raising the inconsistent coverage issue appears to have been a sufficient "conflict of interest" in *Executive Aviation* to require the services of independent counsel. Surely, coverage issues involving allegedly uncovered claims in an action involving multiple claims, punitive damages in an action involving compensatory damages, and claims in excess of policy limits, create "conflicts of interest" every bit as genuine as the one cited by the Court of Appeal in *Executive Aviation.*

For example, a claimant is required to plead and prove facts constituting malice, fraud or oppression to recover punitive damages. California Civil Code Section 3294. But an insurance carrier may not be obligated to idemnify its insured for "willful" misconduct under Section 523 of the Insurance Code. Consequently, in cases involving punitive damages, an insurance carrier may not have an economic incentive to pay for a vigorous defense of punitive damages allegations. It might even reduce its own exposure by permitting the claimant to establish the insured's "willful" misconduct.

Insurance carriers have attempted to resist the *Executive Aviation* rule by distinguishing a "reservation of rights" from a "conflict of interest." Such a distinction does not find support in the decision in which the rule was first enunciated.

Many insurance carriers considered *Executive Aviation* to be an aberration and frequently ignored its mandate. Not until *Previews, Inc. v. California Union Insurance Company,* 640 F.2d 1026 (9th Cir. 1981), did it become apparent that the rule in *Executive Aviation* would be applied in another context. Cal Union had issued a liability insurance policy to Previews idemnifying it for certain acts, errors and omissions subject to a $5,000 deductible. A class action was initiated against *Previews* for violation of a state statute. Cal Union apparently offered to defend Previews, but contended that the $5,000 deductible would be applied to every member of the class and also reserved its rights on a number of other coverage issues. Previews hired its own attorneys to defend the class action and then in a separate action sued Cal Union for these legal fees. The District Court and the U.S. Court of Appeal held that Previews had a right to *reject* the

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P.O. Box 67C46
Los Angeles, California 90067

defense offered by Cal Union and hire outside counsel:

> "California law provides that in a conflict of interest situation, the insurer's desire to control exclusively the defense must yield to its obligation to defend the policyholder. Accordingly, the insurer's obligation to defend extends to paying the reasonable value of the legal services and costs performed by independent counsel selected by the insured." 640 F.2d at 1028.

Significantly, and unlike the opinion in *Executive Aviation*, the U.S Court of Appeals in *Previews* made no reference to the right of the insurance carrier to retain a second counsel to defend the insured. In fact, the defense of *Previews* was conducted entirely by the independent counsel selected by the insured, and no attempt was made to involve another attorney to advocate the interests of the insurance carrier. The *Executive Aviation* rule was applied without the confusing dictum regarding the need for two separate defense counsel.

The *Previews* decision was greeted harshly by the insurance industry. It is a matter of public record that *Previews* was offered a settlement by Cal Union if it would stipulate to a request that the opinion be decertified for publication. Although the settlement was consummated, the U.S. Court of Appeals declined the stipulated request and published the decision.

The insurance industry has continued to resist the literal application of the *Executive Aviation* rule and has proposed legislation to limit or eliminate its application. A few claims managers have attempted to make do with the *Executive Aviation* rule and have discovered some measures to deal with the least desirable consequences.

D. *Partial Solutions.* 1. *Qualification and Experience of Counsel Selected by the Insured.* An insurance carrier has the right in appropriate circumstances to question the attorney selected by the insured as to his or her ability to conduct the defense of the underlying action. An unqualified or inexperienced attorney may voluntarily withdraw from representing the insured if persuaded by the insurer that a more experienced trial counsel should control the litigation.

However, any such confrontation should be based on a genuine and well-founded concern by the insurer about the credentials of the attorney selected by the insured. Any dialogue initiated by the insurance carrier on this issue must be with the independent counsel selected by the insured. If the insurance carrier attempted to confront the insured with this issue, it would risk serious exposure to the independent counsel for defamation or tortious interference with the relationship between the insured and the independent counsel.

2. *Compensation of the Independent Counsel.* The rule in *Executive Aviation* is that the insured must pay the "*reasonable* value of the legal services and costs performed by the independent counsel, selected by the insured." 16 Cal.App.3d at 810. An insurance company is not obligated to pay an unreasonable fee to any attorney. While an insurance carrier might not get the bargain-basement rates offered by its favorite law firm, it can resist and refuse to pay exhorbitant bills submitted by independent counsel. In determining a reasonable fee in California, insurance carriers should apply the factors set forth in Rule 2-107 of the Rules of Professional Conduct of the State Bar of California. Among these factors are "the experience, reputation, and ability of the lawyer or lawyers performing this service."

3. *Eliminate Duplication.* In most instances, it should not be necessary to retain two counsel to do the same job. The *Executive Aviation* rule may be sound, but the need for two counsel does not necessarily follow. If the insured has selected a reasonably competent defense counsel in a "reservation of rights" situation, there is simply no requirement in law or logic for a second counsel chosen by the insurance carrier. Insurance carriers should resist the temptation to involve familiar faces merely for the sake of comfort if the independent counsel appears qualified to provide an adequate defense for the insured.

4. *Negotiation to Avoid Confrontation.* Finally, insurance carriers and insureds should avoid a confrontation on coverage issues, if at all possible, until the underlying action has been settled or adjudicated. A coverage dispute should not be permitted to prejudice the quality of the defense which an insurance carrier owes to its insured. A carrier may wish to offer to retain a competent counsel selected by the insured at a reduced or negotiated billing rate.

In some instances, an insured, particularly in commercial litigation, will volunteer to pay a portion of the fees not paid by the carrier in order to be represented by its own counsel. In instances where the carrier concludes that it is necessary to retain its own counsel to protect the interests of its insured, it should attempt to obtain an agreement pursuant to which the two counsel are directed to segregate and divide responsibilities for the defense of the action so as to avoid duplication as much as possible.

Sometimes an effort to find a manageable solution will be impeded by the reluctance of an insurance carrier to permit the independent counsel to control the defense of the underlying action. In this event, counsel for the insured may do well to remind the carrier that is has the duty to relinquish the control of the defense, and that its refusal to do so may risk waiving its coverage defenses.

The insurance carrier has an equally persuasive weapon to induce the insured to negotiate a reasonable arrangement. At least one California case has suggested that an insurance carrier can defend a claim and "reserve its rights" to recover its *costs of defense* from its insured.[6] Such a practice may seem harsh where the carrier controls the defense. However, a "reservation of rights" as to the costs of defense, including legal fees, appears to be enforceable and perhaps even advisable where a carrier is compelled to pay costs to a counsel selected by its insured for a defense which appears to the carrier to be inadequate or too costly.

The insurance industry is attempting to readjust the manner in which it conducts or supervises the defense of an underlying action in a situation in which it has "reserved its rights" on coverage issues. An insured is entitled to employ an independent counsel at the insurance carrier's expense in such a situation. Rather than debate the manner in which this right will be exercised, an insurance carrier and its insured may be well advised to negotiate an arrangement which would provide the insured with an effective and efficient defense of the underlying action.

—Thomas W. Johnson, Jr.

FOOTNOTES

1 *Centennial Insurance Company v. Applied Health Care Systems, Inc.*, 710 F.2d 1288 (7th Cir. 1983) (applying California law).
2 *Gray v. Zurich Insurance Co.*, 65 Cal.2d 263, 277 (1966).
3 *Tomerlin v. Canadian Indemnity Co.*, 61 Cal.2d 638 (1964).
4 *St. Paul Fire and Marine Insurance Co. v. Sears, Roebuck & Co.*, 603 F.2d 780 (1979).
5 *Tomerlin v. Canadian Indemnity Company, supra*, at 648.
6 *Safeco Title Insurance Company v. Moskopoulos*, 116 Cal.App.3d 658 (1981).

Re 'Time to Trial': Letter from Judge Gale

Dear Mr. Pretty:

I note in reading the October, 1983, edition of the *Association of Business Trial Lawyers Report* that on page five thereof under the caption "Update: Time to Trial in Southern California Courts" you list the "number of months from filing of at-issue memorandum to commencement of trial" in the South Central (Compton) District as being 43 months for jury trials and 29.5 months for non-jury trials.

Be advised that said figures are incorrect and far exceed the time for cases *actually filed at Compton.* The medium time for the period from which an at-issue memorandum is filed in Compton until the trial date is 15 months. It is an unusual situation when a litigant cannot have his or her case sent out for trial on the first date set, and, when such cases are not sent out, it generally is due to the case being pre-empted by a five-year case transferred from another branch for trial or the result of mutual request for a continuance.

In addition to the cases initially filed at the South Central Branch, Compton tries a greater number of cases that are transferred from other districts, most of which are five-year cases. Apparently the figures you published are a composite of the time from the filing of an at-issue memorandum in respect to those cases actually filed at Compton and the five-year cases that are transferred to Compton after they have matured in other branches.

Very Truly Yours,

Kenneth W. Gale
Judge, Los Angeles County Superior Court

EDITOR'S NOTE: ABTL Report *appreciates the clarification by Judge Gale. The Los Angeles County statistics in the recent "Time to Trial" article were taken from the Monthly Conspectus issued by the Los Angeles Superior Court.*

Contributors to this Issue:

Hon. Ralph J. Geffen is a Magistrate of the U.S. District Court for the Central District of California.

Thomas W. Johnson, Jr., is a partner in the firm of Irell & Manella.

Laurence H. Pretty, President of ABTL, is a partner in the firm of Fulwilder, Patton, Rieber, Lee & Utecht.

Nominations For ABTL Board

Nominations for candidates to the ABTL Board of Governors should be submitted to Nominations Committee Chairman Charles S. Vogel, Esq., Sidley & Austin, 2049 Century Park East, Los Angeles, CA 90067.

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trates has not created a back log of cases waiting to be tried.

Appealing the Magistrate's Ruling

In the case of excepted matters, proposed findings of fact and recommendations made by the Magistrate are subject to determination by a District Judge. The Local Rules (§ 3.1) provide that objections of a specific nature, supported by points and authorities, must be filed within 10 days of mailing of the Magistrate's written report. The District Judge will determine objected-to portions of the report or proposed findings, etc., on a *de novo* basis (usually after receiving a report on the objections from the Magistrate) and may accept, reject, or modify the findings or recommendations, in whole or in part. He *may* also receive further evidence or recommit the matter to the Magistrate with instructions; *de novo* determination does not necessarily mean a *de novo* hearing. In most cases, the reconsideration is made upon the written record. If oral argument is requested, the District Judge will decide whether it will aid in reconsideration.

Typically no objection is taken to the report and recommendation of the Magistrate and it is deemed consented to and becomes final upon expiration of the ten-day period for filing objections. In all other pre-trial matters which are *determined* by the Magistrate, reconsideration by the District Judge may be sought (§3.3). In that case the review is not *de novo* but requires a showing, with points and authorities, that the Magistrate's order is clearly erroneous or contrary to law in specific respects.

Disqualifications of Magistrates

Motions to disqualify a Magistrate pursuant to 28 U.S.C. §§144 or 145 are referred to the District Judge to whom the civil matter was assigned. If the motion is granted, the case is assigned to a different Magistrate. All proceedings by the Magistrate are stayed until the motion for disqualification has been heard and determined (§3.5). Since the District Judge assigned to a case retains the authority to retake control of a civil matter referred to a Magistrate, there is no essential suspension of authority to consider and rule on matters which were pending before the Magistrate, although the power to retake control is sparingly exercised.

Experience of the Magistrates

The federal Magistrate system was implemented in the Central District of California in January, 1971. The three persons chosen from approximately 128 lawyers are all still serving. Subsequently, four additional Magistrates have been added and application is pending for authorization to add an eighth. In addition, there are ten attorneys who serve part-time, principally handling criminal matters, in various portions of the vast Central District.

All of the Magistrates in Los Angeles were painstakingly selected by the District Court Judges and have extensive legal experience prior to appointment, averaging in excess of 15 years. The combined experience is in both civil and criminal fields and includes contract, corporate, and business practice.

In this era of ever growing dockets, the U.S. Magistrates not only assist the federal District Judges but also can assist business litigators in efficient and expeditious resolution of disputes.

—Hon. Ralph J. Geffen

The President's Letter

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ally awarded is less than the amount of the offer that was refused. The proposed revision* of Rule 68 makes two major changes:

1. The first and most dramatic change is that the sanction against the party declining the offer, in the event that the judgment for the prevailing party is less than the offer, now includes a mandatory award of reasonable attorney fees, as well as costs, and

2. The offer of judgment may now be made by either party, not just the party defending against a claim.

The purpose of Rule 68, as adopted in 1938, was to encourage settlements and avoid protracted litigation by taxing a claimant with costs if he should recover no more after trial than he would have received if he had accepted the defending party's offer to enter judgment in the claimant's favor for a specified amount of money or property, or other relief. The rule has rarely been invoked and has been considered largely ineffective as a means of achieving its goals (Rule 68, Committee Note, Preliminary Draft of Proposed Amendments to the Fed.R.Civ.P., August 1983). The sanction of costs is quite often a small fraction to the total cost of litigation and usually a much smaller amount that the amount at stake. However, the change to a mandatory award of attorney fees against the party who refuses an offer and then wins a judgment for less than the amount offered could have major adverse consequences for even a winning litigant. A rule of this type could easily have a potentially coercive effect against the prosecution of a meritorious claim in good faith in at least the following types of cases brought in the federal courts:

1. *Cases Where A Federal Statute Provides for Increased Damages at the Discretion of the Court*

In a case where an applicable federal statute provides for damages to be multiplied at the discretion of the court, the plaintiff may have a good faith belief that the circumstances are such that the increased damages are called for. If the defendant, sensing a losing case, chooses to make an offer of single damages at a realistic value, the plaintiff is placed in the position where it must gamble that the court will exercise its discretion to increase the damages, or face the possibility of actual damages only equal to, or less than, the amount offered and be liable to pay the defendant's attorney fees from the time of the offer. Such a state of affairs could have the net result of chilling an injured party from persevering with a claim for increased damages even in cases where there is a good faith basis for believing the situation fits the circumstances that Congress intended to redress by increased damages.

2. *Cases Involving A Claim for Injunctive Relief*

The proposed revisions to Rule 68 make no provision for what happens in a case where the claimant is seeking injunctive relief and damages and the defendant presents an offer of damages, which is higher than those eventually awarded on the judgment, without offering to be enjoined. The plaintiff would most likely decline the offer because of the lack of an injunction. Would this then subject the ultimately prevailing plaintiff to pay the defendant's attorney fees after the date of the offer, even though the offer had not provided for an injunction which was the basis of plaintiff's refusal to accept the offer? If this were the result, it would appear to be manifestly unfair.

3. *Cases Involving A Statutory Award of Attorney Fees at the Court's Discretion*

As we know, an award of attorney fees to the prevailing party, at the discretion of the court, is provided for in some types of cases by federal statute. In such situation, a party which anticipates losing may make an offer which is less than the damages eventually awarded but does not provide for an award of the prevailing party's attorney fees. Once again, the prevailing party is forced to guess whether the court will choose to award the statutory fees. If it guesses wrong, it risks an award of attorney fees against itself.

It seems absurd that there could be a situation where the statutory provision for damages to a prevailing party should be lined up squarely in opposition to a federal rule provision awarding attorney fees to a losing party which had made an unaccepted offer of judgment.

The potential for unfairness that the foregoing situations present does not mean that there should be no effort to strengthen Rule 68 in a way that will encourage litigants to settle litigation on realistic terms or face a penalty for unreasoning obstinacy. However, the revision of the rule should not result in an overswing of the pendulum that penalizes litigants from pursuing or resisting claims on bases that are reasonable and presented in good faith. The state statute relating to offers of compromise, *Cal. Code of Civil Procedure, Section 998* has features which perhaps point the way for a better balanced revision of the federal rule. It gives the Court discretion to make an award against a party, which has rejected an offer of settlement by the opposing party and fails to obtain a more favorable judgment, of the offeror's costs of the action and its expenses of expert witnesses. The discretionary nature of the award and its limitations to costs and expert witness fees should be considered by the revisers of Rule 68. A public hearing on the proposed revisions in Los Angeles was held February 3, 1984. It provided an interesting opportunity for a new airing of an ancient debate.

—Laurence H. Pretty

*At least one United States District Court, the Central District of California, has already adopted a Local Rule 23 which parallels the substance of the proposed Rule 68 revision.