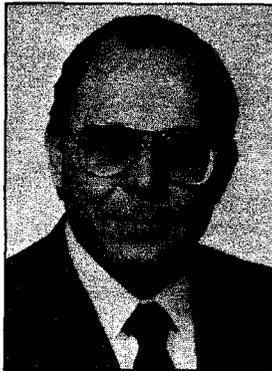


Letter from the President

As a part of the trial bar, ABTL shares the general concern of all lawyers regarding the current criticism of the American trial process. This adverse commentary predicts that the judicial system and society itself will soon be buried by a tidal wave of litigation. These doomsday predictions are made by leaders of the bar, luminaries of the judiciary and distinguished members of academia. The eminence of these forecasters and the frequency of their declarations have nearly persuaded everyone that their conclusions are beyond dispute.



Charles S. Vogel

All of them point to the burgeoning case loads and conclude that we have a "litigation explosion" or, in rougher terms, "litigation pollution." Advocates of the litigation explosion thesis claim that the problem stems from a contentious society harboring elevated expectations, encouraged by idealist judges and abetted by greedy and misguided lawyers. The central theme of this apocalyptic forecast is that we have too much litigation and

radical reform is required.

It seems to me that most of us have accepted these conclusions out of hand. We find ourselves criticizing ourselves, each other and the trial system in general. Perhaps we have been too ready to condemn our society, our profession and the litigation process. Some quarters are beginning to question the prophets of doom.

It now appears that the critics of litigation may have based their case on faulty assumptions and on an inaccurate understanding of the trends in litigation. In fact, one might now question how much litigation is too much litigation. Fortunately, a growing segment of the legal community is considering these issues anew, without accepting the litigation explosion thesis as gospel. Their efforts are providing a new perspective.

Professor Marc Galanter has published an article calling into question the basic evidence on which the proponents of the litigation explosion thesis rely. (Galanter, "Reading The Landscape of Disputes: What We Know and Don't Know (And Think We Know) About an Allegedly Contentious and Litigious Society," 31 *UCLA Law Review* 4, October 1983.) According to Professor Galanter, the critics of the system cannot really demonstrate

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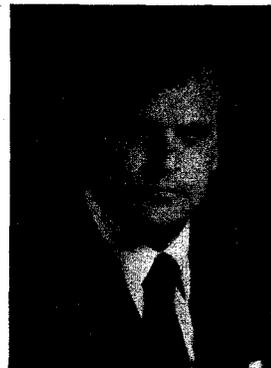
The Business Lawyer Tackles the Criminal Law

It's late in the evening and you are about to finish off that second scotch. As you loosen your silk tie, the telephone suddenly rings. Over the phone, your most important business client moans, "I'm in trouble . . . some sort of criminal investigation. What do we do?"

You gulp down that scotch as you frantically try to recall something about criminal procedure. Unfortunately, the last time you thought about it was 20 years ago at the bar exam.

To be sure, business clients are increasingly calling upon their corporate litigators for help in criminal or administrative investigations. Both types of investigation pose similar legal problems even though their consequences may differ. The government's powers to compel testimony or the production of documentary evidence may differ, and the tactical responses of defense counsel to the investigation may differ based upon the power available to the government.

Still, the strategic design of the defense response will be the same whether the investigation is administrative or criminal. Moreover, the constitutional and evidentiary privileges available to protect the subject of the investigation are the same in either case. You should employ the same approach to managing and monitoring evidentiary production regardless of whether the investigation is criminal or administrative.



Brian O'Neill

Experience teaches that your initial response to the investigative process usually creates the climate in which the resolution of the client's problem will occur. The more favorable a climate you can create by his or her response to the fact of the investigation, the greater likelihood the matter will be resolved to the client's advantage. This article suggests strategies for responding to government investigations and describes the tactical responses available to resist the investigation and protect the client's interests.

The first notice the business client has of an investigation is often provided by the service of process seeking information about the client's business. The process may be a grand jury subpoena,¹ a district attorney subpoena,² a civil investigative demand by the Justice Department,³ or an administrative agency summons. The initial contact

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The Business Lawyer's Response

Continued from Page 1

by the government may be less formal and come by way of a visit from a government investigator.

When you as defense counsel learn of the investigation, you should immediately identify the powers and the sanctions available to the agency conducting the investigation by referencing the authorizing statute: for example, if the investigation is being conducted by the IRS, the operative statute will be U.S.C. 7602; the Securities Exchange Commission, 1 U.S.C. 78ff; the Federal Trade Commission, 1 U.S.C., etc.

Remember that some agencies may not lawfully conduct an investigation unless the agency has issued an order that an investigation proceed. For example, the F.D.I.C. Office of Investigation may not lawfully conduct a formal investigation into apparent violations of the banking laws unless a formal order of investigation has been issued.⁴ Where the law requires an investigation order, you should specifically request and review the order of investigation at the first opportunity. That order is the agency's charter and may be used to constrain the agency's investigation within its lawful bounds. Moreover, the order of investigation serves to define the relevancy and materiality of inquiries by the agency. By way of illustration, if the order of investigation provides that the FDIC is to investigate the unsecured commercial loan practices of a member institution, the FDIC investigators may be resisted insofar as they seek information concerning secured real estate loans at the bank under investigation. Such inquiries would be irrelevant and immaterial to the investigation as it is defined in the order of investigation.

In most instances, an agency's powers to compel the testimony of witnesses and the production of documents is not self-enforcing. That fact alone can have critical significance as you assess the strength of the client's position vis-a-vis the government. If the government agency does not have sufficient resources or the disposition to litigate the enforcement of its summons, you can take a firmer position than in those cases where a subpoena is self-enforcing. In other words, knowing the agency does not have sufficient resources or the disposition to litigate the enforcement of its summons, you can negotiate a modification or even a withdrawal of the summons with government counsel.

After discovery of the agency's powers and sanctions, you should attempt to learn the general disposition of the agency towards cases of the sort involved and any peculiarities which may attend the current investigation. For example, if the Federal Trade Commission is investigating the real estate syndication industry in Arizona and California and your client is engaged in that industry, it would be important to know that the FTC is investigating particular marketing practices. If your client is not engaged in such practices, it may be that your response to the government inquiry will be more cooperative than it otherwise would be. By your cooperation, you might be able to persuade the FTC that your client's conduct is of a different character from that of other participants in the industry. Alternatively, you might be able to provide information about the egregious conduct of some of your client's competitors where that conduct is the sort in which the FTC is currently interested.

The most significant service you can provide for a

client under investigation is to learn as early as possible the direction of the investigation and its scope. Those questions may be answered by an inquiry of the government counsel at the first meeting.

The first meeting with the government should occur as soon as possible after determining the government's power and the general scope of the investigation. It is in that first meeting that a working relationship with the government is established. The creation of a relationship characterized by respect and trust should serve the client's interests. An understanding at the outset of what the government powers and the government's goal is fundamental to the effective representation of the client's interest. If you are uncertain as to the agency's enforcement powers and policies at the outset of the investigation, the risk is created that the government will exceed the bounds of its authority as the investigation progresses.

The client's status in the investigation should be identified at the first meeting. Is the client viewed as a third-party witness to the activities of another or as a target or possible target of administrative sanctions and/or criminal prosecution? If government counsel represents that, although the client is presently viewed as a probable witness the client's status could change to that of a target or subject, prudence dictates that you treat the more serious prospect as the reality.

Where the client is identified as a potential subject, you must consider the invocation of the Fifth Amendment privilege against self-incrimination. The privilege may properly be invoked in any proceeding, including an administrative investigation, if there is a remote possibility that the testimony sought from the client may tend to incriminate the client. *Hoffman v. United States*, 341 U.S. 479 (1951); *Slochower v. Board of Education*, 350 U.S. 551 (1957).

The privilege may also be invoked to protect against disclosure of documentary evidence if the act of production of the documents may have testimonial aspects and incriminating effects. *United States v. Doe*, — U.S. — (No. 82-786, February 28, 1984). A careful weighing of the decision to invoke the privilege is required because any waiver of privileged material based upon counsel's misapprehension as to the possible consequences of the investigation is binding on the client and may be used in a criminal prosecution. *United States v. Kordel*, 397 U.S. 1 (1970).

Having determined the extent of the client's potential jeopardy, you should next identify the information sought by the government. While the summons or subpoena are helpful in that respect, it may be that the summons is overly broad or so general as not to identify with precision the information actually sought by the government. In any event, it is well worth the effort involved to meet with the government to discuss whether the government is actually interested in all of the materials sought by its summons or subpoena.

It is in this area that a knowledge of the agency's enforcement power is helpful. If the agency's summons is not self-enforcing and the agency is required to go to court for an enforcement order, you have some leverage to apply in negotiating reasonable modifications in the scope of the summons. The agency attorney should know that the court to which the agency must go for an enforcement order will have concerns about the validity and scope of the investigation. The court may inquire as to

whether the investigation is properly authorized; the court may also inquire into whether the investigation is being pursued in good faith for a proper purpose; *United States v. La Salle National Bank*, 437 U.S. 298 (1978). Finally, the court may address the scope of the subpoena relative to the agency's lawful investigative purpose. Such an enforcement hearing may require the investigative agency to divulge information critical to the client's defense at an earlier stage than the agency desires.

For all those reasons and more, government counsel should be anxious to avoid an enforcement proceeding. Those government disincentives to litigate create negotiating leverage, which, fairly and honestly exerted, will often lead to a modification and moderation of the summons from one that is overly broad to one that is fair to your client.

Unfortunately, the same leverage does not exist as regards grand jury subpoenas, which are self-enforcing. That is, non-compliance with a grand jury subpoena is punished by contempt which may be punished by im-

prisonment or fine until such time as compliance is effected.

A criminal investigation of a business enterprise is almost always conducted via the grand jury. Police agencies, with very limited exception, have no power to compel testimony or to compel the production of documents or witnesses.⁵ Accordingly, prosecutors investigating business crime utilize the grand juries. Such investigations are almost always federal investigations because the limitations upon the county grand juries in the State of California are such that they are not nearly so effective at criminal investigations as federal grand juries. Each county of California has but one grand jury and each grand jury has both civil and criminal functions. Accordingly in a county as vast as Los Angeles, the grand jury is simply not an effective agency for investigating business or economic crime.

The powers of the federal grand jury, however, are considerable. Under Rule 17(a) of the Federal Rules of Criminal Procedure a grand jury subpoena may seek "books, papers, documents or other objects . . ." as well as testimony. A grand jury subpoena may be served upon anyone and may be used to compel the production of any person as evidence. *United States v. Nixon*, 418 U.S. 683, 702 (1974). Failure to comply with a grand jury subpoena is punishable by contempt.

Where a subpoena seeks the protection of documentary evidence, the subpoena is often unduly broad. The mere breadth of the subpoena can impose significant burdens on the party served with the subpoena in gathering and organizing the material called for. Where a subpoena is not sufficiently particular or where it imposes an unreasonable or oppressive burden on the subpoenaed party, Rule 17(c) of the Federal Rules of Criminal Procedure provides the subpoenaed party a remedial motive to quash or modify the subpoena. The existence of the Rule 17(c) remedy also provides a standard against which the subpoenaed party may negotiate modifications of the subpoena. Again, an early conference with counsel for the government and an understanding of the issues should enable counsel to achieve a modification of the subpoena through negotiations.

Constitutional and evidentiary privileges apply to materials sought by grand jury subpoenas. Thus, the party's Fifth Amendment right may be asserted in bar of testimony and in certain instances to protect documentary evidence against disclosure. The attorney/client privilege and the work product doctrine are also available and, prior to their production, all documents should be screened to cull out those documents which contain confidential communications between client and counsel.

In some instances the attorney may be served with a subpoena seeking production of his or her files related to the client under investigation. Both the attorney/client privilege and the work product doctrine are available and may be asserted to protect against disclosure of the client's papers as well as the attorney's own work product.

Where the client's papers are in possession of the client's attorney they may be subpoenaed without violating the client's Fifth Amendment rights. However, if the client had a Fifth Amendment privilege in the papers and their transfer to the attorney for the purpose of obtaining legal advice, then the attorney could assert the attorney/client privilege in behalf of the client to protect the confidential character of the records. *Fisher v. United*

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Using Volunteer Lawyers As Settlement Judges: A Case History

EDITOR'S NOTE: Using volunteer lawyers as settlement judges is gaining growing acceptance. The Los Angeles County Superior Court experimented with the idea during the Olympics; The United States District Court for the Central District recently announced it will establish such a permanent program. Yet, the Orange County Superior Court has already used lawyers as volunteer settlement judges for the past seven years. Here are the impressions of one lawyer who has acted as a volunteer settlement judge in that program:

At approximately 8:30 a.m., I trudge into the Department to which I have been assigned and introduce myself to the court clerk. I remind the clerk that I cannot even spell the words "personal injury," let alone settle a case involving a beast of that description. The clerk hands me the file on a business case. Clipped to the top is a court form for me to fill out at the conclusion of the Conference on that case. The form vaguely resembles a Czechoslovakian Customs Declaration with the concomitant clarity attendant thereto.

Joseph A. Wheelock, Jr. The clerk then assigns me to a nearby cell (jury room, attorney conference room, etc.) for the day. I take the file to my cell and spend the next 15 minutes hunting up an ashtray. I then peruse the file, making whatever notes may be appropriate. Next I repair to the courtroom and announce: "Are counsel here on X v. Y?" Invariably, there is an earth-shattering silence. I spend the next 5 to 10 minutes locating counsel, one of whom is downstairs buying something from the cafeteria or the magazine store and the other of whom is closeted in a phone booth trying to negotiate a reduction of support payments with his ex-wife. We all then return to my cell, where the Mandatory Settlement Conference commences.

I usually talk to both counsel together before talking to them separately. The Conference on a given case lasts anywhere from one-half hour to two hours or more. If no settlement occurs, I send counsel downstairs to obtain a Trial Setting Conference. If the matter does not settle, I discuss the mechanics of the settlement to ensure that all parties are in accord and then send them on their merry way. In either event, I then attempt to fill out the Czechoslovakian Customs Declaration in some appropriate manner or better yet, give it to the clerk, tell him or her what happened, and let the clerk wrestle with that form.

There is no question but that the Orange County program has been an unqualified success. The fact that the settlement rate for Conferences handled by attorneys as compared to Conferences handled by Judges has been equal over the years speaks very loudly in that regard. In effect, by using attorneys as settlement judges, the

Court has tripled the manpower (two attorneys and one Judge versus one Judge only) and, at the same time, maintained the same settlement efficiency rate.

In my opinion, an attorney brings some things to bear as a settlement judge that a regular judge does not. True, the attorney has not been ordained by the State and does not wear a black robe. The attorney, therefore, cannot knock heads as effectively as a judge. In the same manner, the attorney in some cases cannot persuade counsel for the parties as effectively as a real, live judge that the way he sees the case is probably the way any real, live judge is going to look at it at trial.

That drawback aside, however, I believe that, on the whole, attorneys bring the following things to a party of this nature that a Judge does not:

First, the Judges who handle MSC's have in many cases been doing so for years. Although many of them enjoy this aspect of their work, a certain amount of ennui cannot help but set in. For the attorney, on the other hand, acting as a settlement judge is something new and different. Consequently, I think it is probably true in general that the attorneys bring a certain degree of élan to the process that may otherwise be lacking.

Second, I think that attorneys, as compared to judges, are more experienced in looking at a case in the same way as the parties' counsel. All of have been, and continue to be, in the same seat as the counsel with whom we are conducting the Conference. We are used to applying the type of cost-benefit analysis which is particularly helpful in focusing on what is at stake in a given case, and I suspect that we are probably better than most of the judges in applying a quantitative analysis to a business litigation.

In addition, I suspect that many attorneys bring more informality to these Conferences than the judges do. I know that I do. A judge is very mindful of the dignity of his or her office and of the need not to prejudge a case. An attorney is obviously not in the same position. The attorney is freer to use his or her personality to elicit from counsel a more in-depth analysis of the respective positions. In the same manner, I believe that attorneys are probably more successful in evoking more candor from counsel.

Finally, there are a number of settlement judges, as we all know, who will go to practically any length to settle a case.

Many of us have had the experience, for instance, of suing on a promissory note signed by the defendant and witnessed by several Bishops where the defense is that the amount in the controversy was really intended to be a gift, and, accordingly the defendant under no circumstances will offer more than "nuisance value." It is not unheard of in cases such as this for you, as the plaintiff's counsel, to be hammered by the settlement judge to reduce your offer. I really doubt that any attorneys acting as settlement judges take this approach.

Let's face it: there are some cases which *should* be tried. One of my fondest recollections as a Pro Tem is telling counsel for one of the parties that his settlement offer was an eminently reasonable one, that he should not budge from it, and that he should try the case if the other side did not meet it. The other side did not meet it, and I happily sent both counsel to Department 1.

The program is not totally free from problems, however. Although there is some communication between the

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States, 425 U.S. 391 (1976); *United States v. Osborn*, 561 F.2d 1334 (9th Cir. 1977).

All of the above steps precede the actual production of documentary evidence and/or testimony in the investigation. Properly employed, they may narrow the inquiry but they are not likely to halt the investigation. Most investigations are subject to Newton's first law: once started they tend to continue in motion. For that reason, you should, from the very outset of the government's investigation, make an independent factual investigation. The defense investigation should commence as soon as you are armed with knowledge of the purpose of the government's investigation and its area of inquiry. In the absence of a defense investigation, you will be unable to adequately represent the client as the government's focus becomes more specific or as investigative directions change.

A defense inquiry into the facts and understanding of the facts is the single most important ingredient to a successful representation of the client's interests in the investigation. An effective defense investigation absolutely requires that every document which is turned over to the government has been reviewed by you and that you interview those officers and employees of the client who have any responsibility concerning the affairs under investigation.

Under *Upjohn v. United States*, 449 U.S.383 (1981), the communications of a corporation's officers and employees to counsel for the corporation conducting an investigation are protected by the attorney/client privilege against external scrutiny. This is so because "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." That is, to the extent interview memoranda or other notes are prepared as a result of interviews of the officers and employees of the corporate client against discovery by the government, they are protected by the attorney/client privilege.

Interview and other investigative memoranda may also be protected as attorney work product. The protections afforded the confidentiality of such materials are greater under the work product doctrine than under the attorney/client privilege. Thus to the extent any written materials generated during the course of a defense investigation contain the observations, value judgments, witness assessments and other evidence of counsel's mental processes, a higher degree of protection will be afforded such materials. In *Re Grand Jury Proceedings (Duffy)*, 473 F.2d 840 (8th Cir. 1975). For that reason, some attorneys routinely include their assessments of witnesses' credibility in interview memoranda. Best, *The Work Product Doctrine in Criminal Cases*, ABA Litigation, Summer 1978.

All the above steps are no different from your response to any threatened litigation against your client: You should review the claim. Through contact with the adverse party, you should attempt to determine what relief the adverse party is actually seeking. You should determine the resources available to the adverse party in pressing his or her claim. Once that basic intelligence is developed, your particular response to the investigation may depend upon whether the investigation is a criminal or administrative investigation. That is, immunity against prosecution of individual targets or subjects might be an attractive inducement to cooperation in a criminal case. On the other hand, if the probable remedy in an adminis-

trative proceeding would be an order that the client take curative steps which the client has already taken, there would be little incentive to cooperation.

The administrative or criminal investigation poses a danger to counsel which is not present in civil litigation, i.e., exposure to allegations of obstruction of justice.⁶ For that reason, the defense investigation should be conducted in a manner that ensures counsel will not become the focus of the investigation.

Under the recently enacted federal Victim and Witness Protection Act of 1982 (18 U.S.C. 1512), it is now a federal crime to seek to influence a witness' testimony through "misleading conduct toward another person" and to "harass another person with the result that someone is hindered or dissuaded from testifying or providing information to federal investigators. This statute applies regardless of whether formal proceeding is pending. A witness interview which involves refreshing a witness' memory or pointing out inconsistencies with other evidence could easily be seen as an effort to influence testimony under the statute. That the attorney conducting the interview was seeking only to learn the truth and encouraging the witness to testify truthfully is merely an affirmative defense to a prosecution under the act.

Having a witness present during witness interviews affords a measure of protection. If the subject of the interview is to remain privileged as attorney work product or under the attorney/client privilege, the witness to the interview must be an attorney or have been engaged by the attorney to assist in preparing for litigation.

Moreover, your pre-submission review of the client's paper evidence should be well documented. Maintaining a log of when the documents are received and reviewed and preparing an inventory of all documents received is likely to protect against any allegations that counsel destroyed any documents.

In organizing documents for submission to the government, it is important to prepare copies of all documents prior to their submission. Having a complete set of such documents is a critical part of the monitoring process. It enables you to better prepare witnesses for their testimony and to uncover holes in the government's theory of the case.

The attorneys representing other subjects and/or witnesses in the investigation should be consulted to learn of other aspects of the investigation which may not be apparent from the subpoena addressed to one's own client. To the extent such communications are necessary to the joint defense of the respective clients, they are covered by the joint defense attorney/client privilege. See, O'Neill, *Joint Defenses in Investigations and Litigation*, Practising Law Institute, 1982.

The defense of a client in an investigation is not unlike the representation of a client in civil litigation. Effective representation requires understanding the adverse party's powers and objectives and careful attention to information produced. If any one star can be a guide, it is that the constitutional implication of evidence production must always be kept in mind. An unwitting waiver of privileged material can lead to loss of license, a remedial order which effectively terminates the client's operations or even an indictment.

—Brian O'Neill

1 Rule 17, Federal Rules of Criminal Procedure.

2 Business & Professions Code 11759.

3 15 U.S.C. 1131.

4 12 U.S.C. 1820, 12 C.F.R. 308, subpart F.

5 A notable exception exists in California which provides the District Attorney the power to subpoena witnesses and documents in connection with investigation into potential Cartwright Act violations (Business & Professions Code 16759).

6 18 U.S.C. 1505 and 1512.

Book Review: The Not-So-Handy Lawyer's Handbook

Is the law funny?

Not really. Anecdotes recounting occurrences within the legal system may be funny.

For example, a colleague of mine was making final argument to the late Honorable Leon Yankwich, a Federal District judge in the Central District. Judge Yankwich was short of stature and had the habit of slouching in his chair or bending over his books while on the bench, which made him invisible from the lectern. Caught up in his argument and his notes, my colleague looked up only to see the apparently empty bench.

"Where's the little bastard gone now?" he muttered quietly. "I'm right here behind you," said the judge, who had come down from the bench to see an exhibit. "Please proceed."

The Official Lawyer's Handbook
By Robert White, Esq.
Simon & Schuster, New York, \$5.95

Then there is the perhaps apocryphal story of the late Honorable Thurmond Clarke, Chief Judge of the Central District, stepping down from the bench to punctuate his evidence ruling with a punch in the nose of the still arguing counsel. The two slugged and wrestled their way down the aisle and out the courtroom door before being separated by the bailiff. Judge Clarke then smoothed his robes, took the bench, nodded to his recent sparring partner, and also said, "Please proceed."

Till now, humorous anecdotes about real people have been the spine of judicial humor. But can the practice of law itself, the system and methodology of becoming and performing as a lawyer, be funny? Are philosophy, religion, government, any system devised to moderate human behavior, inherently funny?

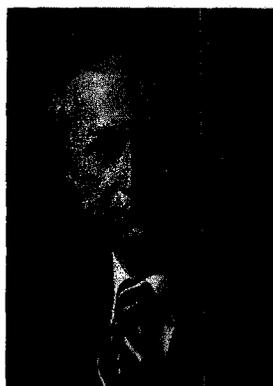
Not really, or so the author of *The Official Lawyer's Handbook* appears to have discovered about twenty percent of the way through this new nonbook. Apparently conceived as a pastiche of cartoons, burlesques, and parodies about the practice of law, the *Handbook* rapidly turns into a handbook (as in *The Official Boy Scout Handbook*) and purportedly tells the reader how to do it: how to get into law school; how to get through law school; how to get a job; how to make partner.

Unfortunately, it also tells how not to do it; how to bluff your colleagues; how to bamboozle the partners; how to cheat on your timesheets; how to overcharge your clients. If these prescriptions are offered for their humorous, rather than instructive, nature you would never know it. For example:

"In reporting meetings or conferences on your time sheets, never just say 'Attended meeting with general counsel of client - 2 hours.' If a partner was there, he may have recorded the

meeting on his time sheets as lasting only 1 1/2 hours . . . Always say 'Prepared for and attended meeting with general counsel of client - 2 hours.' Those three extra words, which don't cost you anything, could make all the difference."

Those extra words don't cost you anything, but those extra minutes probably cost the client fifty bucks. Maybe that's the funny part.



Thomas J. McDermott, Jr.

Under the title "Ten Ways to End a Legal Career," the *Handbook* includes nine knockouts, all in the same key as No. 7:

"Score with a secretary that a senior partner has been unsuccessfully putting the moves on for months."

Unfortunately, a tenth way to end a legal career is:

"While defending a client in a deposition, tell him he has to answer the other lawyer's questions truthfully."

I suppose young associates are expected to see the hilarity in such an absurdity. Other litigation advice includes:

"The litigator's role in this system is to help his client obscure and obstruct."

and

". . . a litigator shouldn't be someone who embarrasses easily or thinks a lot about the result of his life's labors. However, a lot of young lawyers get sucked into litigation because that's all law school has really taught them to do."

That last phrase may be the funniest quip in the book but one senses it was unintended.

Since I started practicing law in 1958 ("Gee, Gramps, did they have a Civil Code then or did you keep it all in your head?"), one may suspect that I am not sensitive to modern judicial humor, or modern humor of any sort for that matter. But although I was weaned on Thurber, Gibbs and Leacock, I've done my time with Saturday Night Live, Animal House and the National Lampoon. Food fights and flatulence have not become my model for keen-witted jesting, but I get the point.

One thing that is common to all of the humor noted above, but not to the *Handbook*, is a consistent point of view. You cannot mix burlesque, parody and silliness with self-help advice, some sound, some rotten, and expect it all to come together. As I read, I often wanted to ask, "Is he kidding?" That is not good for a book of humor.

Who should scan this book? ("Read" would be over-stating the effort.) Certainly not lawyers with any experience, who will be either uninterested in, or horrified by, what comes off as "advice." Certainly not lawyers with any sense of humor, because much of the humor is of the summer camp type — "run to the bathroom and vomit" is the right response to many legal vagaries — and the sharper told burlesques are well known. Perhaps college graduates contemplating a legal career, or law students, or first-year associates with strong moral values are the proper audience.

Let us all hope that not too many clients come across it.

—Thomas J. McDermott, Jr.

The Orange County Superior Court Settlement Program

At the present time, the road to trial in the Orange County Superior Court begins (as it does in all Superior Courts) with the filing of an At-Issue Memorandum. Within approximately three months thereafter, a Status Conference is held in Department 1, at which time the Presiding Judge determines whether the case should be assigned to mandatory arbitration.

If the case is not so assigned, the Presiding Judge sets a date within two or three months hence for the first Mandatory Settlement Conference. If the case is not settled at the first MSC, a Trial Setting Conference is set within three to five months thereafter. The TSC is a temporary phenomenon at this time due to the inability of the Court presently to set trial dates within 90 days after the first MSC. At the TSC, a trial date is set within 90 days, and a second MSC is scheduled several days prior to the trial. The second MSC is normally conducted by a Judge, although voluntary attorneys are used from time to time if one or more of the five Judges who handle this type of pre-trial MSC are absent from the court.

Volunteer attorneys were first used in Orange County Superior Court in connection with MSCs in 1977. Prior to June, 1984, the Court set aside an entire week every three months as "Settlement Week." During Settlement Week, the Judges assigned to civil trials handled nothing except these MSCs. The Court compiled a list of attorneys over time who were interested in participating in the program.

Several months prior to each Settlement Week, the Court notified the program attorneys by letter that they were invited to participate as Judges Pro Tem for that particular go-around. Two attorneys were assigned to each Department which handled MSCs. A further group of attorneys were assigned to the bullpen in Department 1 as backup in case of cancellation by an attorney assigned to a Depart-

ment, unexpected overload, etc.

Since June, 1984, the Court has dispensed with Settlement Week. These initial MSCs are now held every Friday. Most of the judges assigned to civil trials participate in them. In addition, a particular Judge is assigned for six months at a time to Department 4 to do nothing other than MSCs. The Court now requests the participation of settlement attorneys by telephone, with three to four being assigned to each Department. The expectation is that, due to scheduling conflicts and the like, only two attorneys per Department will actually be able to handle the assignment.

There are presently 300 to 350 lawyers who participate from time to time in the program. There are no formal prerequisites to such participation. Instead, the lawyers are selected on a volunteer basis with informal screening to ensure that they are capable of performing the task of a settlement judge.

The present settlement rate of cases at the first MSC is approximately 17% — down from 35% several years ago. This decrease in the settlement rate is attributable to the fact that the first MSC is being held much earlier in the case than it used to be. As a result, it now frequently occurs that counsel for the parties are not in a position to discuss meaningful settlement at that time. Various efforts are being undertaken by the Court to ameliorate this situation.

The most important and interesting statistic of all: throughout the history of the program, the settlement rate of the cases at the first MSC that are handled by an attorney as Judge Pro Tem has been equal to the settlement rate of such cases handled by a Judge.

—Joseph A. Wheelock, Jr.

My thanks for some of the material go to Judith Cobb, Master Calendar Coordinator for the Orange County Superior Court.

Using Volunteer Lawyers

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Court, the individual judges and the settlement attorneys concerning the policies that they are presently attempting to implement and what tools should be used to effect that result, this communication has not been as frequent or effective as it could be. For instance, it is not clear under what circumstances the Court wants the settlement attorneys to involve the judge in a particular case. It is also not clear precisely what alternatives are available to the settlement attorney in various situations, such as, for example, one in which he or she believes that a settlement can probably be orchestrated between the parties once a certain limited amount of discovery is completed. In other words, supervision of the program, both by the Court in general and by the individual Judges on a Department by Department basis, could be improved.

I firmly believe that the next step is for the Los Angeles Superior Court and the U.S. District Court to consider seriously implementing a program such as the one I have just described. The experience in Orange County has been too good to let it remain localized.

—Joseph A. Wheelock, Jr.

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December Dinner Meeting

Bankruptcy court litigation is the subject of the next ABTL dinner meeting scheduled for December 11 at the Hyatt Regency Hotel.

Bankruptcy Judge Barry Russell is the featured speaker in a program organized by Tom Garcin of Sidley & Austin.

Letter from the President

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that we have too much litigation. He observes that the proponents of this view rely on indicators that provide very little information or guidance. Typical of the evidence offered to prove that we are an over litigious society are the following:

1. Growth in the filings in federal courts;
2. Growth in the legal profession;
3. Accounts of monster cases such as the AT&T and IBM anti-trust cases;
4. Stories about bizarre and high publicity cases, e.g., child sues parent for "malparenting," sports fans sue officials and so forth; and
5. Personal accounts by members of the business community and other institutions of how litigation has impinged on other institutions, e.g., school busing cases, airport noise cases, offshore drilling, etc.

As for case filing statistics, Professor Galanter points out that even though there has been a dramatic rise in federal court filings, the absolute rise has barely kept pace with population growth. Moreover, 91% of the cases are settled and the number of cases terminated per judge has been steady since World War II. He also points out that an historical perspective shows that recent litigation growth rates are about half of what they were during the early 19th century. By itself, a statistical analysis of filing simply does not support the conclusion that ours is a contentious society pursuing meritless cases bringing the judicial system to its knees.

Professor Galanter further emphasizes that it is a myth to believe that the courts are jammed with monster antitrust and class action suits. Likewise, the horror stories pointing to the bizarre and aberrant cases which seem to be out of sync with popular values are not so common and are nothing more than oddities providing interesting mediafare. As such, these cases tend to perpetuate a false impression about most litigants, litigators and trial judges.

Joining Professor Galanter in dispelling the litigation explosion thesis is Andrew Barlow, a sociologist and faculty member of the University of California, Santa Cruz. His article, entitled "In Defense of Litigation," published in Vol. 10., No. 2 of *Bar Leader*, September-October, 1984, concludes: "The 'litigation explosion' myth provides a thoroughly distorted explanation of U.S. society's increasing use of the law. Unfortunately, this is the explanation most widely reported in the media, as its advocates are among the most important lawyers in the country. As a result, public opinion has begun to reflect this mistrust of litigation. A Gallup poll conducted last Fall found that 76% of respondents believe that lawsuits are justified half the time or less. And, without recognizing his own roll in creating this view, Chief Justice Berger lamented in his speech to the ABA last February that the public's opinion of lawyer's status has been slipping lately.

Mr. Barlow identifies the same weaknesses in the assumptions and premises that are offered in support of the "litigation explosion" thesis as does Professor Galanter. He contends that growth in litigation is both healthy and explainable. From his perspective, rising litigation rates result from changes in the types of conflicts that have arisen in our society. He relies on the observations of Judge Bazelon, Senior Judge of the U.S. District Court of Appeals for the District of Columbia, who argues that more litigation is the result of recent expansions of causes

of action in response to structural changes in American society. Mr. Barlow concludes that the major growth in litigation today is in three areas: domestic disputes, torts and public law. These claims do not so much indicate a contentiousness on the part of society as they do a recognition that more people should and do have easier access to the courts than have ever had it in the past. Much of this new litigation simply responds to important new social problems or represents belated efforts to implement the concept of equal justice for all.

These commentaries by Professor Galanter and Mr. Barlow are supplemented by continuing studies and research about the American judicial process. One of the more distinguished studies carried on locally is conducted by the Institute for Civil Justice, established by the Rand Corporation in 1979. These and similar studies analyze the characteristics of litigation that contribute to delay, inordinate expense, inflated jury awards and consider systems for encouraging compromise and settlement. All of these issues are proper subjects of concern, but need not result in the conclusions urged by the proponents of the "litigation explosion" thesis. Without full and complete analysis as to the actual causes for increased case filings, no one can say whether there is too much or too little litigation.

As for now, trial lawyers would do well to question these indictments, support the American trial process and work only for changes that are clearly justified. In short, the trial bar must not retreat from the accusations of its critics but should test the assumptions and premises of those who would change a system that has served this country so well.

More importantly, trial lawyers should not join in the chorus of our detractors, but should challenge the validity of such claims. To do less will surely result in a continuing decline of the public regard for lawyers. This is an issue which properly concerns the ABTL and all other bar associations.

—Charles S. Vogel

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