ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

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State vs. Federal Court: A Lawyer's Perspective

Federal or state court — where do you file?

This threshold question confronts every lawyer whose case is subject to concurrent jurisdiction. The choice often is crucial both to the progress and outcome of the suit. Forced to elect between the Scylla of a federal tribunal and the Charybdis of state court, one should carefully balance the myriad factors involved and not rely solely on divining rods or the family talisman.

Here — in no fixed order — are the principal matters you should consider in deciding whether to go state or Federal. (Obviously, not all of these factors apply to every case.)

Nature Of Case. Some actions naturally lend themselves to being tried in a given forum. The wealth of experience possessed by federal courts in handling anti-trust and securities fraud cases augurs well for filing there, even when analagous state statutes exist that theoretically entitle a plaintiff to equivalent relief. For example, only a comparative handful of cases interpret the California counterpart of the U.S. securities laws. When such violations are asserted, lawyers instinctively head to the federal courts where U.S. statutes enjoy a long and full-bodied history.

Benjamin E. (Tom) King

In these areas the federal courts are the voice of experience, and also are far more effective in sorting out the often complex factors that are inevitably involved. Yet, if a claim is based on unfair competition as well as an anti-trust violation, but proof of the latter is thin or difficult, plaintiff may be wise to opt for the state court, concentrating strictly on the common law claim.

Ambush by Counterclaim. By filing in state court, a lawyer may as a practical matter discourage or prevent a defendant from invoking a harsh federal remedy by way of cross-complaint or counterclaim. Thus, if diversity exists and plaintiff nonetheless elects to bring a breach of contract action in a state court, the case may remain there, and the defendant may countersue for common law fraud and other relief. However, had federal jurisdiction been invoked the defendant may elect to file a counterclaim under the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. §§1961, et seq.), or the

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Supervising Judge Explains New Law and Motion Rules

You've been going at 110%. You're pushing everyone around you. Finally, you arrive at the point that you're almost on top of things. The phone rings. It's a client you can't put off, telling you that his secretary just received a call from some lawyer who says that he's going to be in Department 85 or 86 at 1:30 that afternoon to get an injunction that will shut his operation down. He wants you to get over there and do something. Anything.

So you go. At 1:30 other counsel hands you 3½ inches of documents headed by a proposed TRO/OSC. From the looks of it, you know that his office has been preparing for this moment for weeks. You've had about two hours real notice and only the barest opportunity to be briefed by your client. In a few minutes you have to face a judge empty-handed, opposing an order that might have catastrophic results to your client.

Hon. Norman L. Epstein

Sound familiar? Vary the scenario just a little and you have a situation faced by hundreds of lawyers every year.

Regardless of the plaintiff's entitlement to a provisional order, the unfairness of the last minute notice is beyond dispute in most cases. But temporary restraining orders may be given ex parte, and, taken literally, that implies no notice at all. Up to now, the Los Angeles Superior Court Law Departments Manual has called for four hours notice in most cases.

Judge Lawrence Waddington and I were struck by the unfairness of this minimal notice during our assignments to the writ courts in 1984. We proposed a change to lengthen the notice time to one day, then conducted an informal survey of attorneys on both sides who appeared at ex parte hearings and among bar groups. The overwhelming number favored a more reasonable notice period.

We realized that in most cases, opposing counsel, or the client, had an idea that a restraining order would be sought. And many attorneys followed a practice of giving opposing counsel more than one-day notice that it was coming. They found that their position was enhanced when the court learned that the opposition was not taken totally by surprise, and that it had had some opportunity

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State vs. Federal Court

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U.S. anti-trust or securities laws — all of which may pose a far more ominous prospect for a vulnerable plaintiff. Had the plaintiff elected to stay on the state level and no petition for removal been filed by the defendant under 28 U.S.C. §1446, those heavyweight remedies, with possible treble damages or attorney's fees might not have been available. In one misguided stroke, the risk to the client has been increased manifold. Plaintiff's overly zealous lawyer has fallen into a trap of his own making.

Risk Of Transfer. The prospect of a motion for change of venue being granted for the convenience of parties and witnesses, pursuant to 28 U.S.C. §14.4(a), is a specter that looms over many federal court filings. Unlike the U.S. judiciary, state courts have no power to remove a case to another jurisdiction. But many federal judges relish such a prospect, for not only may a foreign forum be more convenient, but the judge simultaneously has lightened a heavy caseload. A motion to transfer is sometimes regarded as making the court an offer it cannot afford to refuse.

If transfer is ordered, the consequences can be deadly. The local client is now fighting his battle on alien soil and at increased expense. Further, other counsel must now be engaged in another jurisdiction and the original lawyer likely will be forced to surrender control of the case.

Filing in state court is, of course, no guarantee against transfer since the defendant can remove the case to the U.S. District Court pursuant to 28 U.S.C. §1446. In California this device often is thwarted by listing "Does", or fictitiously named defendants, in the complaint. Since in theory the Doe may be a local resident, the requisite diversity may be defeated, at least until the Does are dismissed. (*Molnar v. National Broadcasting Co.* (9th Cir. 1956), 231 F.2d 684; *Preaseau v. Prudential Insurance Co. of America* (9th Cir. 1979) 591 F.2d 74). Also the right of removal may be lost for other reasons. For example, the failure of all defendants to join in the petition, or file it within the requisite time period, will doom the motion to transfer.

Where State Law Should Be Changed. It is well settled that, under the doctrine of *Erie R.R. v. Tompkins* (1938) 304 U.S. 64, 58 S.Ct. 501, 82 L. Ed2d 1188, state substantive law controls where federal jurisdiction is founded on diversity. From this standpoint, the forum selected should make no difference. But this is not an universal truth.

Where state law is against the client's position, but is outmoded and should be changed, pursuing the claim in state court is preferable. If one files on the federal side, recourse cannot be had to a higher state court to overturn existing precedent. This factor may be decisive where important public policy issues are at stake. For instance, it required action by the California Supreme Court to eliminate contributory negligence as an absolute defense in personal injury cases, invoke new rules for adjusting rights to contribution and indemnity between joint tortfeasors, and make far reaching decisions in the area of products liability. A federal district as well as circuit court would be impotent to change existing state law and judicial reform would have to await another day. (See: *Fidelity Union Trust Co. v Field* (1940) 311 U.S. 169, 61 S.Ct. 176, 8 L.Ed. 109). The opposite course should be followed if plaintiff wishes to rely upon a state appellate-level decision that has outlived its usefulness.

In brief, where the time is ripe to change existing substantive law, the state side is the wiser choice — unless an U.S. constitutional issue is involved that may be attacked directly in the federal court.

Another consideration is how familiar the federal judge is with state substantive law, and how strictly he or she will apply it; similarly, is the state judge sufficiently conversant with a federal law where concurrent jurisdiction exists?

Where State Law Unsettled. If state law is sufficiently unsettled, a federal court may in exceptional circumstances exercise its right of abstention, thereby staying or dismissing the proceeding pending outcome of a state court decision. (*Louisiana Power & Light Co. v. City of Thibodaux* (1959), 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058; cp. *McNeese v. Board of Education* (1963), 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622). This factor is especially pertinent if the issue is of surpassing public significance. Where state precedent is lacking, the federal courts make an intelligent guess, or what Circuit Judge Jerome N. Frank once called a "prophetic judgment." (*Cooper v. American Airlines* (2d Cir. 1945), 149 F.2d 355, 359).

To sum up: avoid federal tribunals where state subtantive law should be wholly revamped or is extremely murky.

Subtantive vs. Procedural Matters. It is often difficult to determine whether a given issue is substantive or procedural, *Erie R.R. v. Tompkins, supra,* and its progeny notwithstanding. Matters that are normally considered to be procedural still will be governed by state law if they will have a substantial impact on the outcome of the case. (*Hanna v. Plumer* (1965) 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8) While questions involving the statute of limitations, presumptions, burden of proof, conflicts, res ipsa loquitur, proper or necessary parties and exhaustion of administrative remedies generally are deemed to be substantive and decided pursuant to state law, a federal court may rule otherwise in a given case. (For a recent illustration of successful forum-shopping where the statute of limitations was critical in a defamation suit, see *Keeton v. Hustler Magazine* (1984), - U.S. -, 104 S.Ct. 1473, 79 L.Ed. 2d 790). Likewise, the right to a jury trial, and rules governing indispensability of parties and class actions, traditionally are regarded as procedural, but might be deemed substantive in a particular situation.

If state law on an overriding issue is clearly in plaintiff's favor, but a close question exists as to whether it is substantive or procedural, the safer course may be to file in state court.

Controversial Cases. With life tenure, federal judges may be better suited to handle controversial cases, particularly if civil rights or similar constitutional issues are involved — and if a taint of local bias remains. Such situations are now rare, but plaintiff must be aware of the possibility a state judge who may lose his or her seat at the next election, will not be as independent, or willing to do the unpopular, as a federal jurist. *Vox populi* can be an intimidating influence. Here, again, the exact nature of the litigation, and the respective abilities of the available judges, will dictate the choice.

Res Judicata And Collateral Estoppel. A federal court judgment is effective for purposes of res judicata and collateral estoppel upon entry of judgment in the trial court. (*Prager v. El Paso Nat. Bank* (5th Cir. 1969), 417 F.2d 1111, 1112). In contrast, many states will not invoke such doctrines until the judgment has become final upon appeal. This distinction can be vital. Hence, if the lawyer wishes to use a favorable outcome to lay issues to rest in

a companion case, the federal route may be more efficient; waiting for an appeal to lend finality to a judgment in a state court can cost a couple of year's delay, or blunt its effectiveness altogether.

Uncertainty About Jurisdiction. Where jurisdiction is doubtful, the state side is safer. Thus, if counsel is not sure of a defendant corporation's principal place of business, plaintiff's complaint may be vulnerable to a motion to dismiss for lack of diversity jurisdiction, or, at the very least, become embroiled in a time-consuming and expensive dispute defending the jurisdictional choice.

Costs. Trying cases before the federal bar invariably is more expensive than in a state court. The intricate and voluminous nature of federal rules and the formality of many of its procedures all account for this (i.e., a court order will be required for routine extensions of time to plead or to respond to a discovery request). The new local rules adopted by the U.S. District Court for the Central District of California are as long as Hammurabi's Code, and almost as strict.

Case Management. Federal judges operate on all-purpose basis, handling cases from birth to burial. Not so in many state courts, including California, New York, and Illinois, where a master calendar system largely prevails, i.e., separate departments exist for law and motion, writs and receivers, and assignment for trial. Like many of the factors discussed here, the distinction cuts both ways. Many lawyers prefer the advantages of an all-purpose judge who becomes familiar with every aspect of the case, believing that system discourages dilatory maneuvers. On the other hand, the master calendar approach sometimes results in speedier decisions, more day-to-day continuity at trial and a tendency toward specialization in issuing writs or learning the nuances of a particular area of civil law.

If plaintiff's case is likely to be decided in law and motion pursuant to summary judgment, by a judge who the lawyer believes will be favorable, then the master calendar may be advantageous, i.e., the judge is known well in advance. In federal court where an all-purpose judge is selected on a random basis, his or her identity is undetermined until the case is filed. The lawyer must decide whether either of the two approaches to case management will likely impact the case.

Time To Trial. The ability to proceed to trial fast can be decisive. Hence, the downtown Superior Court in Los Angeles requires an average of about three and one-half years from filing to commencement of trial, as opposed to less than one and one-third years in the nearby federal courthouse. The extra cost of litigating in federal court may be partially or entirely offset by this two-year advantage. (In New York City, the race to trial seems to have about evened out between the two judicial systems). Generally, in smaller communities the state route is faster, while in large urban centers, such as Chicago and Dallas, the federal forum moves more quickly. This may be one consequence of the all-purpose judge format followed in federal courts.

Client's Peace of Mind. No doubt about it: out-of-state clients prefer the federal forum, with its aura of magisterial impartiality. Even if the state court has an excellent reputation, the lawyer may not be able to convince the client of its lack of bias or provinciality (unless, of course, the client happily prevails).

Historically, diversity jurisdiction was established to provide access to a competent tribunal free from local

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Letter from the President

This is my last letter and I wish to express my appreciation to the many people who have contributed to a successful year.

When I have been asked about how I enjoyed being President of ABTL I always reply, "It is one of the easiest jobs in the world. This is an Association that essentially runs itself." From the President's perspective, the people who really make this organization work are the governors and officers, and we have been especially well served by Elihu Berle, Bob Shlachter and Pat Boltz. As each of us proceeds up the ladder of this organization, he or she takes on the ministerial tasks necessary to the overall operation. By the time you become President you simply have the privilege of presiding at meetings and taking credit for the effort of others. It's really appropriate to end the year by giving credit where credit is due: Messrs. Berle, Shlachter and Boltz and the entire Board of Governors.

Charles S. Vogel

Other important contributions came from Dinner Chairperson Peter Ostroff and Seminar Chairperson Margaret Morrow. We all owe them a vote of thanks for organizing wonderful programs and an outstanding Seminar. Finally, Mark Neubauer has been the man behind the scene, providing the *ABTL Report*. He has performed the task for several years and it is fitting that he has been elected to the Board of Governors.

Finally, I must acknowledge the specific contributions of each person who served as a panelist or prepared materials for our programs. This willingness to share experience, expertise and information with other lawyers is the most substantial contribution any professional can make to his or her colleagues. It is that attitude which is the lifeblood of *ABTL* and I wish to acknowledge each of our panelists by setting forth their names at this time:

Michael A. Diamond
Skadden, Arps, Slate, Meagher & Flom

James E. Lyons
Skadden, Arps, Slate, Meagher & Flom

Brian J. McCarthy
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Honorable Manuel L. Real
Chief Judge, United States District Court

Honorable Barry Russell
United States Bankruptcy Judge

Thomas E. Garcin
Sidley & Austin

Sally S. Neely
Sidley & Austin

Honorable Vernon G. Foster
Los Angeles Superior Court Judge

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prejudice or influence where controversies existed between citizens of different states. The constitutional framers were alert to the apprehensions of commercial investors. (1 *Moore's Federal Practice,* §0.71 [3.-1]) Circuit Judge John J. Parker, referring to diversity jurisdiction, once stated that "No power exercised under the Constitution has, in my judgment, had greater influence in welding these United States into a single nation; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into the various parts of the Union; and nothing has been so potent in sustaining the public credit and the sanctity of private contracts."

Thus, to many lawyers — as well as clients — federal courts have an appearance of objectivity that does not necessarily apply to all state forums. In an era of mass communications and vast interstate relationships, this view would seem to be an anachronism, but it is one that lingers.

Distance To Court. Federal courts typically are situated in large cities, while state courts abound in every county. Thus, a state forum may be closer and more handy for the lawyer and client and, by sheer coincidence, inconvenient for the opposition. (There is, alas, no rule of conduct that bars one from forcing the opponent to travel long distances just to reach the courthouse steps).

Courtroom Decorum. Federal cases invariably are conducted in a stricter, more formal atmosphere. This may be an advantage if the opponent is a savvy, forceful trial lawyer who knows the ropes, since he or she may be held more in check by a federal than a state jurist. Whether this necessarily follows, however, ultimately rests upon the peculiar temperament of the judge who happens to be ruling the roost at the time.

Procedural Distinctions. The differences in procedures are numerous and significant. Here are some that should be kept in mind:

—*Pleadings:* Notice pleading, involving a "short and plain statement of the claim," is the rule in federal court. (FRCP Rule 8(a)). Some state courts, such as Illinois, New York and California, are more stringent, requiring fact pleadings where the elements of each cause of action must be separately and specifically spelled out; thus, if a single set of circumstances gives rise to five different theories of recovery (e.g., breach of contract, breach of implied warranty, breach of express warranty, assumpsit and unjust enrichment), each is typically pleaded in independent counts. Motions for a more definite statement under FRCP Rule 12(e) are not favored in federal court, and it may be easier to plead a complicated case there, using discovery as the vehicle to flush out the underlying details. In other states, such as Texas and Ohio, this distinction does not apply, since the state courts there generally accept notice pleadings.

—*Verdicts:* Civil jury trials in federal courts demand unanimous verdicts absent a stipulation to the contrary. (FRCP Rule 48). In many state courts a verdict is reached if only 9 out of 12 jurors, or some numerical majority, agree. The federal requirement of unanimity can be highly advantageous to a defendant.

—*Jury Panel:* A federal jury panel is often selected from a wider and more diverse area, and better suited to unraveling the complexities of sophisticated litigation. Some practitioners believe it is comprised of persons of better socio-economic status who tend to return more generous awards than is true of state jurors. Also, no jury fees are required in federal courts.

—*Voir Dire:* In the federal forum, jury questioning is customarily conducted solely by the judge. State judges traditionally are more liberal in permitting counsel to examine prospective jurors. This coincides with the overall view that federal judges run a tighter ship.

—*Jury Instructions:* Unlike federal practice, an automatic exception exists in some states where a misleading or erroneous jury instruction is given. Under FRCP Rule 51, the error is waived unless counsel objects before the jury retires, distinctly stating the matter to which objection is made and grounds therefor. This difference can be extremely important.

—*Disqualification of Judges:* Drawing the "wrong" judge, e.g., one who has a recognized and long-standing bias against plaintiffs or defendants, can be devastating. Theoretically, a federal judge may be disqualified from hearing a case upon the filing of an affidavit of prejudice, setting forth the facts and reasons. (28 U.S.C. §144). In practice, this device is so strictly construed that its use is rare. (Wright, Miller & Cooper, *Federal Practice and Procedure,* Jurisdiction §§3542, 3551; *Roussel v. Tidelands Capital Corp.* (D.C. Ala. 1977), 438 F.Supp. 684). State practices vary. California and llinois permit one automatic disqualification per case, without a showing of cause; New York and Texas do not. An unfettered right to disqualify can be valuable.

—*Discovery:* Federal discovery is broader, more expeditious and easier to conduct than in some states. Technical objections that impede discovery usually are less tolerated by federal jurists. This results partly from the widespread use of magistrates to decide discovery disputes. Magistrates are specialized enforcers; one of their main functions is to prevent dilatory tactics. They get to know the nature of the case and the attorneys intimately, and can be very effective in keeping a suit on track.

Further, out-of-state depositions of non-party witnesses may be taken in a federal case with a minimum of fuss and without the necessity of a prior order (the clerk merely issues the subpoena under a miscellaneous number). In contrast, in state courts, a commission or letters rogatory must first be obtained on motion — a straightforward procedure to be sure, but one that may be time consuming if a sizable number of foreign depositions is anticipated.

—*Indispensable Parties:* The necessity of joining an indispensable party during the course of the litigation may destroy diversity in federal court, resulting in dismissal of the case and forcing the plaintiff to start anew in state court — with attendant delay, cost and embarrassment.

—*Joinder:* Naming additional parties in a federal suit requires court permission; not so in a state where fictitiously named parties are used. On the whole, however, joinder in federal courts is generously allowed.

—*Relation-Back:* The relation back doctrine, where a new party is affected by an amendment to the pleading, is specifically governed by FRCP Rule 15 (c). The key issue, usually involving the statute of limitations, is whether the party to be joined has received notice of the institution of action such as will prevent prejudice, and knew or should have known that, but for a mistake concerning identity, the action would have been brought against the party. (See *Korn v. Royal Caribbean Cruise Line, Inc.* (9th Cir. 1984), 724 F.2d 1397). Various states laws differ on this point and may be more restrictive. Here, again, in jurisdictions such as California where the use of Does is prevalent, the relation back doctrine normally protects plaintiff against the possibility that the statute of limitations will expire before the newly discovered party is added — regardless of whether the party knew of the action or can show prejudice. The ability to sue Does thus can be of paramount importance where the identity of all prospective defendants is not known to plaintiff at the outset, and expiration of the limitations period is imminent.

—*Cross-Actions:* Cross-actions, such as third party complaints, may be more restricted in federal courts. A third party complaint is allowed only if the newly joined person is or may be liable for all or part of plaintiff's claim against defendant, i.e., via contribution or indemnity. (FRCP Rule 14). Some states permit third parties to be joined if the facts alleged merely possess a transactional nexus with the original complaint.

Additionally, under FRCP Rule 13 counterclaims against plaintiffs and cross-claims against co-defendants are limited to matters arising out of the same transaction or occurrence. This raises a double-edged consideration, for it may or may not be to the plaintiff's advantage to allow a third party defendant to be impleaded. On the one hand, such joinder may make the case unwieldy, and slow down its progress; yet, the prospect of more defendants (including third party defendants) being forced to share the burden of an adverse verdict may promote settlement.

—*Injunctions:* Obtaining appointments of receivers and injunctions often is easier in state courts where the judges may not impose as heavy a burden of persuasion on the applicant. On the other hand, federal practice specifically allows consolidation of a hearing on preliminary injunction with a trial on the merits (FRCP Rule 65(a)2). This expedited procedure can be invaluable to a plaintiff and put maximum pressure on a defendant.

Findings of fact are required for preliminary injunction proceedings under FRCP Rule 52(a). Many state courts have no analogous requirement.

—*Stays:* As previously noted in discussing the doctrine of abstention, federal courts occasionally abate an action pending the outcome of a related state court proceeding. Yet, under 28 U.S.C. §2283, a federal court may not stay proceedings in a state court, except as expressly authorized by an Act of Congress, where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. In consequence, a pending state court proceeding is rarely enjoined by a federal judge, but the federal court may stay its own suit. Thus, where counsel protectively files parallel actions in both federal and state courts, based upon the same set of facts, the federal case may simply be sidetracked. (But see: *Silberkleit v. Kantrowitz* (9th Cir. 1983), 713 F.2d 433.)

Evidence: In general, federal courts are liberal in admitting evidence. The Federal Rules of Evidence, in effect since 1975, depart from state rules in many material respects, however, and can have a direct bearing on the outcome of a particular case. Consider:

—*Hearsay:* Evidence Rule 803, after setting forth 23 specific exceptions to the hearsay rule, provides an across-the-board exception if the testimony has "equivalent circumstantial guarantees of trustworthiness" and other prescribed criteria are met. Also, prior inconsistent statements under oath are treated as substantive evidence and not admitted merely for impeachment. Evidence Rule 801(d)

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New Law and Motion Rules

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to prepare a response. But the more prevalent practice was to give as little notice as possible.

The problem this presented was greater than unfairness to the other side. The fairness of the adjudication itself was diminished when only one side was fully prepared for the hearing.

The result is a change in what has become known as the "four hour rule." Cal. Rule of Court 379 requires a party seeking an ex parte restraining order to notify the opposing party "a reasonable time" before the ex parte hearing. Section 405(c) of the new Law Department Policy Manual requires that "[a]dvance notification should be given by noon of the court day preceding the day on which an ex parte order will be sought." A shorter period is permitted only on a showing that the regular notice could not be given, and that the notice that was given was as much as possible.

The rationale for requiring notification by noon of the preceeding court day was that it would give an opponent at least two major blocks of business time — the following afternoon and morning — for client and counsel to meet and prepare.

As before, the notice may be oral or in writing, and should include the nature of the relief sought. (Section 405(b).) Besides noticing the party against whom the relief is sought, the moving party should also notify all appearing parties in the suit, as well as nonappearing parties, not in default, who the moving party knows have been served. (Section 405(d).) The court will not consider a request for a temporary restraining order unless the prescribed notice has been given, unless facts are shown by declaration or affidavit that support the conclusion that notice could not be given, or that there are proper reasons not to require it. (Section 405(e).)

The above provisions are applicable on a county-wide basis.

The typical case in which a lesser notice than noon of the day before will be allowed is that of an imminent or ongoing destruction of plaintiff's property. The typical case in which advance notice is excused is that of a defendant who is apt to secrete the asset the injunction seeks to preserve — like the defaulting trustee who is likely to clean out the bank account and decamp for parts unknown.

Even where the court is satisfied that a restraining order should be issued without advance notice, it is a common practice to issue it for a period of a few days only, with a requirement that an extension to the full TRO period (15 days or, if good cause is found — and it usually is — 20 days; C.C.P. 5527) be conditioned on immediate notice of the order and a further ex parte hearing for which advance notice is given.

The new provisions do not go as far as fairness might indicate in many cases. The opposing party (or counsel, if known) must be notified, but it is not necessary to serve the moving papers or even to make them available for that party to pick up by messenger. But they do provide a more realistic opportunity for the party to notify counsel, and for the attorney to get a pretty good idea of what he or she will have to confront before walking into court.

The change in the ex parte notice provision is the most important substantive change in the new Law Department Policy Manual for the Los Angeles Superior Court. The new Manual became effective in the Central District and all branch courts on July 1, 1985. A redraft was necessitated by the new "law and motion rules," issued as Rules of Court by the Judicial Council. It is no coincidence that these rules are quite similar to the former Policy Manual of the Los Angeles court. But there were a number of differences, and the result was an understandable confusion. This was especially true where the local provision seemed to be more restrictive than the statewide rule.

The new format quotes (rather than paraphrases) the applicable Rule of Court, and follows it with provisions that seek to explain or apply it to particular circumstances. Code provisions and major case citations are also provided.

The Manual covers Law Department matters (hearings, papers, demurrers and motions to strike, amendments, contractural arbitration, summary judgment and SAI, dismissals, judicial arbitration, venue, interpleader, consolidation, motions to be relieved as counsel, and discovery); Writ Department matters (injunctions, prerogative writs, receivers, civil harassment, provisional directors, late claims, attachments, and ancillary orders), ex parte matters, and defaults.

Counsel are asked to cite to provisions of the new Policy Manual, rather than the old, when referring to local provisions. The entire revised Manual is included in Court Rules, published by the Los Angeles Daily Journal; and in the Attorney's Handbook, published by the Metropolitan News. Copies are also available at all branches of the County Law Library. But they are not sold by the Court.

Changes in court policy, requiring revision of the Manual, are infrequent. But changes in the Rules of Court, and new case law that impacts on Manual provisions are likely to come more often. Take, for example, the five-day rule for opposing papers. Cal. Rules of Court, Rule 317(C)(2) provides that the opposition must be filed at least five court days before the hearing. No sooner was the Manual printed, with this provision replicated in Section 110, than the Fourth District held that the opposition may be filed five calendar days before the hearing, and that the requirement of five court days is invalid. *Iverson v. Superior Court* (1985) 167 C.A.3d 544.

There may be other glitches, here and there, that have managed to escape us. If you find one, or if you have a suggestion to make the Manual more usable to the Bar, please let me (or my successor) know. The better it is, the more it will help us all.

—Hon. Norman L. Epstein

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Annual Update: Time to Trial in Southern California Courts

While the log jam in the Los Angeles County Superior Court continues for civil litigators, a number of branch courts — such as the Northwest District in Van Nuys — have made inroads in reducing the time to trial for civil litigation. According to ABTL's Annual Survey of Southern California Courts, the Van Nuys court has reduced the wait for civil litigants by almost half to less than two years for both jury and nonjury trials. Elsewhere in Southern California, the Orange County Superior Court has also made substantial progress, reducing to just 11 months the median time from the filing of the At-Issue to trial.

Overall, the delay in obtaining a civil jury trial in Los Angeles County increased since the last ABTL survey from 36 to the current 41 months. However, the wait for nonjury trials decreased slightly from 31 to the current 28.5 months. These statistics are based on the most recent monthly conspectus of the Los Angeles County Superior Court, which made the calculations through May, 1985.

The speediest courts in the Los Angeles County system are Van Nuys, Torrance, Norwalk and Compton. Van Nuys, Compton and Norwalk also showed the greatest improvement over the last ABTL survey. For example, Van Nuys reduced by more than half the wait for jury trials — from 44 months to the current 21.5 months. The Northwest District also reduced the delays for nonjury trials to just 19 months from the last survey's 29 months. Equally strong reductions of the time to trial were made in the South Central District in Compton and the Southeast District in Norwalk.

The East District in Pomona remains the most congested for civil litigants seeking a jury trial. There, the median time to trial is a full 57 months from the filing of the At-Issue. Waiving the jury in Pomona shortens the delay substantially to a mere 38 months. Other congested districts of the Los Angeles Superior Court remain Central District, Pasadena and Santa Monica. Pasadena remains the most difficult district in which to obtain a speedy nonjury trial, with the median trial wait a full 50 months from the filing of the At-Issue.

The Central District continues to have the heaviest case load in the Los Angeles County system, with 21,312 cases awaiting trial as of April, 1985. The next heaviest case load is in the West District in Santa Monica, with 2,879 cases awaiting trial, and then the Northwest District in Van Nuys, with a trial waiting list of 2,338 cases, both through April. Overall, 35,808 cases are awaiting trial in the Los Angeles system, compared to 33,594 a year ago.

The continued improvement in the Orange County Superior Court may catch many litigators by surprise. The Orange County's current 11 month wait is down from the 19 month delay in the last ABTL survey. Among the factors reducing the delay is the current Orange County Superior Court practice of holding the trial setting conference *immediately* after the mandatory settlement conference. Previously, Orange County had delayed the trial

Continued on Page 8

U.S. DISTRICT COURTS[3]

	Months from Issue To Trial (Median)	
	Nonjury	Jury
Central District:	15	18
Northern District:	13	18
Southern District:	16	20
Eastern District:	14	**

LOS ANGELES SUPERIOR COURT[1]

(Number of Months From Filing of At-Issue Memorandum to Commencement of Trial (Median))

	Jury	Nonjury
Central District	45	38
West District (Santa Monica)	40.5	5*
East District (Pomona)	57	38
North Central District (Burbank-Glendale)	55	18
Northeast District (Pasadena)	48	50
North Valley (San Fernando)	**	**
Northwest District (Van Nuys)	21.5	19
South District (Long Beach)	39.5	1*
South Central District (Compton)	24	12
Southeast District (Norwalk)	23.5	12
Southwest District (Torrance)	26	17.5
TOTAL:	41	28.5

* Probably just single case.
** No such cases disposed of.

OTHER SUPERIOR COURTS[2]

	Number of Months From Filing of At-Issue to Commencement of Trial
Orange County:	11
San Diego County:	16-18
San Bernardino County:	5½-6
Ventura County:	5
Santa Barbara County:	6
Riverside County:	6

1 From Los Angeles County Monthly Conspectus for May, 1985, issued by Los Angeles Superior Court.

2 This information was obtained from the County Clerk's offices of the respective courts. The data upon which the figures are based differ: some are based upon median time calculations and others on current estimates of the Clerk's offices.

3 From Annual Report of Director of Administrative Office of U.S. District Courts for the 12 months ending June 30, 1984. (Condemnation and certain other civil matters excluded from statistics.)

Time to Trial

Continued from Page 7

setting conference for 90 days after the MSC. Thus federal court is losing one of its advantages over the state system — speed.

Waiting time in federal court remains steady from last year's ABTL Survey — just 15 months to trial in the United States District Court's Central District from the time a case is placed At-Issue.

However, most federal cases do not get that far. Ninth Circuit statistics show that the average federal case in the Central District is disposed of in just five months after the complaint is filed. The Northern District Federal Court in San Francisco is even faster with a median time of only four months to resolve civil litigation.

The U.S. Central District remains the busiest of all the federal courts in California, handling 104 jury trials and 215 nonjury trials, according to the most recent federal statistics for the year ending June 30, 1984.

Elsewhere in Southern California, the Santa Barbara County Superior Court substantially reduced its backlog to just six months between the At-Issue and trial, compared with 17 months in the last ABTL Survey. Riverside County showed similar improvement, also reducing the backlog to a six month wait from the former 18 months. However, Ventura County Superior Court remains the fastest venue — just 5 months to get a trial date from the time you file your At-Issue Memorandum.

Letter from the President

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Raphael Cotkin
Cotkin, Collins, Kolts & Franscell

Bruce A. Friedman
Cotkin, Collins, Kolts & Franscell

Honorable John L. Cole
Los Angeles Superior Court Judge

Honorable Norman L. Epstein
Los Angeles Superior Court Judge

Honorable Irving A. Shimer
Los Angeles Superior Court Judge

Robert H. Fairbank
Gibson, Dunn & Crutcher

Robert E. Mangels
Jeffer, Mangels & Butler

Richard C. Field
Adams, Duque & Hazeltine

Peter R. Taft
Munger, Tolles & Rickershauser

Honorable Peter S. Smith
Los Angeles Superior Court Judge

I extend my best wishes to Elihu M. Berle in the coming year, with every confidence that the vitality of our membership and the quality of our program assures another successful year for the *ABTL.*

—Charles S. Vogel

State vs. Federal Court

Continued from Page 5

(1) (A). State rules on such points may vary.

—*Exclusion of Relevant Evidence:* Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. (Evidence Rule 403). Surprise, as such, is not listed as a ground for exclusion, although it probably is intended to be encompassed by the Rule.

—*Subsequent Remedial Measures:* The traditional rule excluding subsequent remedial measures or warnings (e.g., Evidence Rule 407) was modified by the California Supreme Court in *Schelbauer v. Butler Manufacturing Co.* (1984), 35 Cal.3d 442, involving a strict liability claim against a corporate mass producer of goods; also see *Ault v. International Harvester Co.* (1974), 13 Cal.3d 113. The Eighth Circuit reached the same result in *Robbins v. Farmers Union Grain Terminal Ass'n.* (8th Cir. 1977), 552 F.2d 788.

—*Attorney Client and Work Product Privileges:* The expansion of corporate privileges announced in *Upjohn Co. v. United States* (1981), 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584, a landmark nondiversity case, may not necessarily be followed by all state jurisdictions. (Also see: Evidence Rule 501.)

Lawyers' Own Instinct. After all the objective factors have been painstakingly evaluated, the lawyer may decide to depend solely on plain, old-fashioned gut-level feeling or experience. Call it what you will, but this may be the ultimate test. There is still no substitute for what a knowledgeable lawyer's instinct tells him or her, for this inherently takes into account many of the considerations discussed here. The sixth sense may outweigh the other five.

—Benjamin E. (Tom) King

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