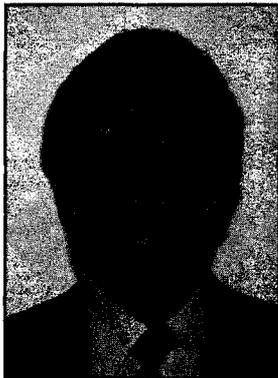


Letter from the President

The strong relationship between the Association and the civil trial judges of Los Angeles County is one of the most important components of the foundation of the Association. It was with this in mind that ABTL instituted its Judge of the Year Award last year. The first award was given to California Chief Justice Malcolm Lucas, a former Los Angeles County trial judge who has made many outstanding contributions to the administration of justice and our court system.

Last month, ABTL recognized Los Angeles County Superior Court Presiding Judge Richard P. "Skip" Byrne as this year's trial judge of the year.



Peter I. Ostroff

There is a significant connection between the two recipients of what we hope will become a prestigious and coveted award. The contributions of Justice Lucas and Judge Byrne, while enormous, plentiful and varied, coincide respecting the efficient administration of justice and the recognition of the truth of the principle that "justice delayed is justice denied." While a trial judge, Justice Lucas was assigned the complex Equity Funding litigation, one of the first of the "mega" cases, which involved so many parties, so many issues, so many cases and so much money that it threatened to clog our court system for years with little being accomplished beyond the generation of enormous income for the lawyers involved. This litigation hit the District Court in the early 1970's when the rules respecting management of complex litigation were few and untried and there existed little in the way of precedent for techniques for management of these types of controversies. Justice Lucas took firm control of the situation, imposed (and enforced) a relatively short but fair schedule for completion of discovery and trial preparation, all of which resulted in disposition of the entire controversy and the numerous claims within a time frame and at a cost far shorter and far lower than even the most optimistic would have considered possible.

Now, more than ten years later, at a time when delays in our civil trial court system have become so problematic that our legislature has felt constrained to legislate against delay at the urging of the California Attorney General, it is not surprising to learn that Chief Justice Lucas has identified the implementation of trial court delay reduction programs as a top priority. This involvement in trial court delay reduction is the connection between Justice Lucas and Judge Byrne.

Continued on Page 8

Interview: The 'Fast Track' from Behind the Bench

More than 18 months ago, on October 15, 1987, Los Angeles County launched a pilot project known as the "Fast Track" program, in accordance with the Trial Court Delay Reduction Act of 1986. The project set new procedural rules, with the goal, by 1991, of achieving disposition of 90% of civil cases within one year of filing, 98% within 18 months of filing and 100% within two years of filing. Initially, cases with odd numbers have been assigned to the project, and attorneys handling those cases have been faced with short time deadlines that cannot be extended merely by stipulation.

Recently, *ABTL Report* interviewed three of the 25 judges working on the "Fast Track" to find out how the program is working. Typically, they are setting trials for dates seven months

Continued on Page 2

Who are the judges?

The three fast-track judges interviewed by *ABTL Report* are:

Judge Norman Epstein, a Los Angeles County Superior Court judge for eight years. Before that, he was a judge of the Los Angeles Municipal Court for five years and vice chancellor and general counsel for the California State Department of Education for 12 years. He received his B.A. and law degree from UCLA.

Judge Robert Lopez, a Los Angeles County Superior Court judge for 14 years. Before that, he was an Alhambra Municipal Court judge for two years. He received his B.S. from UCLA and his law degree from USC.

Judge Diane Wayne, a Los Angeles County Superior Court judge for eight years. Before that, she was a judge of the Los Angeles Municipal Court for three years. She received her B.A. from UCLA and her J.D. in 1967 from USC. She is married to Los Angeles County District Attorney Ira Reiner.

The interview was conducted by Thomas J. McDermott, Jr., a partner with Rogers & Wells, and Vivian D. Rigdon, an associate with Sidley & Austin and Associate Editor of ABTL Report.

Interview: The 'Fast Track'

Continued from Page 1

after the initial status conference — which creates a powerful incentive to settle. Trial dates are rarely if ever changed. The judges are coping with a system similar to that in federal courts, although they have three times as many cases as federal judges and smaller staffs.

ABTL: What do you think is the most important thing you've learned about the Fast Track Program?

Judge Wayne: That it can be done. The cases can get tried in a year if the judges take sufficient responsibility to make the lawyers change their time schedules and their expectations.

Judge Lopez: I would concur with Judge Wayne that the program has every possibility of success in the future. Right now, we are understaffed, but the judges are working to keep up with the challenge of the ever growing caseload in this county.

Judge Epstein: The most dramatic thing that we've learned, although it should be obvious, is that a change of this magnitude does not come easily. We're changing the pace of litigation. It transfers control from the attorneys handling the case to the judge. It takes some getting used to. And it's the sort of thing that doesn't come easily to most lawyers and judges.

Judge Lopez: Actually, it's not new to the federal system. In effect, it'll make each of us a federal judge in the control of the calendar. Practitioners who are conversant with the federal system can simply apply their knowledge in the state system.

ABTL: Are there any procedural aspects of the program that you wish had not been included, Judge Wayne?

Judge Wayne: No. I think that the time lines that we started with were important for changing people's expectations. In the future, I would like to see some of them even shortened. For instance, the time to file an at-issue memorandum should be 60 days, but you can't start off that way. This was a Draconian change. The lawyers need to digest it.

Judge Epstein: I agree with that. The procedures are reasonable and we ought to stick with them for the course of the experiment.

Judge Lopez: Yes, I think so too. This is going to be the future for the State of California. All trial courts will be run this way.

ABTL: Judge Lopez basically has stated that he thinks the program is going to become permanent. Do you agree with that, Judge Epstein?

Judge Epstein: Oh yes. Something along these lines is going to become permanent. This is the principal policy priority of the Chief Justice.

ABTL: Are there any resources that would make this program work better or more efficiently in your court?

Judge Lopez: The system was adopted without any consideration for the trial judge. They have given us no assistance. We have the same staff that we had when we had one case at a time. But we have approximately 1,000 cases to handle.

ABTL: What resources do you have? Do you have the two or three law clerks available to you that they have in the federal court?

Judge Wayne: We have one court clerk who does not do legal research and a fifth of a law clerk. We need at least another court clerk and a law clerk.

Judge Epstein: We're divided loosely into teams of five judges. And each team has one research attorney assigned, so that, as

Diane says, each judge has one fifth of a law clerk. In addition, there is one calendar clerk for every three judges.

We need a calendar clerk full time for each courtroom. The clerks are simply swamped. They handle a trial, a full motion calendar, ex partes, and the dozens of phone calls that come in every day. It's too much work. The federal judges in the Central District have two full time research attorneys. Many of them have externs in addition to that. They also have magistrates. We have none of those resources.

The expectation was that there would be fewer motions per case with a direct calendaring system. The logic was that an attorney is not going to want to bring a near baseless motion before the judge who is going to try the case. I think those expectations are correct. But, while there are fewer motions per case, the shortening of time to trial means that you have a concentration of the number of motions you hear. The courtroom clerks are being run ragged and the research attorneys are being overworked. We need more resources.

ABTL: Judge Lopez, if I were to ask you to state one negative aspect of the program, is there something that immediately jumps to your mind?

Judge Lopez: You have to sneak trials in, and that's a burden, to sneak a trial in between 10:00 in the morning and whatever hour you close up. You almost don't have time for trials, at least in our department.

ABTL: Do you follow a schedule similar to the one that the federal courts follow, with law and motion on Monday, and trials on Tuesday, Wednesday, Thursday and Friday?

Judge Lopez: No. That's the problem. We have law and motion every day of the week.

Judge Wayne: That was the one thing that the presiding judge asked us to do uniformly, so that it would not wreak havoc on the trial lawyers' calendar. I think it's a good rule, even though I obviously would like to do it all on one day. It was an accommodation to the needs of the bar.

ABTL: How many cases do you have assigned, Judge Lopez?

Judge Lopez: Over 1,000. Today it's probably about 1,040.

ABTL: Is that true with each of you?

Judge Wayne: Yes. About 1,000.

ABTL: Well, if each one of you has three times the cases that a federal judge has, with less than half the resources, how do you expect the program to work?

Judge Wayne: We're going to have to work harder than the federal court judges I guess.

ABTL: Are you finding the lawyers prepared when they come to court?

Judge Lopez: Not yet, not in mine.

Judge Wayne: Oh, I am. I think the bar has done a terrific job. You rarely hear lawyers asking for continuances. They complain a lot, but they do what they can to make the system work, and I think they've been great.

ABTL: Has that been your experience, Judge Epstein?

Judge Epstein: More that way than the way Judge Lopez has described. There are problems from time to time, but in the



Judge Norman Epstein

main, attorneys have been prepared and the organized bar has made a contribution.

ABTL: If there was one single thing that you could ask lawyers to do that would improve the working of the program, what would that be?

Judge Wayne: To talk to each other and try to resolve problems in their cases before they come to court.

Judge Lopez: Even before they come to court, before they file a case, they should consider cooperating, because if they don't, they've got this short strap attached to them. They're going to have to be very cooperative because the time limit is so short.

I have a second thought and that is that motions are troublesome to the fast-track judge. If you think about each lawyer in each case making one single motion apiece during the pendency of their litigation, assuming an inventory of 1,000 cases, you already have 2,000 motions; one motion per side times 1,000 gives you 2,000 motions. I try to discourage motions. The motion practice as it has been administered in the past just isn't going to work in the future.

ABTL: What steps do you take to discourage motion practice?

Judge Lopez: I tell them, don't file motions and that motions are disfavored by the court.

Judge Wayne: I tell the lawyers that, before they file a motion, if they are speaking to each other and working well with each other, I will be happy to do anything telephonically. And that, before they file it, if they'd call, we can just discuss the motion and I'll give them direction. That really is helpful.

The lawyers are very appreciative. They say, if you're willing to do that, we feel embarrassed to call upon you for that benefit. It forces us to work things out among ourselves.

ABTL: Do each of you take telephone calls to resolve disputes?

Judge Lopez: I do.

Judge Epstein: I have found that the amount of discovery motions are way down. Maybe ten percent of the motions that I hear are discovery. Part of that is the new discovery act, part is the direct calendaring system. With respect to telephone conferences, a law operative January 1 of 1989, gives a right to every lawyer, not pro pers, but every lawyer, to have any law and motion matter heard by telephone with two exceptions: where live evidence is going to be presented or where there is a trial setting in a fast track case.

ABTL: Judge Wayne, how do you handle discovery disputes?

Judge Wayne: If they get complicated, I sit the lawyers down and try to get them to work on it together with me as a resource. If the lawyers are stubborn, I will eventually assign them to a referee. I hate to do that because it's expensive and it also takes some of the control away from me. I've assigned probably four or five cases to a referee all year.

ABTL: What are the most important hearings in the course of a fast-track case?

Judge Wayne: That really depends upon the judge. The original status conference where you set up your discovery is very important. The mandatory settlement conference is a very important hearing. I do a lot of mandatory settlement conferences and have many in one case. Other judges have eliminated all of them,

so it depends on the individual judge.

Judge Epstein: I agree with Diane. The initial status conference is for the judges to take hold of the case, to get an understanding of what the case is about and set out the basic rules for the future governance of the case, for example, when discovery is to be finished. Second, of course, is indeed the mandatory. I do mandatories as well. I think they're very important and my experience is that the overwhelming number of cases that I set for mandatory, something like 90%, settle. So, it's been worth doing. But there is a variation in practice. Some judges don't hear mandatories.

ABTL: Looking at that first original status conference, do you require the lawyers to file a discovery plan prior to coming to that conference?

Judge Wayne: No, because they would agree on months of discovery. I impose a discovery plan after listening to what the case is about and making a decision, hopefully not an arbitrary one, but a decision as to when discovery cut-off should occur.

Judge Epstein: I agree. I'm reluctant to ask lawyers to do things that strike me as jumping through hoops, to manufacture papers and schedules that really aren't needed. In my experience, the discovery schedule can be handled in about three minutes in 99% of the cases.

Judge Lopez: Yes, I would concur.

ABTL: What if lawyers can't meet the discovery cut-off?

Judge Wayne: I will sometimes adjust the discovery cut-off date. I will never adjust a trial date. If we start changing the trial date, the whole system will break down. The whole fast-track system is based on a firm commitment by the court to have a firm trial date.

Judge Epstein: I will usually modify discovery cut-off where both sides agree. If we don't have a stipulation, I will modify it if I'm convinced, in the interests of justice, that there's a need to do it, that some reason has intervened that wasn't apparent earlier. Where one party has done what they're supposed to do and the other party just hasn't done it and wants more time, I would not extend the time.

There are two dates that are very difficult to change. One is the trial date and the other is the mandatory settlement conference date. Those are precious times. We can only hear so many mandatories in a day and be effective and they're scheduled, in my court, months in advance. Once set, they are very difficult to change.

Judge Lopez: The basis of the system is to not give that trial date away. Once you've got it, it's in concrete.

We have the additional problem of having criminal cases come in. That of course, throws trial dates out the window for civil cases. Indeed, that is the bane of the trial court judge in Central Civil right now.

ABTL: On an average, how many criminal cases does a civil judge get in a year?

Judge Epstein: I tried eleven in 1988. I don't know what the average is.

Judge Wayne: I'm a little different, I don't try any because of my husband being a prosecutor. [Judge Wayne is married to Los Angeles District Attorney Ira Reiner.]



Judge Robert Lopez



Judge Diane Wayne

Interview: The 'Fast Track'

Continued from Page 3

Judge Lopez: Mine is a little bit of a distorted picture because I took over an existing calendar in midyear. If you factored it out for a year, it would be eight.

ABTL: Judge Wayne, how many trials have you had to continue due to your own schedule, that is trials lasting longer than you had originally anticipated?

Judge Wayne: None.

Judge Epstein: Her record is remarkable in that respect. I personally think that there just isn't enough time to try cases. We have to settle them. The lawyers have to settle them, the courts have to settle them and we have to try the case on the date that it is set, whether I try it or another judge tries it for me.

ABTL: Are you finding that cases are easier to settle because you have had supervision of the case from the beginning?

Judge Wayne: Yes.

(Others): Yes, yes, no question about it. Unequivocally.

ABTL: Are you finding fewer motions that are frivolous, for example, because you had the case from the beginning?

(Others): Absolutely. No doubt about it.

ABTL: Judge Wayne, if I were before you today at the first status conference with a typical business litigation matter that was going to be tried non-jury for one week, when would you set that for trial?

Judge Wayne: In less than seven months.

Judge Wayne: Right.

Judge Lopez: I would too. When they come into the courtroom, they realize that the cause will be tried very, very soon — in six months, seven months, eight months from today. Lawyers are going to have to be ready to try their cases.

Judge Wayne: Now you can see why they're settling.

Judge Lopez: I had a case where the lawyer said in a humorous vein, that he wanted a trial tomorrow and I said, "How about today?" It just happened that it was one of those good days so we could try it that very day and they thought better of it. But that case settled.

Judge Epstein: I had two of those this week. They're both unlawful detainers. You get a priority and this is fast-track. We'll try it on Monday. Counsel were simply astounded. "You mean next Monday, that's when we're going to try it?"

ABTL: Are lawyers prepared for trial?

Judge Wayne: They're prepared for trial. Some, of course, are prepared better than others. But that's the same as it's always been.

ABTL: What are sanctions imposed for?

Judge Wayne: For failure to file an at-issue memorandum on time, for failure to serve on time. I try not to sanction a lot. But the sanctions are there and available if we need to use them.

ABTL: What are the sanctions that you impose for failure to file the at-issue memorandum on time?

Judge Wayne: Probably \$250, sometimes \$500, depending on how many chances I've given somebody.

Judge Epstein: I don't think I've done it at all. In a proper case I would do it, but where someone has not filed the at-issue in time we issue an OSC [Order to Show Cause]. If they show up, they generally have some excuse and I'll give them a limited

amount of time to file it. If they haven't filed it the next time, the case will probably be dismissed.

Judge Lopez: I don't use sanctions much either. Once the attorneys come in, they get the feeling that you're in charge. They don't want to cross the court. It's a losing battle.

Judge Epstein: It's not unanimous on the court. Some judges would impose sanctions, some would not.

ABTL: You mentioned earlier Judge Epstein that if an at-issue memorandum was not received within the time required by the statute, I believe it's 140 days, that you would issue an OSC. Do you have an automatic procedure in place so that happens?

Judge Epstein: Yes, we do.

Judge Lopez: We do?

Judge Wayne: We don't know for sure. I worry about that.

Judge Epstein: The computers are supposed to do it and I think they generally do. But I don't have unbounded confidence in that system, so I monitor my own cases by physically going through files. I have found dozens of cases where an OSC should have been issued for inactivity and it slipped through the cracks.

ABTL: Is there an automatic OSC that issues from the court if there is a failure to serve within the statutory time or failure to file an at-issue memorandum within the statutory time, that's automatically done by computer?

Judge Lopez: Theoretically, but this computer system has been of minimal value as far as I am concerned.

ABTL: Then each one of you would say that you go through your own files on a more or less periodic basis to weed out the dead wood? Is that correct?

Judge Wayne: Well, I don't. I wish I had time to do that. I do occasionally, but not enough. That's why we need some extra support staff.

Judge Lopez: We don't have the resources to do that. You can imagine the chore of going through 1,000 cases.

ABTL: Is there some kind of a structure that's been set up by either the presiding judge, or a committee of judges?

Judge Epstein: We have a five member steering committee made up of Judge [Robert H.] O'Brien, Judge [Stephen M.] Lachs, Judge [Phillip M.] Saeta, Judge [Vernon G.] Foster and myself.

ABTL: There is a provision that says at the status conference, the judge has the right and perhaps the obligation to refer matters either to arbitration or to a Judge Pro Tem or retired Judge. Judge Wayne, have you ever done that?

Judge Wayne: Yes. Absolutely.

ABTL: What are the criteria which you look to in making that decision?

Judge Wayne: Well, any case likely to have less than a \$50,000 recovery, or that will be helped by arbitration, I'll send. I send cases to retired judges when people talk about needing a lot more time. The only way you can get out of the program is if you'll stipulate to going to a retired judge. Also, there has been a very good program that Judge Weil is administering — the joint settlement program. That's been very effective for settling cases before trial.

Judge Epstein: That's the one I was going to mention. It's called JASOP for Joint Association Settlement Officer Program. It's made up of panels of lawyers furnished by each of five bar associations organizations. ABTL is one of them. Panels of two lawyers meet every court day, four days a week on personal injury matters and one day a week on business litigation. They

attempt to settle cases. They have settled something like 35% of the cases that are assigned to them. This is a voluntary program, the attorneys who act as settlement officers do so without compensation and without enough recognition.

ABTL: Are you finding that lawyers under the fast-track are trying cases better or about the same or worse than they were under the normal procedures?

Judge Epstein: I see no discernible difference.

Judge Lopez: I don't either.

Judge Wayne: A lawyer is a lawyer is a lawyer.

ABTL: We should end on that line. Is there any one thing that the trial lawyers could do to make this program work better in your court room?

Judge Epstein: The lawyer should put himself or herself in the position of the judge to better understand what it is that the particular procedure is supposed to accomplish.

Judge Lopez: We're in a revolution, or rather, we're in the evolution of a revolution.

Judge Wayne: You sound like Jesse Jackson.

(Laughter)

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Judge Lopez: The revolution is the overthrowing of the master calendar system. We are evolving that revolution at this time. Eventually there will be no master calendar.

ABTL: During the evolution of the revolution, what could trial lawyers do to make it revolve better?

Judge Lopez: Settle cases. They must settle cases. If they do not settle cases, the system cannot work. Settlement is the emphasis from the first moment they step into my court. What have you done to settle? Have you made an offer? Have you made a demand? That's what gotten me through my period on fast-track.

ABTL: Judge Wayne, how would you answer that question?

Judge Wayne: Lawyers need to spend more time with each other trying to work out problems before they see me. But, basically, I think the bar has done a terrific job in trying to support the program.

Jury Selection Revisited: The Current Rules of the Game

Jury selection has, often and properly, been called more art than science. Nonetheless, lawyers conducting jury selection must, in practicing their art, be aware of the rules, statutes, case law and, not insignificantly, constitutional provisions providing for the right to trial by jury and defining what a juror can be asked during jury selection.

The backdrop for all jury selection is constitutional, the Seventh Amendment in the federal courts and comparable provisions of state law in state courts that guarantee trial by jury in civil cases. The Seventh Amendment gives us, however, very little guidance and Article 1, § 16 of the California Constitution is only a little more helpful.

Neither the Codes nor the accompanying rules shed much additional light on the process of jury selection. Local rules and guidelines tend to be equally unhelpful in the federal courts, although the public record in complex cases sheds some light on actual federal practice. In addition, in recognition of the problem attendant to a large body of unwritten rules of practice, lawyer representatives to the Ninth Circuit Judicial Conference from the Northern and Eastern Districts of California, have begun publishing interviews with judges to de-mystify not only jury selection rules but other idiosyncratic or unofficial rules and practices.

The state courts, and particularly the Judicial Council, have been active in promulgating and publicizing standards for judicial *voir dire*, although none for the more prevalent and time-consuming attorney *voir dire*. As a result, the propriety of difficult questions is not resolved, or even addressed, in any of these primary source materials. As such, the rules of jury selection have, by and large, been developed on a case-by-case basis.

The Function of Jury Voir Dire

In order to understand what questions a lawyer can ask a prospective juror, or request the trial judge to ask, it is essential

Continued on Page 6



David M. Stern

Jury Selection Revisited

Continued from Page 5

first to return to basics. Why should there be jury *voir dire* at all?

The answer to that question goes to the very essence of our legal system, the goal of which is to render verdicts based upon evidence adduced at trial. That goal is not only instinctively just, but a condition precedent to the public's perceiving the system as fair and accepting the results it produces. The goal, to be sure, can exist and be achieved in the absence of trial by jury, as the civil legal systems in much of the British Commonwealth attest. And, most certainly, trial by jury, standing alone, does not assure fairness and justice, as numerous sad chapters in American legal history amply demonstrate. Rather, our system represents a combination of two concepts, trial by jury and due process. The jury selection process is the initial point at which these two concerns meet.

Given our legal system's goal of justice based on fact, it would seem axiomatic that bias, even short of a preconceived opinion as to the proper outcome of a case in advance of hearing any evidence, would automatically disqualify prospective jurors without more. For reasons of history primarily, it does not. Jurors are not excludable for cause based on preconceived opinions as to the outcome unless they cannot lay those preconceptions aside and decide solely on the evidence.

In most cases, reliance upon this unsatisfying principle is a necessary response to pretrial publicity in which there is, as Justice Frankfurter observed, the inherent tension between "the fair administration of criminal justice [and] another safeguard of our constitutional system — freedom of the press. . ." *Irvin v. Dowd*, 366 U.S. 717, 730, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). Without this principle, it would be virtually impossible to resolve judicially the most notorious crimes and disputes.

However, jury *voir dire* has not yet been reduced to a single question: "Can you, if selected as a juror, decide the case based on the evidence notwithstanding your personal beliefs?" The reason for not so limiting *voir dire* may be a consequence of the "scientific" judgment of the unlikelihood "that a prejudiced juror would recognize his own personal prejudice — or knowing it would admit it. . . . [T]he more prejudice or bigoted the jurors, the less can they be expected to confess forthrightly and candidly their state of mind in open court." A. Friendly and R. Goldfarb, *Crime and Publicity* 103 (1967). It may be a result of history and practice. Or, it may only be a matter of time before jury *voir dire* yields to the demands of economical litigation and crowded dockets. Whatever the cause, jury *voir dire* remains very much alive and part of the civil trial.

The Limits Of Jury Voir Dire

Lawyers, understanding that the only clearly proper area for jury questioning is the elimination of bias, have cleverly sought to accomplish jury education and screening under the guise of bias elimination. Some of these areas of expansion are plainly defensible and a logical extension from the principle of bias elimination. Thus, courts and commentators agree that lawyers can inquire into broadly defined issues of qualification; the presence of certain disabling sensory impairments such as total blindness or deafness (the disability must impair the ability to communicate and understand and may not serve as a subterfuge for discriminating in violation of the Unruh Civil Rights Act, Cal. Civ. Code § 51 et seq.); and even lack of intelligence to understand the facts and law. However, because the constitutional foundation for this questioning is, as noted, quite weak, excursions beyond narrowly defined limits are often, although not consistently, circumscribed.

Between minimal *voir dire* sufficient to eliminate biased jurors and excessive *voir dire* aimed at educating, indoctrinating, pre-

judicing or pre-instructing lies a line between proper and improper questioning or, in rare cases, excessive limitation upon proper questioning. While that line is not easily discerned, disputes involving a small number of areas in civil cases predominate the case law and help define what can and cannot be asked in a large number of situations. Although an in-depth discussion of these areas, and many others occasionally involved, is beyond the scope of this article, a brief synopsis is helpful and probably sufficient as a starting point.

Insurance

Probably the most frequently litigated area involves *voir dire* relating to insurance. Plaintiffs are quite frequently desirous of interrogating jurors about insurance. The articulated rationale for such questions is to eliminate jurors who would be financially impacted by a verdict for the plaintiff because of their relationship with insurers. The real reason is to suggest that the defendant is insured and thus would not be required to personally respond to any judgment. A minor variant on this theme is to suggest that one party is economically advantaged or disadvantaged and thus does not need or can easily afford an award.

The current political season offers courts yet another opportunity to visit the area. When the problem last arose, in the "medical malpractice crisis" of the mid-1970's, the California Court of Appeal had no problem in restricting questions asking "whether any members of the panel had recently read in the paper or seen and heard on television any discussion with regard to this type of lawsuit, called medical negligence or medical malpractice." The trial court refused to permit such questioning because of its tendency to "have injected into the present case unnecessary emphasis upon the subject of 'malpractice' insurance. . . [and] to implant in the minds of the jury that the defendants are insured," and the Court of Appeal concurred. *Barton v. Owen*, 71 Cal.App.3d 484, 508, 139 Cal.Rptr. 494, 508 (1977).

To the extent a general rule emerges from the many cases dealing with the insurance question, the rule appears to be that trial courts have almost unlimited authority to prohibit questions about or references to insurance, but may commit reversible error if they permit repeated references to insurance where no insurance company is a party to the case. The tendency, therefore, will be not to permit the questioning and, consequently, not to plant the seeds for reversal.

Damages

The second largest group of reported decisions involves cases in which attorneys, generally representing plaintiffs, sought to quiz prospective jurors on their willingness to award "substantial" damages. Such questioning is proper in order to determine whether a juror would be unable to return a verdict at or above a certain amount, or would require a higher standard of proof on liability in order to award large damages.

More often than not, however, the real reason for such questioning is to extract a commitment from jurors to vote in favor of the plaintiff if the evidence is as the plaintiff claims. Seeking to extract such a commitment is improper but seldom results in reversal. In a rare instance, repeated questioning setting out the suggested award and seeking jury concurrence that the amount sought is not "out of line" or "too large" for a particular injury, or, more blatantly that one will return a verdict for the amount asked for if it is substantiated by the evidence produced reversal. Reversal on this ground alone remains exceptional.

Hidden Persuaders

Far more interesting questions arise in cases that have extraneous or at least non-crucial elements that may exert influence upon the verdict. The list of possibilities is almost

endless, although the most common problems arise with testimony of experts, well-known personalities and police officers; video-taped depositions; re-enactments and simulations; seriously injured plaintiffs; particularly unpopular or unsympathetic defendants; and bias related to race, sex, national origin, religion, handicap and the like. The proper balance between minimal questioning and inadvertent overemphasis is often difficult to strike.

Chedd-Angier Production Co. v. Omni Publications Intl., 756 F.2d 930 (1st Cir. 1985), involved a breach of contract case arising out of the television series "Omni." In addition to producing "Omni" and publishing a magazine of the same name, the defendant also published "Penthouse", a sexually explicit adult magazine.

Omni appealed a \$223,000 verdict, claiming "that the jury was biased as a result of its purported knowledge of [its chairman, Bob] Guccione's association with sexually explicit magazines and films. . . [and] that there was insufficient *voir dire* . . . concerning juror attitudes on these issues. . ." It also sought a post-verdict evidentiary hearing on these same questions. *Id.* at 937.

In affirming, the First Circuit determined that the trial court's granting and enforcement of the motion *in limine* to bar mention of "Penthouse" was enough and that to have done more "might have magnified the importance of Guccione's connection with the sexually explicit subject matter and so have been counterproductive." *Id.* Obviously, Omni could easily argue and, it should be assumed, did argue that it, not the Court, should have had the choice on whether excessive inquiry would backfire; as such, the case probably demonstrates that courts will accommodate notorious parties to a point, but will not warrant that every last possibility of bias, however subtle, has been eliminated.

While issues such as religious preference, political affiliation, divorce and remarriage do arise and can produce prejudice, the general rule appears to be that *voir dire* on these issues should either be disallowed entirely, or limited to issues of actual bias except in the rare case in which such matters may be directly relevant.

An area in which examination of unconscious bias is clearly permissible is that of excessive sympathy for a severely injured plaintiff. Such questioning is permissible, often mandated. The Connecticut Supreme Court recently articulated the rationale for this type of inquiry in *Lamb v. Burns*, 202 Conn. 158, 520 A.2d 190, 194-95 (1987):

When a considerable potential exists for feelings of sympathy to have a bearing upon the outcome of a case, a query seeking to uncover the extent of the juror's susceptibility to such feelings should be permitted. It was of vital importance to the defendant that any such susceptibility be brought to light.

The question that the trial court disallowed was whether the juror would feel sympathy for a person encountered on the street who exhibited signs of injury. The court reasoned that the question was irrelevant on the issue of prejudice, saying "the question really is: 'Would the person set aside the sympathy they feel and follow the law?'" Although a prospective juror of normal heart and reasonable mind would scarcely be likely to answer the defendant's question in the negative, the defendant certainly had a right to this inquiry in order to gauge juror reactions, and thereby to forage for possible prejudices and unusual levels of sympathy. The alternative question framed by the trial court, though perhaps more to the point, was not the defendant's exclusive conduit for discovering the propensities of the prospective jurors.

Similarly, it is appropriate to determine whether particular evidence would shock or sicken a juror. Obviously, the mention of such evidence can indoctrinate, educate, or tend to commit a juror to a particular view of the facts. Such problems can be dealt with by instructions. To ignore that a juror would be

sickened by evidence cannot be so easily transcended; thus, on balance, it is better to permit such questioning on *voir dire* than to prohibit it.

Personal Experience

A subset of the preceding category, although one important enough to justify separate discussion, involves personal experience. In general, this problem has arisen in motor vehicle accident cases sometimes related to unusual or "idiosyncratic" problems, *e.g.*, exploding gas tanks and snowmobile accidents; and other times relating to the mundane, *e.g.*, minor accidents or car-pedestrian collisions. The problem may also occur where a juror possesses special expertise; *e.g.*, a lawyer, that might influence his decision or that of other jurors.

In such cases courts can and should permit *voir dire* directed to the issue of whether the juror can decide upon the evidence rather than personal experience. When they do not, although the standard for review is "abuse of discretion," courts will reverse:

After a review of the transcript of the *voir dire*, we conclude that Ford's right to an impartial jury guaranteed by the Sixth Amendment was impaired by the district court's failure to sufficiently probe the jury. We believe minimal inquiry into such areas as the juror's or his family's involvement in rear-end collisions and collisions that resulted in burn injuries, in addition to questions concerning ownership of a Mercury Comet — all of which go to the nature of the case and the identity of the parties — was essential to producing disclosure by the jurors of possible prejudice against Ford." *Fletzer v. Ford Motor Co.*, 622 F.2d 281, 286 (7th Cir. 1980).

Prejudicially Worded *voir dire*

The final significant category raising substantial problems involves not the substance but the form of jury questioning. Common experience indicates that this problem, although rarely arising on appeal, occurs more frequently than any other at the trial court level. The reported cases are consistent with common wisdom, a little overreaching is tolerable; excessive overreaching is not. Limitations on questioning almost never generate reversal because, as noted earlier:

Even if a juror had formed or expressed an opinion as to the adequacies or inadequacies of jury verdicts in negligence cases, that fact would not have disqualified him. A juror to be competent need not be devoid of all beliefs and convictions. All that may be required of him is that he shall be without bias or prejudice for or against the parties to the cause and possess an open mind to the end that he may hear and consider the evidence produced and render a fair and impartial verdict thereon." *Kujawa v. Baltimore Transit Co.*, 225 Md. 195, 167 A.2d 96, 98 (1961).

Conclusion

The process of jury selection exists in a world of competing goals. While the right to a fair trial remains a paramount concern, it has given way to other values in the past, such as the need for a free press, and promises to give way to other values, possibly of less obvious worth, such as uncrowded dockets, in the future.

Whatever compromises and accommodations are made in the future, they will likely be made at the trial court level, much as they have been in the past. Appellate courts very clearly give great deference to trial judges. As such, the rules for jury *voir dire* will, for good or ill, continue to be passed on to the legal community not through published opinions but by word of mouth among experienced lawyers and candid trial judges. This oral tradition has served us well in the past. We can only hope it will continue to serve us well in the future.

—David M. Stern

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Letter from the President

Continued from Page 1

When the Trial Court Delay Reduction Act ("AB 3300") was enacted, Los Angeles County was clearly identified as the court system that had the most serious problems in terms of trial delay and, therefore, was the most in need of reform. Judge Byrne from the outset, as Assistant Presiding Judge, took charge of development and implementation of Los Angeles County's program. One of the many insights applied by Judge Byrne was the keen awareness that this program could not work without the active support of all segments of the trial bar.

Over the past twenty years, numerous attempts have been undertaken to reduce congestion and speed the time to trial or disposition of civil cases in Los Angeles County. It is both fair and appropriate to observe that none of these efforts have succeeded; the best of the efforts have been of no use or harmless; the worst have been counterproductive and confusing. Judge Byrne recognized that it was important to communicate an appreciation and understanding that the new system was very different and did not involve business as usual in any sense. He also recognized that this understanding and appreciation could not come in an entirely pain-free environment. Judge Byrne recognized that active involvement of the trial bar and the implementation of the program was essential and he formed bench/bar committees for the purpose of developing the concepts of the program and creating the rules that would govern its operation. ABTL played a prominent role in these committees. The "fast track" or trial delay reduction rules set forth are the result.

The program has now been in operation for approximately a year and a half. There is no question that the program has had an enormous impact. The central ingredients of the program are active and early caseload management by individual trial judges to whom the "fast track" cases are assigned and individual accountability by the "fast track" judges for an enormous caseload generally averaging approximately 1,000 cases per judge. The impact has been profound. On any given day, through status conferences, law and motion matters, applications for provisional remedy and trials, a far greater number of cases come to the attention of a trial judge than ever did under the master calendar system. This undoubtedly fosters earlier disposition of many cases.

Moreover, that discovery disputes and other non-dispositive law and motion matters must come to the attention of the judge who will actually try the case undoubtedly encourages resolution of such disputes without the necessity for court intervention. There has been a substantial reduction in the caseload of the eighth floor judges who handle the law department matter for non-"fast track" cases. In my opinion, this must, at least in part, be attributable to the fact that lawyers are reluctant to present such matters to "fast track" judges and the practice of resolution without court intervention of those matters has spread to the non-"fast track" cases.

There are, to be sure, trade-offs that are not insignificant. For example, once assigned to trial, a non-"fast track" case may properly expect and receive nearly exclusive attention from the trial judge. This is not true with respect to "fast track" cases because the IC judges have an enormous calendar over and above whatever case happens to be set for trial at any given time. Accordingly, trial time is far more abbreviated and interrupted before a "fast track" judge. Also, the program has been in operation for too short a time to determine its long-term impact with any real degree of assurance.

Nonetheless, Judge Byrne's administration has unquestionably been aggressive, creative and, to all appearances, effective in expediting case disposition. The approach taken by the Los Angeles County Superior Court is also to be commended in that it is about to move beyond the mandated experimental stage to reach to all of its cases at least to some degree.

Commencing June 1, 1989, Department 1 will implement a delay reduction program that will be applicable to the non-odd numbered cases, the cases which have not been assigned to the "fast track" program. This program is part of the trial court delay and reduction efforts mandated by AB 3300 and applies to the even numbered cases which are not presently covered by the "fast track" rules. These will remain subject to a master calendar system but involve more active court management through the use of status conferences, relatively early deadlines, and setting of trial dates as early as feasible. This program is implemented pursuant to a new Chapter 12 of the Los Angeles County Superior Court Rules, Rule 1200 through 1210.

The impact of these new rules is discussed in the interview of three judges in the trial delay reduction program in this issue of the *ABTL Report*.

Both Justice Lucas and Judge Byrne have been strong proponents of this type of radical revisions to trial court procedures and both have viewed trial court delay reduction as a matter of the highest priority. No other issue, with the possible exception of the establishment of levels of judicial compensation sufficient to attract and retain the highest quality judges, is more important to the quality of administration of justice in this State. It is very fitting, therefore, that the Association's first two honorees have been at the forefront of the efforts.

On another subject, I cannot resist this opportunity to express my views respecting the recent endeavors by certain Los Angeles lawyers to institute some kind of "good behavior" code for litigation counsel. The notion is that civil litigators are no longer as "civil" to each other as we used to be in some kinder, gentler, period of years gone by and we should be "nicer" to each other as we proceed through litigation. From this premise has developed a further notion that rules of behavior should be adopted to serve, at least, as guides or examples for better behavior. In my view, this is nonsense.

As trial lawyers, we are constrained to follow the laws of the United States, the California Rules of Professional Conduct, the ethical rules of the American Bar Association, to the extent that they impose obligations in addition to those provided by the California Rules, and to be prudent. Beyond that, our obligations are to provide the most effective representation that we know how for our clients. Our behavior, strategies and tactics in any case should be shaped by those obligations and not by any independent notion that we owe an obligation to be nice to our adversaries. The problem with imposing obligations of someone's notion of "good behavior" include: (1) the inherent impossibility of making fair, objective judgments about what may or may not be consistent with such rule; and (2) that someone's notion of "good behavior" may be quite inconsistent with providing effective and otherwise entirely proper representation of our clients. My purpose in making this brief mention is to urge that responsible trial lawyers resist efforts of our well-intentioned colleagues to legislate good manners in an arena where other interests are of paramount importance.

— Peter I. Ostroff

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