

Letter from
the President

With courts backlogged and legal fees escalating, alternative dispute resolution or "ADR" is in vogue. Mini-trials, summary jury trials, arbitration, "touchy/feely" mediation and even more traditional settlement conferences are popular alternatives to actual trials with live witnesses and their inherent uncertainty and risk.



Mark A. Neubauer

But the key to current ADR techniques is that they are a *voluntary* alternative to traditional litigation chosen by the parties themselves.

Now, however, a different specter faces business litigators – compulsory ADR. The proposal is Assembly Bill 3011, the "Civil Action Alternative Dispute Resolution Referral Act."

Normally, the mere filing of a bill would not cause great concern. There are scores, if not hundreds, of litigation "reform" bills filed each year in the Legislature. Most rarely see the light of day.

But the Civil Action Alternative Dispute Resolution Referral Act is different. The bill was introduced by Assemblyman Philip Isenberg, Chair of the Assembly's Judiciary Committee, and Isenberg is serious about having this bill enacted by the Legislature. Therefore, business litigators should closely examine this proposed legislation and its potential impact on business litigators and their clients in California.

AB 3011 would add one more step to the pretrial process. In an effort to have parties "voluntarily" agree to an alternative dispute resolution process, courts will hold an "ADR Assessment Confer-

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Briefing the Trial Court:
Some Comments on Correctness

Words are the means of a lawyer's practice. These comments concern a specialized aspect of their use: in a written argument aimed at persuading a trial judge of the correctness of the point being discussed.

In any setting in which the trial judge is asked to read argument before ruling on a matter – law and motion, *in limine* motions, or whatever – the ruling is usually won or lost on the papers. Which means that the motion is often if not usually won or lost on the basis of the lawyer's skill.

To be sure, there are some matters at each end of the spectrum which are less affected by skill. If the matter has "loser" written all over it, and the argument wafts ever so slightly over the level of what may be ethically urged, then argument probably will not help a lot. After all, courts do not decide issues by counting debating points.

Still, a well-written brief may ease the blow, save you from sanctions, and, in any event, make a long-term contribution toward your credibility and reputation.

And if you have a slam dunk winner, a well-prepared brief will, if nothing else, assure that you do not manage to snatch defeat out of the jaws of victory, or appear to the court to take your prospective success – or the court – for granted.

For the rest, the brief is everything. And even for the seemingly foregone losers or winners, more often than not there are degrees of success or failure. You may win – or lose – the main point, yet still win subsidiary or ancillary points that may prove quite valuable later on. This is especially true with respect to those issues about which the court exercises discretion, such as the award of sanctions or fees (and their amount), or the decision whether to grant leave to try again or to take some other action.



Hon. Norman L. Epstein

The Briefing Process

Let me offer a few specific suggestions about briefing. The first, of course, is to *be* brief. Blaise Pascal, the 17th Century French mathematician and essayist, once apologized for writing a long letter, explaining, "I had no time to make it shorter." Pascal, *Provincial Letters*, p. 417. It does take effort, talent, and time to write succinctly. But, consider your reader. You want the court to reach and understand your logic, not to lose the subject in a morass of words.

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Second, and in aid of the first, outline before you write. Preparation of a detailed outline involves the exercise of discipline. The syllogisms are complete, or they are not. The supporting facts and authorities are in place, or you can see that they are not and know just what is needed to complete a cogent argument. And once the outline is on paper, it is easy to work with it, moving a point around, embellishing one while trimming another. And when you are done, the prose will almost write itself.

Third, be sure that the principal point is set out at the beginning, even though it may not be the first point in logical order. This may often be accomplished by a brief summary of argument as the first portion of your paper. That lets you be sure that the judge is focused on the principal contention from the beginning. The judge will then more readily appreciate how the subsidiary and supporting issues fit in. Let me turn now to a few thoughts on style, format and content.

Style

It ought to be a cardinal rule of style to avoid legalese. The thereinafores, hereinaboves, ergos, *sub judices* and other Latin affectations gain you nothing, except the suspicion of the reader.

Even less effective, but unfortunately quite common, is the use of *ad hominum* (at the risk of a little affectation) statements. There is nothing wrong with a properly phrased attack of the logic employed by your adversary. But calling opposing counsel or another party names simple demeans the writer. It certainly does not impress the judge, who is likely to conclude that someone who resorts to such tactics does so because of a lack of a proper argument to present.

But every now and then even something bordering on an *ad hominum* can get by. I recall a case about a trusted employee who allegedly was corrupted by a business rival to leave with the company secrets, but not until he had stayed long enough to gather them up. The corrupted employee was referred to something like this: John Q. Smith (hereafter "mole"). The party should not have done it, but it was too engaging to get upset about.

It is helpful to use captions and subcaptions if the argument is complex. But it is never a good idea to try to write the captions as mini-briefs in themselves. I have seen some captions consisting of five or six capitalized lines of screaming but abbreviated argument. That is not their function. The caption ought to consist of few words, and almost never more than a single line. Finally, as a matter of style, avoid excessive use of footnotes.

Format

Leave some white space. I appreciate the constraints of the 15-page rule and similar rules, but it would require a quality of saintliness not to harbor at least a modicum of resentment where the brief presents page after page of argument, from top to bottom and side to side without surcease.

If dates are important to the argument, and especially if their sequence is important, set out a chronology. (This is especially useful for moving and opposing papers on a motion to dismiss for lack of diligent prosecution.) A summary reference and description for key documents may be useful where repeated references will be made to critical papers. In a multi-party, multiple cause of action case, it may be useful to set out a table of who is being sued for what and under which theory.

In California state courts, citations to California cases need only have the official citation; a parallel citation is not necessary. On the other hand, it is not helpful to present only the unofficial citation. Nearly all state judges have the official reporters in chambers and no other reporters.

Content

Even more important than good organization and succinctness is accuracy. The lawyer's integrity is as precious an asset as may be possessed, and it ought not be squandered in misleading arguments or recitations. Where a chronology or statement is presented, include the material that hurts as well as that which helps. The judge, and your opponent, will probably find it anyway, and it is not helpful for the judge to think that you are presenting half-truths.

By the same token, citations must be correct. If you cite case authority for anything beyond the most pedestrian kind of point (the kind that is beyond dispute, and ought to be beyond argument), you should assume that it will be checked. Use internal (pinpoint) page citations to direct the judge to the portion of the case that discusses your issue. Never rely on headnotes or the squib in an annotated code or compendium without checking the case itself. And always be sure your case is still good law. (A case reference in an annotated code that lacks an official citation is almost certainly a reference you do not want to use. The case probably has been decertified or otherwise removed from the citable record.) The same principles of accuracy apply to citations to the record. Peace of mind is assured by citing as though you know your references will be checked. Let the other side incur the consequences of error.

Finally, there is no reason to take up space for off-the-shelf principles that are beyond dispute, such as the standard for summary judgment or the fact that a demurrer is recognized as a pleading in California. A sentence or two with the briefest of cited authority should be enough.

Following Rules

There are Rules of Court, local rules, and local-local rules (i.e., the practices followed by a particular judge). They exist in overwhelming array. As a member of the Bar, you might do what you can to encourage the rulemakers to ease up on the proliferation. (The statewide law and motion rules, and such courtwide documents like the Los Angeles Superior Court Law Departments Policy Manual, are efforts in that direction.) But in the meantime, for the practitioner, the better practice is to know which rules apply and follow them. Most of these rules have escape clauses for the rare case (e.g., where you just cannot get your argument inside 15 pages). But my advice is that, whenever possible, you comply with the rules and not ask for an exception or waiver. Let the other side be the one to have to explain why he or she requires special treatment and cannot follow the normal rules.

Trial Briefs

Finally, a few comments about trial briefs – memoranda that are presented to the judge who will try the case. I confess that I usually have not had much use for them. Few state judges require them, except in special circumstances. I find them particularly unnecessary as duplicate opening statements. As we all know, the role of the opening statement is that of a "roadmap" to inform the trier where the case is going to go. I prefer to hear that, rather than to read it. But other judges may prefer to read it, or to have it both ways.

There are, however, some situations in which trial briefs are particularly useful in state courts. If your issue involves complicated statutory material with which the judge is likely to be unfamiliar (e.g., RICO, CERCLA or CEQA), it is useful to present a memorandum that will help the judge to understand the statutory system and how it applies to the case.

Similarly, where the case presents a complicated skein of factual material (as is common in a documents case), a brief can be invaluable in helping the judge to understand the data and its

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A Primer on Jury Trials In Bankruptcy Proceedings

As a sitting bankruptcy judge, I see attorneys having difficulty understanding the right to jury trial in bankruptcy proceedings. This is especially true of attorneys who do not regularly practice before the bankruptcy court. Below is a primer on when a right to jury trial exists and what court may conduct such a trial. I have given special attention to proceedings involving claims against the debtor, actions to determine

nondischargeability of debts, and preference and fraudulent conveyance actions, because those are the actions in which nonbankruptcy lawyers most frequently appear.

Whether there is a right to jury trial in a proceeding before the bankruptcy court should not involve concepts foreign to the nonbankruptcy lawyer. The issue is governed by the traditional Seventh Amendment test that applies in other courts – whether the cause of action and relief sought are equitable or legal in character. The traditional test in bankruptcy proceedings, however,



Hon. Thomas E. Carlson

leads to results that can be surprising to non-bankruptcy lawyers.

Claims Against the Debtor

Claims against the bankruptcy estate are considered equitable in character. This is so even though a claim is in substance only a breach-of-contract or tort action against the debtor seeking money damages, and would therefore be triable by jury in a state court or federal district court. The Supreme Court decided long ago, however, that there is no right to jury trial in the adjudication of claims in bankruptcy court, because the bankruptcy estate is a trust, and the bankruptcy court sits in equity in administering and distributing the assets of that trust. "The Bankruptcy Act... converts the creditor's legal claim into an equitable claim to a pro rata share of the *res*." This logic applies to all proceedings that are in substance actions against the bankruptcy estate, whether arising pre- or postpetition, and whether initiated by a formal proof of claim or by an adversary proceeding.

There are two exceptions to the general rule. First, there is a statutory right to jury trial in personal injury or wrongful death claims. This exception is not based on constitutional considerations. Congress granted a right to jury trial in such proceedings in response to demands by plaintiffs' lawyers in the wake of the *Johns Manville* bankruptcy. Second, claims are triable by jury if not tried in the bankruptcy court. Thus, if the bankruptcy court grants relief from the automatic stay to allow liquidation of a claim in state or federal court, the parties' right to jury trial is not lost, because the proceeding is not being tried as a matter in equity.

Suits by the Bankruptcy Estate

Unlike claims against the estate, damage actions by the bankruptcy estate do not become equitable merely because tried in the bankruptcy court. Such actions are not considered part of the

administration and distribution of trust assets. A right to jury trial in such actions turns solely on whether the action is legal or equitable under the traditional test. This is so whether the action arises under the Bankruptcy Code, nonbankruptcy federal law, or state law. Thus, there would be a right to jury trial in a state-law breach-of-contract or tort action or a federal antitrust suit brought by the bankruptcy estate if the action sought money damages. Whether there is a right to jury trial is also unaffected by whether the proceeding is "core" or "noncore." Those categories are related to the powers that bankruptcy judges may properly exercise as non-Article III judicial officers. Thus, there is generally a right to jury trial in preference or fraudulent conveyance actions seeking money damages, even though those actions are core proceedings.

There is an important exception to the general rule stated above. Under *Katchen v. Landy*, 383 U.S. 323 (1966), there is no right to jury trial if the action is for recovery of a preference or fraudulent conveyance and the defendant has filed a claim in the bankruptcy case. Although the rationale of *Katchen* is difficult to explain briefly, it ultimately rests on the notion that the preference action has become part of the equitable claims allowance process.

Nondischargeability Actions

Certain types of debts are not discharged in bankruptcy. The most common examples are debts resulting from the debtor's fraud or intentional torts. In order to collect such a debt, however, the creditor must file a lawsuit in the bankruptcy court to have the debt determined to be nondischargeable. In some such cases the underlying debt has already been reduced to judgment, in some cases it has not.

There is no right to jury trial in the determination of whether a given debt is dischargeable. That issue is equitable in character, because it relates to the scope of the debtor's discharge, which is a permanent injunction against further collection of any discharged debt.

It is a closer question whether either party is entitled to a jury trial in determining the amount of the underlying debt, if that is being tried with the question of non-dischargeability. Such an action would clearly be legal in character and triable by jury if tried outside a nondischargeability proceeding. Moreover, although the action is against the debtor, it is not an equitable claim against the bankruptcy estate *res*. A judgment of nondischargeability allows the creditor to pursue the debtor's postpetition assets, which are not part of the bankruptcy estate.

Although the cases remain split, the increasingly prevalent and better view is that there is no right to jury trial on the issue of damages when tried in a nondischargeability case. The determination of dischargeability and the liquidation of the underlying debt arise out of the same transaction and involve adjudication of the same facts. Bankruptcy courts may liquidate the debt without a jury in the course of determining dischargeability, under the doctrine that a court determining an equitable claim may resolve incidental issues of law.

Bankruptcy Court and Jury Trial

Whether a bankruptcy judge may conduct a jury trial depends on whether the proceeding is "core" or "noncore." The bankruptcy court cannot conduct a jury trial in noncore proceedings without the consent of the parties. The courts are divided as to whether the bankruptcy court may conduct a jury trial in a core proceeding without consent.

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Gaining Negotiating Leverage with an Offer of Judgment

Experienced trial attorneys usually know when it is prudent to make a serious and fair settlement offer. The most typical problem arises when, in your view, adverse counsel have incorrectly evaluated the damage portion of their case. Converting this problem into an opportunity to recover costs and attorneys fees as well as encourage counsel to soberly evaluate their chances at trial is precisely what Federal Rule of Civil Procedure 68 ("FRCP 68") is intended to accomplish.



Larry C. Russ

Rule 68 permits a party to make an offer of judgment at least ten days before the trial of any matter. If not accepted within ten days, the offer is deemed withdrawn and is not admissible except in a proceeding to determine costs. The potential right to recover attorneys fees and costs is based on the following pertinent excerpt from FRCP 68:

"If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer."

Most of us would be infinitely more likely to employ Rule 68 if the term "costs" were replaced by the term "attorneys fees." The risk of being assessed an adverse party's attorneys fees incurred after an offer of judgment is made is serious enough to encourage even the most zealous attorney to proceed with caution. At the very least, prudent counsel would advise a client of the risks of not accepting a serious settlement offer.

Ironically, few attorneys realize that in many instances attorneys fees are in fact recoverable as "costs" where a particular federal statute so provides. *Marek v. Chesney*, 473 U.S. 1, 6-7 (1985). Until *Marek* was decided, there was a great deal of confusion regarding the recovery of attorneys fees under FRCP 68. Indeed, the Seventh Circuit Court of Appeals in *Marek*, 720 F.2d 474, 478-479 (7th Cir. 1983), believed that Congress would not have wanted Rule 68 to inhibit litigants from pursuing Constitutionally protected rights. Nor did Congress want the effectiveness of its statutory schemes "blunted because of a little known rule of court."

The Supreme Court granted certiorari to dispel the notion that Congress somehow was unaware of the effect of Rule 68 on its statutory scheme. Rejecting the Seventh Circuit's pronouncement, Justice Burger noted that, by the time Rule 68 was promulgated in 1938, there were numerous federal statutes that allowed a prevailing party to recover attorneys fees as part of the costs. These included the Securities Exchange Act, the Copyright Act and the Clayton Act. (See, the Appendix to the Supreme Court's *Marek* decision for a valuable listing of Federal statutes that provide for attorneys fees within the definition of "costs.")

In light of this fact and the importance of "costs" to Rule 68, "it is very unlikely," Burger opined, that the drafters of the Rule committed some "oversight." On the contrary, "the most reasonable inference is that the term "costs" in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or authority." The following quote from Justice Burger's opinion now

makes clear that attorneys fees are recoverable as costs under Rule 68:

"Absent congressional expressions to the contrary, where the underlying statute defines 'costs' to include attorneys fees, we are satisfied such fees are to be included as costs for purposes of Rule 68." *Id.* at 3016.

Don't be discouraged if the Federal statute applicable to your case does not expressly provide for the award of attorneys fees within the definition of "costs." Where a federal statute does not clearly so provide, case law occasionally permits such a remedy consistent with the letter and spirit of the intended statutory scheme. For example, under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), a property owner may recover "response" costs from a party responsible for releasing hazardous substances on his or her property. Section 101(25), 42 U.S.C. Section 9601. In 1986, Congress enacted the Superfund Amendments and Reauthorization Act ("SARA") which amended the definition of "response" activity under CERCLA Section 101(25) to include "enforcement activities, related removal and remediation actions."

After the SARA amendment, it became well established that the federal government could recover its attorneys fees when it compels a party via legal action to clean up a contaminated property. This right to recover attorneys fees arose out of the definition of "response costs" as amended in Section 101(25). In 1990, District Judge Tevzorian expanded the right to recover attorneys fees as "response costs" to private party litigants. *Pease & Curren Refining, Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945 (C.D. Cal. 1990). Judge Tevzorian combined CERCLA Section 107(a)4(B), 42 U.S.C. Section 9607(a)4(B) (which allows a party to recover "any other necessary costs of response incurred by any other person consistent with the national contingency plan") with Section 101(25) (which defines "response costs" as including attorneys fees) to conclude:

"In ascertaining the plain meaning of 'enforcement activities,' this court concludes that Congress intended for 'enforcement activities' to include attorney's fees expended to induce a responsible party to comply with the remedial actions mandated by CERCLA." *Id.* at page 951.

CERCLA is among the most important new federal statutory schemes dealing with environmental matters. It is therefore quite helpful to know that when defending a governmental or private CERCLA action one may resort to FRCP 68 as a settlement tool. A responsible party may, for example, file an offer of judgment which estimates the actual cost of a remediation action plan. The plaintiff will then have to think long and hard about proceeding with the expense of discovery and trial in the hope of winning an award greater than the amount originally offered. This is especially true if the plaintiff recognizes that it may not recover its own attorney's fees, and worse, may be responsible for an adverse party's attorney's fees as well!

FRCP 68 can be particularly helpful when negotiating with a governmental entity such as the Environmental Protection Agency ("EPA"). The EPA is charged with responding to emergency releases of hazardous or potentially hazardous releases of substances into the environment. The EPA normally subcontracts its response work to private consultants and engineers. As a result, there are numerous opportunities for abuse and, regrettably, response costs are occasionally excessive and unreasonable. (See, "Government Cost Recovery After the Cleanup: Do the Superfund Amendments give the EPA a License to Squander?" R. M. Howard, 42 Baylor La Review 53, Winter 1990.) In these instances, a party's only negotiating leverage may arise out of FRCP 68.

For example, an offer of judgment may be made pursuant to FRCP 68 in the amount of the real or reasonable cost of the

appropriate response to an emergency release of hazardous substances. The EPA must then consider whether it is worth prosecuting a CERCLA recovery action to obtain more money and take on the burden of justifying the occasional loose practices of its subcontractors. It is further worth noting that by making an offer of judgment early on in the process, you will have found a method of requiring the EPA to reimburse your client for its attorney's fees if the EPA is not successful in recovering more than your original offer. *You may carefully structure an offer of judgment to avoid an admission of liability or limit the actual costs and attorneys fees your client may be assessed.*

An offer of judgment under FRCP 68 may be drafted as flexibly as a compromise and mutual release agreement. For example, in *Pigeaud v. McLaren*, 699 F.2d 401 (7th Cir. 1983), the defendant offered one dollar, plus all costs and expenses. The offer also contained the following language: "Nothing in this Offer shall be construed as an admission of liability." The offer was accepted by Pigeaud and he subsequently applied for costs and attorney's fees as the prevailing party. The district court denied Pigeaud's application for attorney's fees because the offer of judgment did not include an admission of liability and thus, Pigeaud could not be deemed the prevailing party. In affirming the district court's decision, the Seventh Circuit added that Pigeaud had established no success on the merits, so that he was not entitled to attorney's fees. *Id.* at page 402. Much of the Seventh Circuit's reasoning beyond the above conclusion is now somewhat flawed in light of the Supreme Court's decision in *Marek v. Chesny*, *supra*.

After *Marek*, it is now well settled that an offer of judgment can itemize or limit costs and attorneys fees, or omit these subjects entirely. (See, Justice Burger's opinion at page 3015.) However, the better practice is to set forth both components of the offer: (i) the substantive relief proposed, and (ii) costs, including reasonable attorney's fees. If your client desires to make a lump sum offer which includes costs and attorney's fees, it will be electing to limit the upside potential liability. At the same time, however, the odds of success may be reduced by the absence of clarity. Consider, for example, the task of assessing the allocation of an offer of judgment between substantive liability and attorney's fees.

In short, it is important that you carefully evaluate the type of offer of judgment that will be appropriate on a case-by-case basis. Wisely visualizing this procedure frequently stimulates concrete settlement discussions and helps your client evaluate the risks and benefits of proceeding to trial.

—Larry C. Russ

Briefing the Trial Court

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relationship to the issues. Often, specific issues come up during the trial, as to which briefing is helpful. Usually, these are evidentiary issues. Where possible, they should be addressed *in limine*, and explained in written memoranda.

For other issues, some lawyers use "pocket briefs" — short, two or three page documents that address a single issue anticipated to come up during the trial. Should these be presented all at once at the beginning of the case? Some judges may prefer to have them all at once and may feel that anything else is game-playing. But presenting them to the judge means presenting them to opposing counsel, and that may involve unnecessarily educating your opponent. I see no problem with holding these back until the issue arises, so long as it is not clear whether the issue will arise. If it is clear, my preference is to have the matter presented *in limine*, so that I have time to review it and decide it.

abtl REPORT

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With briefs written as suggested here — well-organized and phrased, with the key issues highlighted, with accuracy of reference and integrity in presentation — how can the writer lose? Not at all, if there is any justice.

—Hon. Norman L. Epstein

ABTL to Select New Board

At the June 9, 1992 Dinner Meeting, ABTL will be electing its new officers and governors for the 1992-93 year. In addition to the offices of President, Vice-President, Secretary and Treasurer, nine vacancies will exist on the Board of Governors. Any nominations should be submitted to Mark Neubauer, 701 Santa Monica Blvd., Third Floor, Santa Monica, CA 90401.

Securities Arbitration: A Matter of Fairness

Some time ago Robert Coulson, president of the American Arbitration Association, said that the purpose of arbitration – as opposed to court proceedings – is not only to provide an alternative forum, but to provide a “better” alternative forum.

Some parties attempt to define a “better” forum solely in terms of speed and reduced expense. However, if fundamental fairness is lost, one might question whether the parties are receiving what they bargained for when they entered into an arbitration agreement.



Michael A. Bertz

In fact, the Supreme Court, in resolving a conflict between the most efficient means of litigating a matter (in one forum) and complying with the Arbitration Act (which required bifurcation of the claims into different forums), concluded that, while Congress had noted a concern about costliness and delays in court proceedings:

“[T]he purpose behind [the Act’s] passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985).

While also not the overriding goal of the Arbitration Act itself, fundamental fairness is an important part of the fiber of this alternative forum. Thus, the Sixth Circuit reasoned that:

“[T]he standard for judicial review of arbitration procedures is... whether a party to arbitration has been denied a fundamentally fair hearing.” *National Post Office v. U.S. Postal Service*, 751 F.2d 834, 841 (6th Cir. 1985).

This article discusses issues of fairness in the arena of securities arbitration, focusing on the impartiality of arbitrators, application of substantive law, and discovery methods which can expedite fair arbitration proceedings.

Focus Upon the Arbitrator

The impartiality and competence of the arbitrator are critical to a fair arbitration. Until recently, however, only the American Arbitration Association provided training for arbitrators, and securities industry forums appointed some arbitrators who exhibited little or no sensitivity to issues of fairness. Since the 1987 decision in *Shearson/American Express, Inc. v. McMahon* and the advent of revised securities industry arbitration rules, training programs have come into existence through the industry forums which may increase participants’ confidence in the arbitration process.

More is needed, however. Although securities industry rules provide for challenging the selection of an arbitrator, as a practical matter it is often not possible to exercise that right in an informed manner because the rules do not provide enough time between the date when the parties receive information regarding the arbitrator and the date of the arbitration itself, and the information provided is limited. Thus, the parties may be forced to accept an arbitrator at peril of losing the arbitration date and being forced to suffer delays and prejudice. See National Associa-

tion of Securities Dealers (“NASD”) Rules §§21-24.

Challenges to the Arbitrator’s Decision

One ground upon which an arbitration award may be vacated is “[w]here there was evident partiality... in the arbitrators.” 9 U.S.C. §10. The Supreme Court has stated that the Arbitration Act reflects “a desire of Congress to provide not merely for any arbitration but for an impartial one.” *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 147 (1969). [Emphasis in original.]

In addition, some arbitrators freely disregard substantive law – often even in the name of fairness, or “doing equity.” This concept is sometimes used to justify an award of a low dollar amount to a customer that is unrelated to the evidence presented on either side, but which appears to be a skewed compromise that may be no more “doing equity” than it is applying law.

Counsel should bear in mind that the arbitrator’s failure to follow substantive law provides only a narrow basis for appeal, when there is “manifest disregard of the law.” As a ground for vacating an arbitration award, this means more than mere error or a misunderstanding of the law:

“The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator.” *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*, 808 F.2d 930, 933 (2nd Cir. 1986).

Nevertheless, arbitrators are expected to follow substantive law. As the Supreme Court said in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*:

“By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” 473 U.S. 614, 628 (1985).

In that anti-trust matter the Court went on to state:

“Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes... those arising from the application of American anti-trust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim. [Citation.] And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.” 473 U.S. at 636-637. [Emphasis added.]

Nor is there any reason why a party should forego the substantive rights afforded by any other statute, by any implied right of action, or by any common law provision under which any remedy is being pursued, as the Arbitration Act “creates no new legislation, [and] grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts.” *Dean Witter Reynolds, Inc. v. Byrd*, supra, 470 U.S. at 220, n.7. As the Supreme Court said more recently:

[T]here is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.” *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987).

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Keeping in mind the "remedial purposes" of the anti-fraud provisions of the Securities Exchange Act, and the importance given by the Supreme Court to private civil actions in enforcing those provisions to the benefit of injured investors, it should be apparent that the Court's decisions, when read together, reflect a strong expectation that substantive law will be applied to protect investors. See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386-387 (1983); *Baleman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 309-310 (1985); *Basic, Inc. v. Levinson*, 485 U.S. 224, 230-231 (1988).

Moreover, there is no reason why this expectation should not apply with equal force to claims of breach of fiduciary duty, or fraud, or to any other claim brought by an injured investor to vindicate rights considered to be in the public interest.

In reality, however, "judicial scrutiny of arbitration awards" for failure to apply law has been largely unavailable as arbitrators are encouraged by the forums to issue cursory awards – without even the most basic statement of reasoning – thereby withholding from view facts generally necessary to determine whether a "manifest disregard of the law" had occurred. In fact, these forums note that one purpose of the cursory award is to avoid review, thereby enhancing the finality of the award and contributing to the concept of arbitration as a "streamlined" process.

Discovery to Promote Fairness

Traditionally, arbitration rules have sharply curtailed discovery to save time and money. Before 1990, when new securities industry rules were promulgated, the old rules were interpreted as providing for discovery only if the parties voluntarily participated. This gave parties the opportunity to withhold documents and information. Under new rules, parties are required to produce documents and information which "relate to the matter in controversy." See NASD Rules §32(a).

The new rules have spawned abuses, however, that should be addressed. Some members of the securities industry, who once supported arbitration as a means to avoid the costs of discovery, are now using the new discovery rules as a club in an apparent effort to make cases too costly for claimants to pursue in arbitration. Extensive defensive discovery requests are made for documents and information far beyond what is related to the particular controversy. Striking examples have appeared where the customer has charged a broker solely with misrepresentations regarding a small number of stock transactions, and the broker's discovery requests demand all of the claimant's financial records for as long as the prior 10 years.

Arbitration rules generally do not provide for depositions as a matter of right, and certainly this permits participants to avoid a costly discovery device in most cases. However, there may be instances where depositions would be valuable in providing a fair hearing, particularly where a case hinges on the credibility of a principal participant in a transaction. In an appropriate situation, a deposition, limited in time, may foster fairness, and at the same time "expedite the arbitration proceedings." In such a case, while care should be applied, arbitrators should be aware of, and should exercise, their power to order depositions. See NASD Rules §32(d) and 32(e) and American Arbitration Association ("AAA") Rule 10.

For the arbitration to provide a "better" process for resolution of disputes, and not just an alternative forum, procedures and attitudes must promote fundamental fairness in keeping with the reasonable expectations of the parties. The securities industry, which relies heavily on the trust and confidence of its customers, can only maintain that trust and confidence if it fosters procedures which provide for fairness in resolving disputes that may arise.

—Michael A. Bertz

A Primer on Jury Trials

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Noncore proceedings are those in which the bankruptcy judge's powers are limited to conform with Article III of the Constitution. In noncore proceedings a bankruptcy judge may not enter final judgment, unless the parties consent. Rather, the judge may enter only proposed findings of fact and conclusions of law that are reviewed *de novo* by the district court. A bankruptcy judge may enter final judgment in a noncore proceeding with the consent of the parties.

A bankruptcy judge may not conduct a jury trial in a noncore proceeding without the consent of the parties. This is so because the decision of the bankruptcy court in such a proceeding is subject to *de novo* review, and such review would violate the provision of the Seventh Amendment that "no fact tried by a jury shall be otherwise reexamined...than according to the rules of the common law." The bankruptcy court may conduct a jury trial in a noncore proceeding with the consent of the parties, because with such consent, the bankruptcy court may enter a judgment subject to traditional appellate review.

Most bankruptcy proceedings in which there is a right to jury trial are noncore. Actions brought by the bankruptcy estate are the only broad category of actions in which there is a right to a jury trial. Because such proceedings were not traditionally adjudicated by non-Article III judges, such proceedings are also noncore proceedings in which bankruptcy judges' powers are limited. The only actions commonly brought by the bankruptcy estate that are core proceedings are preference and fraudulent conveyance actions under sections 547 and 548 of the Bankruptcy Code. Although not traditionally adjudicated by non-Article III judges, those actions are classified as core proceedings because the substantive rights involved are established in the Bankruptcy Code. Personal injury and wrongful death claims are defined by statute as noncore proceedings, and the statute provides that they must be tried in the district court. As noted above, this classification is based on political and policy concerns and has no constitutional basis.

Core Proceedings

There is a split among the courts as to whether a bankruptcy judge may conduct a jury trial in a core proceeding without the consent of the parties. The courts concluding that bankruptcy judges have such power generally reason that bankruptcy judges' power to enter final judgment in core proceedings without a jury includes the related power to enter final judgment with the aid of a jury. The courts holding that bankruptcy judges may not conduct jury trials in core proceedings without the parties' consent generally reason that no statute expressly provides that a bankruptcy judge may conduct a jury trial and that no such power should be implied because there is a legitimate question whether it would be constitutional.

Conclusion

There is generally no right to jury trial in actions against the bankruptcy estate tried in the bankruptcy court. There generally is a right to jury trial in actions by the bankruptcy estate seeking money damages. In actions by the estate, other than preference and fraudulent conveyance actions, the bankruptcy court may conduct the jury trial only with the consent of the parties. Some courts allow bankruptcy courts to conduct jury trials in preference and fraudulent conveyance actions without the parties' consent.

—Hon. Thomas E. Carlson

ence" to determine "whether the case is appropriate for ADR, refer the case to a (particular) ADR process, determine the amount of discovery to be conducted prior to the inception of an ADR process and, in the case of a referral to arbitration, refer to the arbitrator the determination of discovery to be conducted prior to the inception of arbitration."

The key to Isenberg's bill is that it empowers courts to *mandate* participation in some form of alternative dispute resolution. Some opponents of Isenberg's bill are already cynically referring to it as the "Retired Judges' Full Employment Act."

But serious questions do exist as to the effectiveness of *mandating* alternative dispute resolution. One reason for the high ratio of success of alternative dispute resolution is its *voluntary* nature. The parties choose ADR because they wish to seek a resolution short of expensive litigation. Mandating that every litigant participate in ADR will most likely substantially reduce ADR's highly promising success rate.

By the same token, adding one more cumbersome step to "case management" could substantially add to litigation costs, not only for litigants, but also for the courts.

All of us are already familiar with the wasteful "status conferences" that exist in the Los Angeles County Superior Court, requiring hundreds of lawyers to appear each day to determine when a trial date is to be set, when a mandatory settlement conference is to be set and if the case should be sent to compulsory arbitration. Since most business litigation involves amounts well in excess of the \$50,000 arbitration level, such status conferences become a costly waste of a client's fees.

AB 3011 does not address that concern, leaving it to local court option as to how best to implement the system. If history is any guide, implementation will not necessarily be the least expensive for the business litigant.

Obviously, a goal of AB 3011 – like the compulsory arbitration statutes already in place – is to cull out the substantial number of time consuming personal injury tort cases that consume far more judicial time and lawyer resources than the amount in controversy. It is not, however, well suited to a business case which generally involves more money in dispute and also involves parties who are aware of potential ADR remedies and who often have the resources to pursue them if need be.

The California Trial Lawyers Association has already come out in opposition to AB 3011. Your ABTL is reviewing the legislation to determine its position.

Obviously, alternative dispute resolution is an important aspect of litigation. Moreover, new avenues must be considered to decrease the cost of litigation and improve the effectiveness of the resolution of disputes. But many questions regarding AB 3011 still need to be evaluated. For example, in a state already strapped for financial resources, where will the funds come from for effective use of ADR techniques? Who will pay for the mediators, summary jury judges and other personnel to process and administer a *mandatory* ADR program affecting tens of thousands of cases? A haphazard approach to alternative dispute resolution could destroy its growing effectiveness. An ill considered mandatory program could result in a backlash against ADR if its effectiveness as an obligatory program turns out to be less than what it is achieving as a voluntary choice.

ABTL will explore these issues in the months ahead so that whatever ultimately results from the Legislature will benefit not just ABTL members, but more importantly, our clients.

—Mark A. Neubauer

Smith v. State Farm, 92 Daily Journal D.A.R. 5097 (Cal. App. 4th) (April 17, 1992): An insured may assign his bad faith claim to a third party tort victim if there is a judgment against the insured or the insured has paid settlement money to the tort victim. However, a judgment with a covenant not to execute will not support a valid assignment of a bad faith claim.

Schneider v. Cerio, 92 Daily Journal D.A.R. 4925 (Cal. App. 4th) (April 14, 1992): The communications and conduct of an attorney in aiding and abetting his client in an allegedly unlawful eviction are privileged under the litigation privilege found in Cal. Civ. Code §47. While *Schneider* recognizes the principle that tortious *conduct* is generally not privileged under the holding of *Kimmel v. Goland*, 51 Cal. 3d 202 (1990), *Schneider* holds that a few trivial instances of *conduct*, as opposed to privileged *communications*, cannot be divorced from counsel's entire course of conduct as a legal advisor, and therefore remains privileged.

Mattco Forge, Inc. v. Arthur Young & Co., 92 Daily Journal D.A.R. 4874 (Cal. App. 4th) (April 13, 1992): While the absolute litigation privilege, Cal. Civ. Code § 47, protects an *adverse* expert witness from suit, a friendly expert, i.e., your own expert, may be sued for negligence and his conduct will *not* be privileged. Great, now we'll have a rash of suits against expert witnesses after litigants lose at trial, seeking to blame the expert. Imagine the task of proving the but-for causation of the negligence – a trial within a trial!

MGM Inc. v. Fredricks Development Co., 92 Daily Journal D.A.R. 4491 (Cal. App. 4th on remand from U.S. Supreme Court) (April 6, 1992): *MGM* upheld a ratio of punitive to compensatory damages of 5.44 to 1, and a punitive damages award of \$2 million, where the defendants were wealthy entities.

Vondrasek v. Superior Court, 92 Daily Journal D.A.R. 4266 (Cal. App. 4th) (April 1, 1992): The court held that the doctrine of reasonable implied assumption of the risk, or what the court prefers to refer to as "*reasoned* implied assumption of the risk," may constitute a complete bar to a plaintiff's claim in a strict liability case, notwithstanding the adoption of the doctrine of comparative fault under *Li v. Yellow Cab*, 13 Cal. 3d 804 (1975).

Winet v. Price, 92 Daily Journal D.A.R. 3923 (Cal. App. 4th) (March 25, 1992): The Court of Appeals in *Winet* upholds general releases of all future claims known and *unknown*, and rejects any attempt to defeat the finality and binding nature of such releases by the introduction of evidence of the signatory's unexpressed intentions or his parol evidence which flatly contradicts the release. Most important, the Court of Appeal specifically approves the release language used in the settlement agreement. Litigators should examine this language and consider adopting it in their form settlement agreements. (The Court of Appeal also reviews those exceptional circumstances, mostly in the personal injury context, where plaintiffs are relieved from a general release.)

Merenda v. Superior Court, 92 Daily Journal D.A.R. 1528 (Cal. App. 4th) (February 3, 1992): *Merenda* holds that a plaintiff suing their own attorney for legal malpractice *cannot* recover damages for emotional distress suffered as a result of the attorney's negligence, but *can* recover as compensatory damages the amount the client *would* have received as punitive damages on the discharged claim against the third party. *Wow!!* Imagine the task of proving at your malpractice trial that you would have received punitive damages under the standard of clear and convincing evidence during your first trial, but for some negligent conduct of your attorney. On the other hand, if a jury did find malice, fraud or oppression, and the client failed to receive punitive damages because counsel failed to put on wealth evidence as required by the Supreme Court's recent decision in *Murakami*, that might be negligence per se that caused the loss of punitive damages.

—Rex Julian Beaber