

Letter from the President

For the past six years, the ABTL has regularly presented one hour programs by distinguished panels composed of judges and experienced business trial lawyers from our own community. These programs have covered virtually every aspect of business litigation and have been educational and interesting. Although the officers and the Board of the Association have been reluctant to change this successful approach, we believe the time has come to entertain a discussion about the program format and we solicit the views of each member on this subject.



Several questions merit debate. Should we lower or raise the level of sophistication of the programs? Should we have single speakers instead of panels? Should we invite distinguished speakers on litigation from outside our own community? Should we present programs which focus on substantive areas of the law in which litigation is common such as antitrust and securities? Should we augment our regular bimonthly dinner programs with less formal luncheon seminars on specific litigation topics? Finally, are there ways in which our educational programs can be improved?

Of course, the ABTL's activities extend beyond its continuing education programs. The Association has been actively involved in issues affecting the legal community generally and business trial lawyers specifically. For example, the ABTL has long been concerned about the issue of certification of trial specialists. We are conscious of the serious problems created by any certification program and the need to recognize the very important differences between business trial practice and personal injury practice. As I previously reported to you, the ABTL has acted to have an association representative appointed to the State Bar's Civil Trial Advocacy Consulting Group. We would like to know the views of the members of ABTL on this important subject and we solicit your comments.

The ABTL has also considered questions relating to the independence and competence of the judiciary. Be-

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Shifting the Attorney's Fee Burden: A Proposal

In California today, attorneys who engage in any appreciable amount of trial practice are acutely aware of two major conditions that have had a substantial adverse impact upon efficient and effective judicial administration: (1) severe court congestion and the substantial delays experienced by litigants in bringing civil matters to a resolution, and (2) the individual financial hardship and burden imposed by the ever increasing costs of litigation. Just as there is no one cause for these circumstances, there is no one easy remedy.

1. *Court congestion.* The time from the filing of a civil action until trial has steadily widened. Until recently, in Los Angeles County, virtually the only Superior Court cases assigned for trial were those threatened by the five-year dismissal statute (Code of Civil Procedure §583 (b)). The time from filing of an at-issue memorandum until the issuance of a certificate of readiness by the clerk is between 2½ and 3 years. In other major California counties, the problem is equally acute.



Obviously, this backlog creates gross public dissatisfaction with the entire system of judicial administration.

The old bromide that "justice delayed is justice denied" is much more than a cliché to litigants who are now trying to get civil matters resolved. In practical terms, their inability to enforce or preserve rights which they reasonably believed the law was supposed to protect means that such rights might as well not exist. Further, when the law only compensates with 7% interest extended delays in the enforcement of outstanding obligations or redress for tortious injury (and, in many cases, no prejudgment interest at all), the consequences to litigants are both adverse and substantial.

2. *Litigation costs.* It is no secret that the costs of delivering legal services have grown substantially in the

Ed. Note: A contrary view on this attorney's fees proposal will be published in the next issue.

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Ninth Circuit Begins 'No Brief' Procedure

On June 1st of this year, the Ninth Circuit will permit appeals of both civil and criminal cases pursuant to a new procedure under which the court will hear cases based solely on oral argument, *without the submission of briefs*. This radical departure from the traditional American approach to appellate litigation is an experimental program. Initially being adopted for one year, it is applicable only to appeals from the Northern, Central and Southern Districts of California and the District of Arizona.

This new procedure arises out of a pilot project begun on a voluntary basis in 1978 for criminal appeals from the Southern District of California and the District of Arizona. Not surprisingly, few convicted persons out on bail pending appeal chose to utilize this procedure which substantially speeds up the appellate process. Nonetheless, it has been utilized for habeas corpus proceedings and the Ninth Circuit thus has some exposure to the process. Inquiries directed both to the litigants and the counsel who participated in the pilot project reveal a very high rate of approval by both groups.

The new procedure arises out of the court's recognition that all appeals should not necessarily be treated in the same manner, and that certain categories of appeals naturally lend themselves to an abbreviated appellate process. The court has for some time classified appeals on the basis of the complexity of the issues involved, with "ten" being the most complex and "one" being the simplest to resolve. It is anticipated that the new procedure will be utilized primarily for controversies designated "one" or "two" on this scale, although by agreement more complex matters may also be considered. *Pro se* cases will be excluded on the obvious ground that, on the scale of one to ten, a *pro se* case is inherently an eleven.

Starting June 1st, when a notice of appeal is filed in one of the four districts involved, the clerk's office will provide the appellant with a civil appeals docketing statement that will give the court the information necessary for the selection of cases for this program. The appellant has ten days to file the form.

Based on its evaluation of the information on the civil appeals docketing statement, the court will select the litigants to receive an invitation to participate in the program. Within 14 days of the issuance of this invitation, either party may opt out; but in the absence of an affirmative act to opt out, the litigant has opted in. Litigants not invited by the court to participate in the program can opt in by stipulation, and the current plan is that every case in which a stipulation is filed will be accepted into the program. The Ninth Circuit anticipates that even priority cases will be heard not less than three months



Richard C. Field

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Attorney's Fee Proposal

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past ten years, particularly in the litigation context, where it is often difficult to predict, much less control, the amount of time and expense required.

The ever increasing threat of a legal malpractice action following an unsatisfactory result requires the prudent litigator to insure that he has engaged in every reasonable pretrial tactic, motion and discovery proceeding which, when viewed in the perspective of hindsight, might seem to be required to protect his client's interests.

Accordingly, many attorneys today feel compelled to advise their clients that it does not make economic sense to litigate an issue involving less than \$25,000. The legal fees and costs may well consume at least half of that sum.

A client with such a claim would be better off simply to give his debtor a 50% discount and receive the certainty of resolution and the immediacy of some payment. The situation is no better for those who are potential defendants. The cost of providing an adequate defense of even a frivolous claim is so great as to make it economically advantageous to make a cost of defense settlement. A premium is placed on delay, debt and dishonor.

As already noted, there are no easy answers to these problems. They have resulted from a number of factors: the impact of increasing criminal case loads; the use and abuse of discovery and other pretrial procedures; the lack of any effective incentive to negotiate the early resolution of litigation; bureaucratic and budgetary realities and political decisions limiting the allocation of governmental resources to the judicial branch of government; delays in the filling of judicial posts.

However, that does not mean that constructive steps cannot be taken which may at least contribute to some improvement.

One proposal which might well have a very substantial and positive impact on both court congestion and litigation costs would be to shift the burden of paying attorney's fees to require the losing party in every civil action, at the discretion of the trial court, to pay the reasonable attorney's fees incurred by the prevailing party. This suggestion, of course, is neither novel nor original,¹ but it may well be an idea whose time has come.

The issue of who is to pay the attorney's fees incurred in litigating matters in California is, of course, a matter regulated by statute.² California follows the general "American Rule" that, absent some special considerations, contract or statute, each party is to bear the burden of his or her own legal fees. Still, the California Legislature has seen fit on at least 151 occasions to make statutory exceptions to the general rule.³ Of these 151 exceptions, over 95 mandate the award of attorney's fees and leave no discretion to the trial court except as to the amount.

In addition, California courts have, from time to time, made judicial exceptions to the general rule. See, for example, *Prentice v. North American Title Guaranty Corporation* (1963) 59 Cal.2d 618, 620 ("third-party tortfeasor" doctrine); *Quinn v. State of California* (1975) 15 Cal.3d 162 ("common fund" doctrine); *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1 ("substantial benefit" doctrine); *Serrano v. Priest* (1977) 20 Cal.3d 25 ("private attorney general" doctrine).

Obviously, such extensive legislative and judicial activity relating to the shifting of the attorney's fee burden suggests that, in an increasing number of circumstances, it is simply inequitable and unfair to require the prevailing party to suffer the penalty of the litigation costs incurred to preserve or protect a particular right.

Nonetheless, as the aforesaid statutory and judicial exceptions will reveal, all that really has been accomplished is to give certain special interests and particular segments of our society a preference before the bar of justice. Whether or not this can be justified in terms of political reality or expediency, if a rule needs to have this many exceptions to create special privileges for so many classes of people, then why should the rule exist at all?

Can we really justify giving a special protection to such disparate parties as the lessor of a mineral lease (Civil Code §794), an injured credit card holder sustaining damages by reason of billing errors (Civil Code §1747.50), the contract holder in a suit involving an installment sale (Civil Code §1812.4), or the injured repairman (Civil Code §1794.1 (b)), but deny such relief to all those litigants who have not managed to become the beneficiaries of a special statutory or judicial exception? Wouldn't it make more sense and be more equitable to at least give the trial court in all civil actions the discretion to determine whether attorney's fees should be awarded to the prevailing party, and if so, in what amount?

It seems clear, based upon recent decisions of the Supreme Court, that there is a great deal of resistance to any further judicial tinkering with or modification of the general rule codified in Code of Civil Procedure §1021. In *International Industries, Inc. v. Olen* (1978) 21 Cal.3d 218, the court, in a 4 to 3 opinion, refused to permit the application of the benefits of Civil Code §1717 to voluntary dismissal cases on the grounds of "sound public policy" and "equitable considerations." See also *Davis v. Air Technical Industries, Inc.* (1978) 22 Cal.3d 1; *Bauguess v. Paine* (1978) 22 Cal.3d 626, 637.

The Legislature isn't going to act on a major issue such as this without some impetus from the organized bar. It is an issue that carries with it substantial controversy because of the actual or perceived competing social policies which exist among various classes of litigants. The interests of the poor contingent plaintiff are not always the same as those of the affluent corporate defendant.

In order to stimulate debate on this issue, the author and several other attorneys have submitted a specific and concrete proposal to the 1980 State Bar Conference of Delegates.

The thrust of this proposed new C.C.P. §1021 would give to the trial court in all civil actions the discretion to award reasonable attorney's fees to the prevailing party as part of his costs. In exercising its discretion, the court would consider a number of factors which, depending on the circumstances, could militate against the award of attorney's fees.

It is not the intent of this section to require that attorney's fees be awarded in every case but only under those circumstances where the court determines that such an award is just and fair.

Admittedly, such a provision gives the trial court a tremendous power and authority that could substantially

impact settlement but which, it is submitted, is all to the good. The court would have the discretion to determine the amount of the fees based upon criteria similar to those now invoked where such fees are allowed.

One portion of the proposed new section would provide a litigant with an opportunity to demand security for the payment of a possible post-trial attorney's fee award at any time after an action is at issue. This protects a party from an opponent who has no reasonable probability of being able to respond to a potential fee award.

The only penalty for the failure to comply with an order for security is the loss of the right to claim attorney's fees under this proposed section against the party obtaining the order. Thus no unreasonable burden is placed in the path of the indigent litigant. He would be in the same position as if there were no statutory authority for recovering fees, but the section would provide an equitable balance to insure that the litigant able to pay an award is not unduly penalized.

Obviously, such a provision could be abused, and for that reason a double showing is required to be made. The litigant seeking an order for security must not only establish that his opponent does not have the financial ability to respond to a potential fee award but also that his (*i.e.*, the moving party's) claim or defense has probable validity. Further, the court could award attorney's fees against the party unsuccessfully seeking to obtain an attorney's fee order.

Finally, the proposed §1021 would expressly not impair or enlarge any of the rights which litigants already have under existing statutory exceptions to the general rule.

It may well be that if the new §1021 is enacted, the Legislature should undertake a review of the other statutory provisions to see if they have been rendered superfluous and whether or not they should be retained. However, the passage of this new section need not await such a review because, at most, it would be cumulative and in some cases supplemental to the existing statutes.

The proposed language of the new §1021 *does* address the competing social and economic policies of various classes of litigants. At the same time, it takes California down the road towards recognizing that court congestion and litigation expense can be positively affected by giving to litigants a very strong inducement to either avoid the assertion of unmeritorious causes or defenses or, once asserted, to settle them promptly.

Still, any discussion of the issue involves two separate questions: first, whether or not we should reexamine the rule which limits the award to attorney's fees — it seems that a strong case exists for answering that in the affirmative; second, what form a new rule should take. The matter will be before the Conference of Delegates in September. Thus, there is an immediate opportunity for the organized bar to make a collective judgment on both of these questions.

—H. Walter Croskey

1. See *e.g.* Sands, *Attorney's Fees as Recoverable Costs*, 63 *American Bar Journal* 510 (1977).
2. Code of Civil Procedure §1021.
3. For a table of California statutes providing for an award of attorney's fees, see California Continuing Education of the Bar, "Attorney's Fees," April/May 1979 Program Material, Appendix II. In addition, the Legislature added by 1979 statutes, effective January 1, 1980, the following code sections providing for attorney's fees to be paid to the prevailing party by the losing party: Business and Professions Code §11702(d), Civil Code §§987(e), 1695.7, 1942.5 (g), 3154(f), 4370(c) and 5630 and Code of Civil Procedure §§547(e) and 1021.6.

Jury Trials and Complex Litigation

Despite paying lip service to the "sacrosanct" right to a jury trial a growing number of federal courts have held there is a right *not* to have a jury in complex civil litigation.¹ Conversely, other courts have strongly opposed such attempts to limit the Seventh Amendment.² In a recent opinion (*In re U.S. Financial Securities Litigation*, 609 F.2d 411 (1979)), the Ninth Circuit plunged into this debate over a court's power to strike a jury demand in intricate securities or antitrust actions.

The Circuit Court's decision to reject the "complexity" exception to the Seventh Amendment presented the Supreme Court with an opportunity to resolve the issue which the high court itself created through a cryptic footnote, but on April 28, 1980, the Court passed up this opportunity, apparently content to let the issue continue to fester in the lower courts. The debate over the complexity exception to the Seventh Amendment traces its origin to *Ross v. Bernhard*, 396 U.S. 531 (1970), when the Supreme Court upheld the right to a jury trial in a shareholder's derivative action, but stated in a footnote,

"As our cases indicate, the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such question; second, the remedy sought; and third, *the practical abilities and limitations of juries . . .*" 396 U.S. at 538, fn. 10 (emphasis added).



Mark A. Neubauer Seizing on the three-prong test of that footnote, a number of trial and appellate courts in the First, Second, Sixth, and Ninth Circuits have held that, where a civil action is so complex that it is impossible for a jury to handle the intricate fact-finding involved, there is no adequate remedy at law. Therefore the action is one in equity and should be tried by the court. To require a jury in such complex antitrust, securities or patent litigation would, these courts have held, result in such an irrational verdict as to constitute a denial of due process. See, e.g., *Hyde Properties v. McCoy*, 507 F.2d 301 (6th Cir. 1974).

One of the more eloquent opinions in support of the "complexity" exception to the Seventh Amendment was U.S. District Court Judge Howard B. Turrentine's opinion striking the jury demand in the *U.S. Financial Securities Litigation*, 75 F.R.D. 702 (1977).

The U.S. Financial litigation involved eighteen cases, including five different class actions against more than one hundred defendants, all of which stemmed from the failure of the U.S. Financial real estate development empire in the late 1960s. Turrentine's opinion emphasized his horror at submitting such a massive case to a lay jury. The plaintiffs' pre-trial memorandum was a mere 806 pages with an estimated 241 witnesses to be called by

the plaintiffs alone. Turrentine concluded that more than 100,000 pages of documentary evidence would be presented and that it would take more than several years of actual trial.

While reaffirming that the Seventh Amendment right to a jury trial is "strongly favored," Turrentine stated that he "questioned whether a jury — any jury — is equal to the task." Relying on the footnote in *Ross v. Bernhard*, Turrentine held that "the practical abilities and limitations of juries" mandated a non-jury trial in the U.S. Financial Litigation.

To determine whether that third test under *Ross v. Bernhard* had been met, Turrentine held that a court should look at three factors:

"First, although mere complexity is not enough, complicated accounting problems are not generally amenable to jury resolution. . . . Also, given the comments in *Dairy Queen* regarding special masters, only a case in which such a special master could not assist the jury meaningfully may be subject to removal from the province of the jury because of complex accounts.

"Second, the jury members must be capable of understanding and dealing rationally with the issues of the case.

"And third, an unusually long trial may make extraordinary demands upon a jury which would make it difficult for the juries to function effectively throughout the trial." 75 F.R.D. at 711.

Turrentine went on to find that all three guidelines were met in the U.S. Financial litigation and ordered the jury demand be stricken. However, in a narrow two-to-one decision, the Ninth Circuit on December 10, 1979, overturned Turrentine's holding and flatly rejected the "complexity" exception to the Seventh Amendment.

The majority stated that judges were no better qualified than a jury to act as fact finders in complex civil litigation and dismissed the importance of the footnote in *Ross v. Bernhard*. Although admitting that the meaning of that footnote is "unclear," the Ninth Circuit stated,

" . . . we do not believe that it stated a rule of constitutional dimensions. After employing a historical test for almost two hundred years, it is doubtful that the Supreme Court would attempt to make such a radical departure from its prior interpretation of a constitutional provision in a footnote." 609 F.2d at 425.

At the heart of this controversy is the frustration of many trial judges with the cumbersome procedure of employing the jury as a fact finder in intricate business litigation. Epitomizing that frustration was the court's decision in *ILC Peripherals Leasing Corp. v. International Business Machines*, 458 F.Supp. 423 (N.D. Cal. 1978). After a five-month trial in an anti-trust action against IBM, the jury became hopelessly deadlocked after deliberating for 19 days. In addition to directing a verdict for IBM, the court ordered that the plaintiff's jury demand should be stricken in the event of a re-trial.

Relying on the now-famous footnote in *Ross v. Bernhard*, the court concluded that those jurors who were able to participate in such a long trial were not "a true cross section of the community and were dominated by housewives and retirees or those whose careers did not afford them with a sophisticated technical or economic background needed to rule in the complicated anti-trust action." Warning that the judicial system should not

have to undergo this ordeal again should the court's directed verdict be overturned on appeal, the court stated,

"... the jury was originally conceived as a protective shield between the litigants and the danger of an arbitrary decision by the sovereign. It would be a subversion of this ideal to insist upon submitting a case to a jury when there is a substantial risk that its decision will be arbitrary." 458 F.Supp. at 448-449.

Other courts have been equally concerned about the ability of a lay jury to decide complex civil litigation. The Southern District of New York has perhaps been most critical of the ability of juries in such a role. In striking the jury demand in *Bernstein v. Universal Pictures, Inc.* — a massive anti-trust class action brought by various lyricists and composers against the motion picture studios — the court rejected the plaintiffs' claim to a jury because of the case's magnitude. Of particular concern was the type of jury that would result in attempting to obtain veniremen who could commit themselves to the projected lengthy four-month trial:

"... employed citizens or persons engaged in business for their own account and having familiarity with business concepts would seek to be excused upon justifiable claims of undue hardship... this could, at a very minimum, diminish the appearance

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of fairness. When persons entitled to be excused from such a lengthy case have been eliminated from the venire, must litigants be left with a panel consisting solely of retired people, the idle rich, those on welfare and housewives whose children are grown? Hardly a 'fair cross section of the community wherein the court convenes.' 28 U.S. §1861." 79 F.R.D. at 69-70.

The court in *Bernstein* also revealed its contempt for the ability of the jurors to comprehend the issue before it:

"... The sheer size of the litigation and the complexity of the relationships among the parties render it as a whole beyond the ability and competence of any jury to understand and decide with rationality. Of course, antitrust cases in general are by their very nature complex, so that special rules have been developed in response to that complexity. . . . The ordinary antitrust case is clearly within the competence of juries. This lawsuit is the exceptional case, not the rule." 79 F.R.D. at 70.

The court went on to say,

"... to hold that a jury trial is required in this case would be to hold that the Seventh Amendment gives a single party at its choice the right to an irrational verdict." 79 F.R.D. at 71.

In its opinion, the Ninth Circuit was highly critical of the elitism evidenced in the *Bernstein* opinion:

"The opponents of the use of juries in complex civil cases generally assume that juries are incapable of understanding complicated matters. This argument unnecessarily and improperly demeans the intelligence of the citizens of this Nation. We do not accept such an assertion. Jurors, if properly instructed and treated with deserved respect, bring collective intelligence, wisdom and dedication to their task, which is rarely equaled in other areas of public service." 609 F.2d at 429-430.

Although the Ninth Circuit's decision to reverse Judge Turrentine hinged on the crucial vote of a fellow trial judge, Central District Judge William M. Byrne, the Circuit Court's opinion flung the gauntlet down and virtually dared the Supreme Court to resolve the debate over its footnote in *Ross v. Bernhard*. In its opinion, the Ninth Circuit stated that the *Ross* footnote was "dictum totally unnecessary to the Court's holding. As such, it is not binding on this court." 609 F.2d at 429, fn. 43.

But, as the Court of Appeals also observed, the opponents of juries in complex civil litigation include Chief Justice Warren E. Burger. Only last summer, Burger called for alternatives to jury trials in complex litigation. 609 F.2d at 429, fn. 66.

Nevertheless, the Court apparently decided to pass up the opportunity to initiate the Chief Justice's call for reform, since the Court denied a writ of certiorari in the U.S. Financial case on April 28, 1980.³ Thus, the debate among the circuit courts over the complexity exception to the Seventh Amendment is far from over. The Supreme Court is not yet ready to reveal what it meant by its infamous footnote in *Ross v. Bernhard*.

—Mark A. Neubauer

1. *Hyde Properties v. McCoy*, 507 F.2d 301 (6th Cir. 1974); *Rosen v. Dick*, 83 F.R.D. 549 (S.D.N.Y. 1979); *SCM Corp. v. Xerox Corp.*, 463 F.Supp. 983 (D. Conn. 1978); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F.Supp. 423 (N.D. Cal. 1978); *In re Boise Cascade Securities Litigation*, 420 F.Supp. 99 (W.D. Wash. 1974).
2. *Zenith Radio Corp. v. Matsushita Elec. Industrial Co., Ltd.*, 478 F.Supp. 889 (E.D. Pa. 1979); *Radial Lip Machine, Inc. v. Intl Carbide Corp.*, 76 F.R.D. 224 (N.D. Ill. 1977).
3. The appeal of the U.S. Financial decision was sub. nom. *Grant v. Union Bank*, Dkt. No. 79-1383. The Court also refused to hear an appeal of a similar holding in *IBM Corp. v. Greyhound Computer Corp.*, Dkt. No. 79-1397.

Letter from the President

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cause business trial lawyers practice primarily in non-political business and commercial fields, they should be keenly conscious of the need to preserve an independent, competent and non-politicized court system. While the ABTL has never undertaken to endorse or evaluate candidates for judicial office, it has been frequently solicited to do so and we would welcome the membership's view as to whether the Association should adopt such a program.

During the last year, the ABTL established a formal liaison with the Los Angeles County Bar Association's trial section. The question has been raised as to whether the ABTL could or should establish formal ties to the County Bar. Your opinion on this issue is welcome.

Finally, the ABTL has been discussing with business trial attorneys in San Diego and San Francisco the establishment of ABTLs in those cities. We would welcome a dialogue on the question of the kind of relationship we should establish with other ABTLs in California. For example, is a formal statewide association desirable? Would exchange programs and joint seminars be of interest to our members?

The ABTL will continue to serve the business trial bar of Los Angeles. New officers and a new Board of Governors will soon take office and I urge you to submit your suggestions and comments on the foregoing issues to the President-elect, Tom McDermott, at Kadison, Pfaelzer, Woodard, Quinn & Rossi, 707 Wilshire Boulevard, Los Angeles, California 90017.

—Loren R. Rothschild

This October, Take Your 'Remedies' in Palm Springs

"Remedies in Business Litigation" will be the subject of ABTL's Seventh Annual Seminar October 24-26 at the elegant Canyon Hotel in Palm Springs. Enrollment will be limited to 100 persons.

A distinguished group of panelists will conduct the workshops and provide attendees with a large kit of relevant materials. The panelists include U.S. District Court Judge William P. Gray, Los Angeles County Superior Court Judges Campbell M. Lucas and Bruce R. Geernaert, and attorneys Gerald E. Boltz, Allan Browne, Hillel Chodos, Marshall B. Grossman, Gideon Kanner, Louise LaMothe, William A. Masterson, John Sturgeon, Robert S. Warren and Philip F. Westbrook.

Among the topics scheduled for discussion are injunctive relief, attachments, theories of damages in securities litigation, SEC proceedings, special problems in derivative litigation, real property remedies and remedy problems in business tort litigation. Also due for consideration are contract and UCC remedies, remedies under consumer protection laws and the recovery of attorney's fees (in class action and other litigation), punitive damages and interest.

Because enrollment is limited to 100 persons, registration forms should be returned promptly. The Canyon Hotel has superb facilities and excellent service.

—Robert A. Shlachter

'No Brief' Procedure

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earlier than they would be considered otherwise, and non-priority cases will be heard 14 months or more before their hearing would otherwise take place.

The judges of the Court of Appeals will not be hearing the arguments cold. The appellant is to file a pre-argument statement, not more than five pages in length, containing: a concise statement of the nature of the proceeding and the relief sought, a very brief summary of the case, the questions to be considered on appeal, and a list of citations to the principal cases and to the pages of the record upon which the appellant will rely at oral argument. Thereafter the appellee will submit a pre-argument statement, also not more than five pages in length, containing (if needed) a concise counter-statement of the case and a list of the citations to the principal cases and to the pages of the record upon which the appellee will rely at oral argument.

The appellant will not be permitted to submit a further statement in reply. The panel of judges assigned to the case will have read the portions of the record and the cases cited prior to oral argument.

Most significantly, the court proposes to give essentially unlimited time for oral argument on these cases. While the court does not anticipate that the arguments will take several days, as is occasionally the case under the English system, the court is taking the approach that it will be very liberal in permitting full oral development of the points raised on appeal. The court may on occasion require limited briefing on a specific issue subsequent to oral argument, if it appears that the issue is not satisfactorily developed.

The procedure is designed to be substantially less expensive, and provide for a much more prompt disposition, than cases under the normal appellate process. While most cases of the type typically handled by members of the ABTL are more complex than the program is designed to handle, competent and experienced counsel who can agree on the issues may well be able to obtain a satisfactory appellate resolution of business disputes by this abbreviated process. The opportunity to give a full and complete presentation of the issues on appeal and to have a final adjudication relatively promptly, should be a significant incentive to encourage participation in this program.

—Richard C. Field

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