

Letter from the President

Last fall the Central District issued for comment by the Bar proposed new rules which were designed to implement the recommendations made by the Devitt Committee in 1979.^{1/}



The Central District's proposed new rules mandate the successful completion of a written examination as a condition precedent to admission, mandatory continuing education^{2/} and a specified level of "trial experience" before admitted attorneys would be permitted to conduct trials in that forum.

The nature, substance, content, scope and scoring of the required written examination are to be determined, subject to the supervision of the Court, by a "Central District Committee on Examinations" which would also be responsible for administering the examination at least twice each year and certifying to the Court those applicants who had passed the exam. The examination committee is to consist of five members appointed by the Court, at least four of which are to be members of the Bar of that Court.

With respect to the "trial experience" requirement, the proposed rules divide the Bar of that Court into "experienced" and "trial experienced" attorneys. All "experienced" attorneys are permitted to appear as counsel of record and participate in all matters before the Court *except trial* but only "trial experienced" lawyers are permitted to conduct trials. Only lawyers who have had three "trial experiences" within the five years preceding the request for certification will be certified as "trial experienced." A "trial experience" may consist of a "participation unit" or a "simulation unit," but at least one must be a participation unit.

After the effective date of the proposed rules, an attorney may earn a participation unit in a "qualifying trial" only by (i) serving as lead counsel, *advised* by a "trial experienced" member of the Bar of the Central District or (ii) participating as assistant counsel to a "trial experienced" attorney.^{3/} A "qualifying trial" is limited to (i) a trial before a court of record, state or federal, involving substantial testimonial proceedings of at least a day of duration, going to the merits or (ii) the substantial equivalent such as a preliminary proceeding in a court

Continued on Page 8

Enter the Microcomputer For Litigation Support

For some time now, there has been much talk of microcomputer supported litigation. Articles abound on it. Yet, most of the articles assume a familiarity with the programming and technology of microcomputers that few busy litigators have the time or interest to acquire. This article is a personal description of one lawyer's experience — my own — in creating a working microcomputer litigation support system without having to become immersed in computer mystique.

Formulating Objectives



Initially, I thought it would require excessive input time, and not be consistent with microcomputer capacity, to attempt full text storage of data or comprehensive digesting of all documents and deposition transcripts. Instead, I decided that the overall approach would be to develop an information retrieval system on a microcomputer that would relate the physical location of items of information and an indication of their content (e.g., items stated in transcript pages, in production documents, in interrogatory answers, etc.) to the issues of the case. As the framework for this, I decided to use two basic numbering systems: a File Index, with a numerical code for every document file or transcript in the case, and an Issue Index, with a numerical code for each of the issues in the case. Both indexes need to be open ended to accommodate new items of information and new issues as discovery progresses. Entries for a typical File Index and Issue Index (for a patent case) follow:

File Index	Issue Index
100 CORRESPONDENCE	100 Statutory Defenses
101 General Corresp.	101 On Sale/Experimentation
120 COURT PAPERS	
121 Pleading Binder	
200 DISCOVERY FROM PLAINTIFF	102 Derivation From Another
201 Documents Produced by Plaintiff	103 Obviousness
202 Depos. of Pltf.'s Witnesses	
203 Bill Turner	120 Equitable Defenses

Next, I formulated specific objectives for output, input, machine capability and cost. My output objectives were to

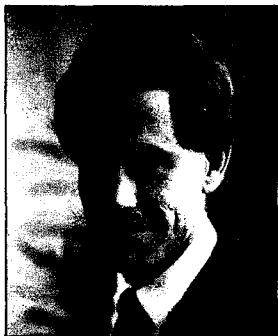
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Protecting Fees In Business Litigation

The thesis of this article is that substantively sound legal practice is the best security for your fees. A client who is well informed of your efforts on the case, who has been given a realistic appraisal of the case, and who knows your efforts have been both diligent and reasonably proportional to the task at hand is likely to be a client who gladly pays your fee, regardless of the outcome.

I. *Some Frequently Neglected Fundamentals.*

A. *Keep the Client Well Informed.*



Paul J. Hall

The well informed client rarely presents a problem with regard to fees. Consult with your client on significant tactical questions and on decisions that will materially impact the expense of the case. As a matter of course, you should send your client copies of all pleadings, briefs, substantive correspondence and, if your client has the interest, even deposition transcripts. The more paper and work product the client receives, the more the client understands the fees charged.

B. *Make An Early and Candid Assessment of the Case.*

The litigator's job is not necessarily to turn in a splendid performance in court or even to clobber the opposition in pre-trial proceedings. Rather, the objective is dispute resolution in a manner that serves the client's business interests. To that end, there is no substitute for an early, accurate assessment of the case that is shared with the client and then guides the lawyer's subsequent handling of the matter.

In determining a settlement and/or litigation strategy, you should consider the amount at issue, the importance to your client of the legal or business issues presented by the case, the complexity of the factual and legal issues presented, the strengths and weaknesses of the client's position, the relative importance of early or delayed resolution of the dispute, and the likely approach to the case by the one or more opposing parties. Remember that legal and factual complexity is not necessarily related to the amount at issue; a \$50,000 case may be just as complicated to prepare and try as some \$1,000,000 cases. It is your responsibility to devise a dispute resolution strategy in which your fees will not occupy a disproportionately large part of the financial picture.

C. *Explore the Possibility of Early Settlement.*

The opposing parties' settlement positions may grow farther apart as they incur substantial litigation expenses and then develop grandiose expectations about an extremely favorable settlement or judgment that will cover the attorneys' fees they have incurred. While there are some cases that won't settle until the opposition is exposed to the harsh light of cross-examination during discovery or court proceedings, there are also many cases in which

your chance of providing a cost-effective service to your client may be greatest at the outset. Remember that in litigation, like poker, you are dealt some strong hands and some weak hands. The weak hands will not ruin you so long as they are recognized for what they are, but what you don't want to do is bump the pot and then finish second.

D. *Use a Litigation Budget as an Analytical Tool.*

Discuss your projected fees with the client and then attempt to establish an appropriate game plan and "litigation budget." Your client should understand that the accuracy of any projected litigation budget depends on what the other side will do, which is often fairly predictable but which may sometimes get out of hand for reasons beyond your control. Nevertheless, a litigation budget is a useful benchmark against which you can measure the relative cost-effectiveness of your efforts.

E. *Keep Your Eye on the Target.*

Always question how each of your actions advances your position and whether it makes business sense for your client. Ask yourself if any given motion or deposition is really necessary. Avoid demurrers, motions for summary judgment and the like unless they promise to be dispositive. Otherwise, all you have done is educate the opposition and run up your fees. In planning discovery, remember that in times not so very long ago very good lawyers tried very big cases without the obsessive attention to every last detail in discovery that sometimes seems to mesmerize lawyers of our era. The pyrrhic victory achieved with disproportionate fees may temporarily satisfy your ego, but it won't help your client's bottom line — or your bottom line — when a victorious but disgruntled client becomes a collection problem.

II. *Spend The Money As If It Were Your Own.*

Having put together a sound approach to the case and taken care that your client is kept well informed, help yourself be cost-effective by considering the following economy measures:

A. *Use Your Client's Resources.*

Remember that your client is available to help you. You can achieve substantial economies and very frequently improve the quality of your work product by taking advantage of your client's resources for gathering facts, preparing draft answers to interrogatories and the like. Don't charge \$100 per hour to do tasks that the client's staff could do without any marginal cost to the client.

B. *Stroke Your Ego With Victory, Not Conspicuous Consumption.*

First class travel for lawyers on the client's tab should go the way of the dinosaur. Indeed, you should spend an extra five minutes in travel planning to try to cash in on the huge discounts that the airlines' fare wars have made available. You would also do well to negotiate rates with your preferred hotels in cities to which lawyers from your firm frequently travel.

C. *Use Economy of Motion.*

Plan your trips to accomplish within a given block of time as much as you can on one or several cases. The six hour charge for a single motion argument in San Francisco should be avoided like the plague; if at all possible, combine it with witness interviews, depositions or activities in other cases that will allow you to spread the time and costs incident to travel as widely as possible.

D. *Don't Buy Retail — At Least Not If You Have Time to Shop.*

Know the rates of your deposition reporters, copying

services and other service suppliers. Don't be bashful about negotiating rates or taking advantage of superior service when it's available. For instance, when you need a deposition transcript promptly but less urgently than a daily transcript, use a firm of reporters that will give you 7 to 10 day service at their regular rate rather than imposing an "expedited" charge for any transcript prepared in less than 3 to 4 weeks.

E. Do It Today.

Plan your work to avoid unnecessary costs. Messengers are a good example: They are astronomically expensive, and in many cases their use can be avoided by doing things one day earlier and then using express mail or an overnight courier service at a fraction of the cost. The same goes for expedited charges from deposition reporters, printers, and the like. Sometimes these charges can't be avoided, such as in a big preliminary injunction fight, but often they can be.

III. A Business Perspective.

With attention to the considerations discussed above, and a bit of luck, the problem of the ingrate client should

be foreign to you. Nevertheless, there are still some steps you can take to improve the business side of your law practice:

A. The Retainer Is A Good Barometer of Sincerity.

Retainers are helpful as a prepayment of or advance against fees, but perhaps more importantly they tell you how earnest your client is about the litigation endeavor. Don't be afraid to ask for a very healthy retainer; it has the salutary effect of making your client think seriously about the importance of the case and the funds that will be committed to it. If a reasonable retainer request scares off a prospective client, you're in luck — most assuredly that was the client who does not willingly pay reasonable legal bills and who would have been a problem down the road.

B. Leave Banking To The Bankers.

Get out of the interest-free banking business by minimizing costs advanced for your clients. Whether your firm bills monthly, quarterly or by the project, there is an inherent and substantial time lag between the times when you (1) pay a cost item, (2) record it and bill it to the client, and (3) obtain payment. Identify the costs advanced proportion of your accounts receivable and calculate the annual cost of those advances, whether in actual interest paid on a line of credit or the imputed interest that should be attributed to your firm's capital used to carry the receivables. The answer will probably shock you, and it may suggest the wisdom of forwarding to your clients for direct payment the invoices for such major cost items as expert witnesses, deposition transcripts, travel and preparation of demonstrative exhibits. With such a policy you should be able to cut the percentage of your accounts receivable attributable to cost items by 25% or more. The substantial savings in actual or imputed interest go directly to partnership income.

With very large cost items such as expert witness fees, you are well advised to have an express understanding that the expert will look to the client for payment rather than to you. This may be discreetly handled by having the expert write an engagement proposal to the client or vice versa. In the case of deposition reporters, such a formal arrangement would be unusual, so you should simply monitor your client's payment of deposition costs in order to ensure that prompt payment keeps the deposition reporter happy.

C. If You Don't Bill It, You Can't Collect It.

All stages of the billing process, from timesheets to collecting, tend to get short shrift from busy lawyers preoccupied with their substantive work for their clients, but each part of the process is a potential logjam on your income stream. Impress upon your partner and associates the importance of promptly turning in their timesheets. A deluge of timesheets at the end of the month will delay billing, and, worse still, late time records may not be reflected on the bill for the month in which the work was done. When this happens, at best you have cost yourself a month of imputed interest on the work for which billing was delayed. At worst, you may find that, due to conclusion of the project or a temporary cessation of activity on the case, it has become inappropriate from a client relations perspective to bill this late-recorded work, so you may lose this income altogether.

Time recorded is not the same as time billed. You must always be vigilant about billing, the lawyer's perennially least favorite task. Don't kid yourself that your partners will ever see the light and cooperate without continuing

Continued on Page 6

abtl REPORT

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Fig. 1

Ex No	Ref No	CONTENT
DP1	P3912	DP 76-77 W. idents invoice for first sale of Y-lens to Joe Smith, now decd.

Ex No	Ref No	CONTENT
		DP 77 Smith told W. that the Y-lens helped him to see clearly when driving at night.

"final memo." The final memo is a permanent hard copy memo filed in a three-ring binder, along with other similarly created final memos, concerning other sources of information, which are created as the case progresses. In the case of a deposition, the final memo would be a hard copy deposition index that is available for use like any other deposition index. Figure 3 is an example of a portion of a final memo relating to a production of documents.

Fig. 2

DOC

PIA 29. Boron coating feature suggested by SMIT was added to appln for patent on Y-lens before it was filed on 12/01/77.
 PIA 30. TURN first gave notice of infringement of his patent orally to Mr. Milton, Defendant's President, at 1980 Chicago show.

Because document production often involves a high proportion of irrelevant documents, I have found it most efficient for the attorney to review the documents first to select those for which records should be created and to dictate the content entries for use of the paralegal in preparing the input forms.

Up to this point, the system is comparable in its output and work-effort requirements to a manual litigation sup-

Fig. 3

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P7064 Lt telling BROW, TURN ins agent, prod liab ins premium for Y-lens shud not be more than for regular lens 'cos it has passed out of experimental stage.
 P7070 MEMO fm SMIT to TURN re "Evaluation to date of Y-lens experiment." Suggests boron coating rear lens surface wud improve acuity.

Fig. 4

DOC

P7064 Lt telling BROW, TURN ins agent, prod liab ins premium for Y-lens shud not be more than for regular lens 'cos it has passed out of experimental stage.
 P3912 DP 76-77. W. idents invoice for first sale of Y-1 lens to Joe Smith, now decd.
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port system based on the use of memoranda to keep track of evidence and relate it to issues of the case.

Using the Store, Search and Sort Capabilities of the Microcomputer

After each memorandum has been edited and printed in its final memo form, the electronically stored information from which the final memo was produced is searched by the microcomputer for only those records which have been selected for assignment of an issue code by the reviewing attorney. The issue-coded records are then added to the issue-coded records for all previous memoranda to create an electronically stored data base — the "master file." The master file is repeatedly supplemented as the litigation progresses and may be stored on the floppy disc assigned to a particular lawsuit.

Another feature of the system is that because only issue-selected records are transferred to the master file, nonrelevant records are screened out. This reduces sort times and avoids using up permanent electronic memory capacity unnecessarily. However, the records that are not issue-coded are still available for manual reference in the hard copy printouts of the final memoranda.

To find the issue-coded information developed on a particular issue or witness, I interrogate the master file by the appropriate issue code number or witness identification symbol. The microcomputer is programmed to select data coded by the witness or issue, sort it into chronological order and either print it out or display it visually.

My printout is on 8-1/2 by 11 fanfold paper. The printout can be conveniently three-hole punched and transferred to a three-ring binder. Usually, I carry with me to depositions or trial a current printout of all the selected information arranged by issue and sorted chronologically within each issue. In addition, if I am about to take the deposition of a particular witness, I will obtain a printout of the available information concerning that witness.

An Example of Its Use

Let us suppose in a suit involving a patent on a contact lens, known as the Y-lens, that one issue (issue 101) is whether the invention was sold more than a year before the patent application was filed (this could render the patent invalid). The inventor, Mr. Turner, claims that if there was a sale, it was for experimentation. Using the records described as the data base, a search for issue 101 would provide the Figure 4 printout.

Obtaining Hardware and Programming

After planning this system, I contacted equipment suppliers to see whether their microcomputers could be programmed to perform the planned system and at what costs. Availability of programming at a reasonable price was also a key factor. I investigated three microcomputers and found a considerable variation in equipment cost, maintenance cost, size of memory, and speed of sorting operations and availability of programming. I provided each supplier with an outline of my planned system and a set of sample raw data and asked them to provide me with at least one printout selected by issue and sorted chronologically. Interestingly, the most technically advanced equipment with the best programming support was available from the lowest bidder, at a total package price including programming within my cost objective. That was the one I accepted.

— Laurence H. Pretty

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H DOC

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P3912	DP 76-77. W. idents invoice for first sale of Y-1 lens to Joe Smith, now decd.
P070	MEMO fm SMIT to TURN re "Evaluation to date of Y-1 lens experiment." Suggests boron coating rear surface would improve acuity.
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Protecting Fees

Continued from Page 3

coercion; accept your partners' slothful natures for what they are and designate your firm's managing partner, a member of the management committee or the firm administrator as the "enforcer" who secures compliance with the goal of timely billing. Finally, if your firm customarily renders (or your client requests) itemized billings, make sure that they are informative. Such cryptic descriptions as "prepare letter" or "research brief" are hardly calculated to explain the big bill you have just sent, so educate your partners and associates to put meaningful descriptions of their work on their timesheets.

D. Don't Forget About The Bill Yet.

Establish a system for following up on past-due accounts receivable. Once again, it is best to acknowledge what we all know to be true: after the work is done, lawyers tend to forget about the bill. When they do remember the bill, they're usually lousy at asking for money. With these human frailties in mind, distribute accounts receivable aging reports on a monthly basis and have your billing "enforcer" or accounting department systematically follow up with billing attorneys to check on the progress of collections. In law, as in other businesses, the collection rate for receivables aged 90 days or more drops dramatically, so don't let bills get into this category in the first place.

E. The Late Charge As Behavior Modification Device.

Consider establishing a program of late charges (not "interest") for bills not paid within thirty days. Since you don't want to be in the banking business, production of additional revenue isn't really the goal of late charges. Rather, they are a valuable tool of behavior modification to induce clients to pay for your services in the ordinary course of business.

The burdensome disclosure requirements of the federal Truth In Lending Act and California's Unruh Act do not apply to commercial or business debts. For individual clients on personal matters, complex disclosure may be avoided and a late charge justified as a liquidated damages provision for failure to pay within 30 days in accordance with the attorney-client contract. However, a late payment charge must be part of a *bona fide* policy to promote follow-up on late payment of bills by clients; it should not be a disguised installment payment plan. Further, to avoid invalidation as a "penalty" such a charge must be a reasonable approximation of the actual cost to the firm of late payment. Ethical considerations impose a requirement of reasonableness. Thus, a late charge in the neighborhood of what your firm pays or would have to pay in order to borrow money to carry its accounts receivable would be an appropriate rate for a late charge.

Any late charge program should be explained in engagement letters for new clients. Current clients should be notified in advance of imposition of any late charges, which could not be unilaterally imposed on current delinquencies. The terms of any late charge should be routinely stated on bills or reminder statements, and its amount should be similar to the firm's cost of borrowing money and guided by the ethical requirement that it not be unreasonable.

These suggestions may help rationalize the business aspect of your law practice, but they are no panacea for collection problems. Careful, cost-effective work and candid communication with your client will always be the best security for your fees.

— Paul J. Hall

"American Lawyer": Searching for Its Identity

It is invariably brash, usually frivolous, often clever and sporadically fascinating.

It has been, as it cheerily admits, described as the *National Enquirer* of the legal profession.

"It" of course is The American Lawyer ("AmLaw") — a throwback to the gossip-filled fan magazines of an earlier, more innocent era.

Does this breezy, ever-so-irreverent legal monthly possess any redeeming social value? In its embryonic days, hardly. Now, a qualified yes. *AmLaw* is having an identity crisis. Like most youths, it's trying to find itself. Sometimes it seems to be learning — slowly. Between its many lapses it has fitful flashes of brilliance.

Meanwhile, *AmLaw* enjoys grand fun throwing darts at the staid and august halls that shelter the legal establishment.

AmLaw has not yet evolved a fixed formula that, for instance, sharply characterizes a magazine such as *Time* or even *Rolling Stone*. But it does employ devices, or even hatchets, that are, as any cliché-clutching muckraker might say, failsafe eye-grabbers.

Let's examine a few from recent issues:

Headline: "How Davis Polk Beat Kaye, Scholer" and inside, just to be sure you don't miss the point, "How Davis Polk's Zone Defense Bested Kaye, Scholer." Obviously



Kaye, Scholer's simplistic boner was in not hiring John Wooden to help it represent General Public Utilities in the Three Mile litigation against Babcock & Wilcox. Note, however, that neither the facts, clients' rights, nor applicable law presumably had any influence on the outcome. It was strictly a matter of the Zone defense, i.e., organizing trial preparations by subject matter

Benjamin E. (Tom) King rather than by witness. (Still, we were a bit puzzled to find that the "loser's" muddle-headed lawyers had blown the case so badly that GPU, their client, recovered \$37 million in rebates from the "winner." In these megabuck cases, a few million is just tip money.) (April '83 issue)

"The Impeccable Carla Hills" is the banner-theme lyrics of another Top 10 *AmLaw* Hit. But is the ex-chief of HUD truly pluperfect?

One acquaintance is quoted as saying that if people patronize Ms. Hills or are unprepared, she will "cut them off at the knees." Worse, claims *AmLaw*, she isn't even "colorful." (April '83 issue)

In a report on the doings (or doodlings) of the U.S. Supreme Court, we learn that, in arguing the *Betamax* case, two L. A. lawyers, Dean Dunlavey and Stephen Kroft, tried to translate technological jargon into plain English and "came out sounding like a couple of linguists explaining the computer to a panel of ancient Greeks." A change of pace here — and a nice touch. (April '83 issue)

Continued on Next Page

Is that sweet lady in your outer office really seeking a dissolution of marriage or merely a reporter-in-disguise digging for a sting-like story, with the lawyer as the mark? Can she ethically secrete her husband's community funds? Well, the advice is, ahem, yes and no, according to what is related in a page one feature entitled "Divorce Scam." (May '82 issue). What further proof is needed to show that many attorneys are borderline? Only lawyers play dirty tricks, not reporters. (April '83 issue)

Or sample these golden juicy nuggets:

"Kiss and Sue" — an "expose" on how Lane Bryant, Inc. is trying to "wiggle out" of a "final premium billing" of \$426,835 charged by its former firm, Weil, Gotshal & Manges. "Premium" here is a euphemism for "padding."

Regarding summer associates programs: The atmosphere at one major L. A. firm was characterized as "tense and suspicious"; it also was prone to giving "make-work assignments." Another, bless it, was "fun-loving" and "fraternity-type." There are so many earth-shattering morsels in these summer program comments that we tremble to repeat more of them.

Ah, alliteration. *AmLaw*, like most second year journalists, loves it. Witness: "How To Be A Perceptive Pest At Partnership Meetings" (May '83 issue) and "No Honey-moon with Hufstedler" (August '82 issue).

Then there is the Tinseltown Touch. The Hollywood legal community supposedly was "whipped" into a "frenzy of speculation" (really?) when a firm's masthead partner decided to join a movie studio. After all, who is going to pick up the clients — a matter of a high intrigue made even more tantalizing when we discover two of the remaining partners are "not even on speaking terms." (April '83 issue)

Etc., etc., etc.

Still, beneath *AmLaw's* flamboyant froth and irrelevant trivia lie a variety of satisfying triumphs. In the last year the editors seem to have tried to broaden, and deepen, their motif.

The retelling of the Kodak-Berkey anti-trust case, how Donovan, Leisure handled it, and how a senior partner there blundered through the trapdoor of perjury, constituted masterly reporting (January '83 issue). The article carries you step-by-tense step through the trial plus, more importantly, the cloak-and-dagger activities that

grimly transpired behind the scenes. Even allowing for hyperbole, the reporting illuminated in a strikingly arresting manner how quirky the twists of fortune can be.

Equally impressive was the follow-up on the William Tavoulaareas vs. *Washington Post* libel trial (November '82 issue). After interviewing the jury in depth, Editor Brill came away with the distinct idea that the foreman was suffering from a classic Napoleonic complex, the jury didn't understand the judge's key instructions, defense attorney Irving Younger overestimated the jurors' intelligence, and justice was subverted. (The \$2.05 million verdict was recently set aside by the Federal District judge who presided at the trial.)

Then there is the article entitled "What Recession?" (April '83 issue). It's all about Cravath, Swaine & Moore, how it is churning out record profits when other firms are losing their clients and their draws. Cravath lawyers, we are told, work harder, charge less for a quality product, and have a steeper partner-associate ratio. Having said that, *AmLaw* misses the very point it strives to make. Just what is the secret to such success, assuming there is one? While the reader can indulge a bit of reportorial hero-worship, no concrete clue is really given.

The May '83 issue points out, interestingly enough, that 20 years ago the Olwine, Connelly firm in New York was formally censured for allowing itself to be interviewed for a feature run in *Life* on how corporate lawyers operate — pretty tame stuff by today's fast-changing standards.

All of this makes for a strange pastiche.

The point is obvious: *AmLaw* is interested in personalities, not issues. Its basic tenet is that names make news. It all-too-often is about as serious as *Penthouse*. It offers the "inside scoop," the "real low-down." Ergo, it has no editorial policy and few editorials. What is its position on Chief Justice Burger's call for a national appeals court? Should the anti-trust or securities laws be more rigorously enforced by the Justice Department or S.E.C.? How should the insanity defense be handled in criminal cases? You don't find any of these or similar matters analyzed, nor scarcely mentioned. *AmLaw* ventures no opinion, and doesn't care to have one. After all, such issues are far less jazzy, and less burning, than knowing what partner high-jacked a lucrative client to a new firm.

So, is there a place for *AmLaw*? Will it continue to rise above its own past mediocrity. Will making villains and heroes out of ordinary work-a-day lawyers find an audience? *People* did it with public personalities, but its readers consist of anyone among the vast populace who wants to be titillated. By contrast, lawyers are far fewer in number and are also a notoriously unexcitable lot. Still, almost everyone peruses *AmLaw*, though few admit it. (Home subscriptions, where the latest scandal or twaddle can be digested in private, are cheaper.)

AmLaw's palpable purpose is to infuse live color and controversy into a traditionally gray, pin-stripped, closed-mouthed profession. It may succeed.

What *AmLaw* needs is a glitzy slogan consistent with its content.

How about: "Love us or hate us, but read us."

P.S. *AmLaw* recently won the Award for Essays & Criticism in the '83 National Magazine Awards competition sponsored by the American Society of Magazine Editors. The runners up included *The New Yorker*, *Time*, *Newsweek*, *The Nation* and *Vogue*. Frivolity doth triumph.

— Benjamin E. (Tom) King

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October Seminar Registration Limited

ABTL's Tenth Annual Seminar, scheduled for the Sheraton Plaza in Palm Springs October 7 through 9, will address the subject of "Trial Tactics in Business Litigation." Panelists will include Justice Otto Kaus, Judge Laughlin Waters and attorneys Shirley Hufstedler, Max Blecher and Pat Lynch, among others.

Enrollment is limited to 125 members. Send your registration fee of \$150.00 (or \$185.00 with spouse) to Naomi Hirschhorn, P.O. Box 67C46, Los Angeles, CA 90067.

The President's Letter

Continued from Page 1

of record in which testimonial evidence going to the merits is taken.

A "simulation unit" may be earned by participating as counsel in a simulated trial in a law school or continuing education course recognized by the Court to be adequately supervised, provided that the attorney's satisfactory performance is certified to the Court.

At the request of the Central District Court, the Federal Courts Practice Standards Committee evaluated the proposed rules and solicited the views of various segments of the Bar, including the ABTL. The Board of Governors of the ABTL, along with other affected Bar groups, expressed their opposition on a number of grounds. After extensive discussion and comment, the Federal Courts Practice Standards Committee advised the Central District Court of the Bar's opposition to the proposed rules and the reasons for such opposition.

With respect to the written examination, the opposition focused upon the tremendous expense and time to be incurred in administering the exam to the thousands of lawyers presently practicing before the Central District Court (in the absence of a grandfather clause) as well as new admittees in the future. Further, it was suggested that there was no evidence of a correlation between passage of a written examination and the ability to conduct trials properly.

The opposition to the "trial experience" requirement was based upon a number of factors. Obviously, one of the principal negative aspects of the proposed rules would be the exclusion of certain segments of the Bar, such as new admittees and young lawyers, from conducting trials in the Central District without the imposition of the added cost to the client of the mandated "supervisory" services of an elite group of attorneys previously designated as "trial experienced." Further, by restricting "qualifying trials" to only those occurring in a *court of record*, the proposed rules precluded attorneys from receiving certification for participation in arbitrations, administrative hearings and "rent a judge" proceedings in which extensive testimonial evidence is taken. The Bar also questioned the implicit premise of the proposed rules that participation in a quantity of trials guaranteed the competency of the attorneys to conduct them properly.

In response to the Bar's opposition, the Central District Court (albeit in a more diplomatic fashion) indicated that the proposed rules, or the substantial equivalent, were going to be adopted and the Bar had the choice of either assisting the Court in drafting the substantial equivalent or accepting the adoption of the proposed rules.

Presented with this Hobson's choice, the Federal Courts Practice Standards Committee spearheaded the development of alternative rules designed to eliminate the more objectionable areas while retaining the basic thrust of the proposal.

The alternative proposal with respect to the written examination requires the exam committee to prepare 250 objective multiple-choice questions covering local rules, federal rules of civil procedure, criminal procedure and evidence to segregate the questions into groups of 50, each group to comprise one version of the examination. The examination is to be an "open book" test and is to be completed prior to the presentation of a petition by an attorney for admission to the Court.

With respect to the "trial experience" requirement, the alternative proposal expands the definition of a qualifying trial to include any adversarial proceeding before a trier of fact involving the taking of evidence so as to encompass arbitrations, administrative hearings, etc., and further enables an attorney to become qualified as "trial experienced" solely by receiving simulation units as a consequence of participation in various trial practice programs, with the number of units to be earned from such programs to be determined by the Court.

In response to the Central District Court's request for guidelines on mandatory continuing education, the Federal Courts Practice Standards Committee submitted a draft rule which mandates completion of ten units of approved educational programs during each of the first five years following the attorney's admission to practice in the Central District. Acting as lead counsel in a trial in the Central District, which proceeds to judgment or continues for at least two days, satisfies the ten-unit requirement; participating as counsel in the courtroom proceedings, attendance at approved continuing education courses and acting as a panelist or lecturer in such courses also earns units, the exact number to be determined by the nature and extent of the attorney's conduct.

While the alternative proposal is far more palatable than the proposed rules issued by the Central District, the more fundamental issue is whether the effort to create and impose new and different standards for practice before the federal courts should be pursued at all. While some benefits may be achieved from requiring a written examination and mandating continuing legal education, it is doubtful that the benefits will exceed the not inconsiderable cost. The "trial experience" requirement is of dubious value. Its adoption would create an unnecessary and inappropriate class structure among lawyers, interfere with the client's right to be represented by an attorney of his own choosing, generate duplicative attorneys' fees to be borne by the client, encourage attorneys — in order to earn participation units or satisfy mandatory continuing education requirements — to try cases that otherwise should be settled, and impose considerable expense and administrative burdens upon an already over-taxed judicial system.

The impetus for the adoption of the new standards was alleged need to improve upon the competency of attorneys practicing in the federal courts. Yet this need is subject to serious doubt. Thus, although 41.3 percent of the judges who responded to the Devitt Committee's inquiries admittedly indicated that there was a serious problem of inadequate trial advocacy, only 8.6 percent rated the performance of lawyers to be less than adequate (83 F.R.D. 215, 219). The alleged "incompetency" in reality is but a minor problem and has been greatly overstated. To meet such a minor problem with a "trial experience" solution, fraught with major negative consequences, is totally unwarranted.

— Marsha McLean-Utley

1/ The Devitt Committee, formed to establish procedures to improve the competency of advocacy before the federal courts, recommended that attorneys not be admitted to practice before those courts unless they had passed a written examination on federal rules and practice and not be permitted, even after admission, to try case unless they previously had conducted four trials under supervision, two of which could be simulated. The Devitt Committee's report further supported mandatory continuing legal education and a "peer review" committee to assess the legal proficiencies of attorneys whose professional competence has been questioned.

2/ On this issue the Central District solicited the Bar's input as to the appropriate parameters.

3/ Only one person may be credited as lead counsel or as assistant to lead counsel, unless the Court orders otherwise. An attorney, however, may acquire two participation units if the qualifying trial exceeds five days.