ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

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Letter from the President

Judicial salaries may not be a subject which concerns you on a daily basis, but it is of much importance to every citizen and particularly to practicing attorneys. A competent judiciary is essential to any functional judicial system. It is important that the compensation offered our judges adequately reflects the task they are asked to perform. Yet some recent trends could result in a lowering of the level of competence of both the Federal and California State judiciary.

Laurence H. Pretty

A number of factors goes into the determination of appropriate salary levels for any position, private or public. Determination of judicial salary levels is no exception. Generally speaking, one looks at the level of responsibilty a particular job entails and notes that this should be reflected in the compensation offered. Market conditions must also be considered.

Most of us would agree that competitive salaries attract the best applicants. But salary is not the only form of compensation. In the case of judgeships, such intrinsic benefits as status, honor, and satisfaction in public service are enjoyed. These forms of compensation are difficult to measure as their importance varies with the individual. Also included in a total compensation package are such benefits as retirement plans, life and health insurance, vacation, holiday, and sick time, and other fringe benefits. For a more thorough discussion of such benefits, see Timothy Pyne, *Judicial Retirement Plans* (Chicago: American Judicature Society, 1981) and Larry C. Berkson and Susan B. Carbon, "Compensation and Benefits of Trial Court Judges: 1980," *State Court Journal,* Vol., 5, No. 2 (Spring 1981). (Survey of Judicial Salaries, May 1983, Vol. 9, No. 1).

Determination of Federal Judicial Salaries

On December 16, 1967, Public Law 90-206 created the Federal Commission on Executive, Legislative, and Judicial Salaries. The purpose of the Commission is to review the pay rates of specified top federal officials including judges at the various federal levels. Recommendations are submitted to the President who, in turn, makes his recommendations in light of those of the Commission. The President's recommendations then become law if not rescinded by Congress.

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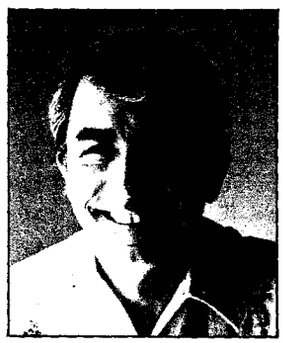
Winning Your Attachments: Problems and Suggestions

The primary reason for the failure of most applicants to obtain a writ of attachment lies in a misconception of the nature of the attachment hearing. The heart of the misconception is that an attachment hearing is a pleading contest similar to a law and motion hearing. This is totally erroneous. The attachment hearing is similar to a trial. True, it is heard on declarations, rather than live testimony. However, the pivotal point is that an attachment hearing is a hearing on *evidentiary proof, not pleadings.* The misconception is most commonly reflected in moving papers that either rely only on a verified complaint, place an undue reliance on a verified complaint or set forth conclusions and ultimate facts rather than evidentiary facts.



Hon. Robert W. Zakon

Therefore, it must be again emphasized at the beginning that the attachment hearing is an evidentiary hearing where the plaintiff must prove his case by a preponderance of evidence and by the use of admissible facts pursuant to the Evidence Code.

The most common mistake, and a fatal one, is the total reliance upon the verified complaint of a corporation. Code of Civil Procedure section 446 prohibits the use of a verified complaint of a corporation in any evidentiary hearing. Therefore, if plaintiff is proceeding only on the verified complaint of a corporation as his sole admissible evidence before the court, then the attachment must be denied as a matter of law.

The second mistake is using a verified complaint without supporting declarations on behalf of either a partnership or an individual. These are not barred by Code of Civil Procedure section 446. However, counsel must ask: What are you offering into evidence by the verified complaint? The point is that the vast majority of verified complaints contain ultimate facts or conclusions rather than evidentiary facts. These ultimate facts or conclussions are not sufficient to allow the Court to issue a writ of attachment.

The best practical approach towards winning your attachment is to completely forget the existence of a complaint, verified or otherwise. Assume you are calling your witness to the stand. He must now testify in a

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The New Local Federal Rules: Some Key Changes

For the first time since the Central District of California was created in 1966, the United States District Court has a completely new set of Local Rules. For the unwary litigator, these changes will result in rejected pleadings, new burdens and limits on discovery, and other potential sources of embarrassment or confusion. But the attorney who carefully reviews and complies with the new Local Rules has new rights to employ for his or her client's advantage.

Some important new changes under the Local Rules:

- burdensome interrogatories are out (30 interrogatories and subinterrogatories are now the limit without leave of court);
- Doe pleadings are in;
- bluebacks are back (if they were ever gone) along with pre-punching of pleadings and other format changes;
- briefs are shorter (35 pages are the limit);
- offers of compromise may now create a right to attorney's fees;
- class actions are quicker (certification must be completed within 90 days).

While there is no substitute for viewing the new Local Rules in their entirety, the above changes and several others bear special attention. Reference to the entire set of the new Local Rules is eased by a reorganized format along chronological lines. Here are a few key changes.

Discovery

For litigators accustomed to wars of attrition, one of the biggest changes is a limitation of interrogatories, *including* all sub-parts, to 30. New Local Rule 8.2.1 provides, however, that on at least seven days' notice, counsel may apply for leave to serve additional interrogatories.

The handling of discovery documents has now been substantially altered by new Rule 8. Deposition transcripts are no longer filed with the court, but must be retained by the attorney noticing the deposition. Document numbering must, as before, begin at the earliest stage of the proceeding with consistent document numbering used throughout discovery and trial. However, the marking of exhibits must be done by officially approved exhibit tags from the earliest stages, and not only at trial.

The use of discovery documents, particularly depositions, has also changed. New Rule 9.4.9(a) now provides that whenever a deposition transcript is lodged with the court for use in connection with either a hearing or trial, each party must mark on the original by bracketing any testimony the party intends to offer at the time of the hearing or trial. Notably, this must be done on the original. To prevent confusion, the Rule does require that different parties use different colors. However, an obvious problem is created where different sections of a transcript are used in multiple hearings on preliminary injunctions, discovery disputes, motions for summary judgment, and trial.

The Rule is further complicated by the requirement that each party mark objections to evidence in the margin by briefly stating the ground for the objection. In multiparty litigation involving multiple proceedings, a deposition original could clearly get quite messy. Whether this Rule will in fact be followed by individual judges remains an open question.

A change of potential far-reaching importance is that counsel, not the court, will now retain custody of all discovery documents, including deposition originals. Any person who desires to obtain such discovery documents, and who is not a party to the litigation, may now obtain them in accordance with Rule 8.4 which permits a person to serve a request for inspection on the Clerk who must then transmit such request to all counsel. The party holding the original of the requested discovery document must turn the original over to the Clerk, who then must photocopy it and surrender the original to the nonparty requesting same.

Notwithstanding the obvious value of originals in ongoing litigation, there appears to be no procedure for the party holding the original discovery document to retain it and transmit a copy in lieu thereof. The only method for doing that would appear to be by a motion for a protective order. Further, it is unclear whether Rule 8.4 now provides an exclusive method for obtaining discovery documents. Does an attorney who voluntarily turns over a copy of a discovery document to a nonparty somehow violate an expectation of privacy of other parties to the litigation? Clearly that is true where an applicable protective order exists, but there is an argument that it exists now, even where no protective order is issued.

Doe Pleading

California's state procedure of using "Doe" defendants has often confused some out-of-state litigators but has provided an extremely useful means of adding defendants after litigation has been commenced. Now, for the first time, the District Court has adopted this practice as well, but only in federal question and not in diversity actions.

The rule regulating ficitiously named parties is 3.7.2 which itself has two subsections. Rule 3.7.2.1 states what has been the rule in this Circuit since 1956, "the Clerk shall refuse to accept for filing any complaint or petition that includes any party designated as a Doe or a wholly fictitious name . . ." However, that subpart is now applicable only to actions in which jurisdiction is founded upon diversity of citizenship. Rule 3.7.2.2, which deals with federal question jurisdiction, provides that Rule 3.7.2.1 is not applicable "when the complaint or petition alleges that a statute of the United States gives this Court subject matter jurisdiction without regard to the citizenship of the parties." The natural implication is that plaintiffs may now add Doe defendants in federal question jurisdiction. That implication has been confirmed in conversations with court personnel.

Offers of Compromise

As surprising as the about face with respect to Doe defendants, the changes with respect to offers of compromise are even more notable because of their impact on all cases in the Court and their apparent conflict with the Federal Rules of Civil Procedure. Rule 68 of the Federal Rules of Civil Procedure, by contrast to Section 998 of the California Code of Civil Procedure, empowers only a defendant to make an offer of compromise which can create a right in the offeror to recover costs in the event the rejecting offeree does not subsequently obtain a more favorable judgment. New Local Rule 23, consistent with California law but apparently inconsistent with Rule 68 of the Federal Rules of Civil Procedure, empowers any party, plaintiff or defendant, to make an offer to compro-

mise. Additionally, and going beyond California law, Rule 23 provides that if the offer is rejected and the offeree does not do better than the offer at trial, the offering party *"shall* recover costs *and* attorneys' fees incurred from the date of the offer." Rejecting plaintiffs are further penalized by being denied all pre-judgment interest.

New Local Rule 23 also establishes a procedure and time frames that are substantially different from those set out in Rule 68. Essentially they are as follows:

1. The offer must be made at least 20 days before trial, not 10 days as set forth in the Federal Rules of Civil Procedure.
2. The offer must be filed with the court under seal.
3. The offeree has 15 days, not 10 days as provided by the Federal Rules of Civil Procedure, in which to accept or reject the offer of compromise and must do so in writing and must file such acceptance or rejection with the court, again under seal.
4. Assuming there is an acceptance, the offeror and offeree must jointly file declarations that there are no other known claimants and must provide the Clerk with a form of judgment consistent with the offer, which the Clerk is then obliged to accept and enter.

New Rule 23 does not provide any specific penalty for any party violating the procedural rules, although presumably the provisions of new Rule 27 regulating penalties, which is functionally identical to old Rule 28, would apply to Rule 23 as to any other rule. The real sanction provided by new Rule 23, as noted above, is found in the provisions which shift costs and attorneys' fees to rejecting parties and which abate pre-judgment interest for rejecting plaintiffs.

Changes in Pleading Format

New Rule 3, in addition to altering the use of Doe defendants in federal question litigation, also makes five procedural changes in pleading format in this district. Taking a cue from the Los Angeles County Superior Court, all federal pleadings must now be both bluebacked and pre-punched at the time of filing. (Rule 3.4.6). However, unlike the Superior Court, the blueback must have the "short title" of the pleading typed in the lower right-hand corner of the blueback. Counsel who fail to comply with this new practice rule will have their pleadings bounced at the Clerk's filing window.

While briefs are shorter, citations are not under new Local Rule 3. Expressing obvious exasperation with the length of briefs, the District Court now requires under Rule 3.10 that all points and authorities, all trial briefs, all memoranda, and all other similar documents not exceed 35 pages in length, except by order of the judge. However, new Rule 3.9.3 requires that all citations to the United States Supreme Court cite all three Reporters — not just the official Report — and that all state court citations, except California, include both the official Reporter and any regional Reporter cite. In other words, counsel citing a case from New Jersey can no longer simply use the Atlantic Reporter cite, but also must obtain the official New Jersey Reporter citation as well. California parallel citations are restricted to the official Report and the California Reporter.

In other changes, single-spacing is now permitted in footnotes and descriptions of real property (Rule 3.4.7.1 and Rule 3.4.7.2). Rule 3.8, which regulates amended pleadings, now requires in contrast to the old rules that amended pleadings be lodged as a separate document concurrent with the filing of the motion seeking leave to amend.

Class Actions

For the first time, the Local Rules now provide procedures for handling class actions and impose substantial burdens on both plaintiff and counsel.

Rule 18.3 provides that discovery concerning certification must commence immediately and be completed within 60 days after filing and that a motion for certification must be filed within 90 days after service of the complaint. Where a party desires to compromise or dismiss a class action, counsel for the class must personally advance the costs of notice and provide the court with proof that the settlement is *bona fide* and that either the class action is not maintainable or that the compromise is in the best interests of the class.

Low Numbering Cases

The rules governing assignments to particular judges are substantially the same as prior to the new rules. There

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is, however, a change in the low number practice. Rule 4.4.1 now requires that at the time an action is filed, the attorney or party *pro se* file a "Notice of Pendency of Other Actions or Proceedings" whenever the low number rule is applicable. Where such notice is filed, it must be served on all other parties, who have five days after receiving the notice to file and serve a statement in opposition.

Motion Practice

David M. Stern

The rules governing motions, previously in Rule 3, are now in Rule 7. The only change in Rule 7 concerns the requirement of bringing declarants to court. The burden is no longer on the party proffering the declaration, but on the opposing party to compel the declarant to appear. A party who desires to cross-examine a declarant may require his attendance at court, provided, however, that the court retains the right to impose sanctions upon a party who requests the presence of a declarant in bad faith. It is not clear whether this change, embodied in new Rule 7.5.4, indicates a desire on the part of the court to permit the cross-examination of declarants, now a very unusual procedure.

Trial and Pretrial

The pretrial procedures previously embodied in Rule 9 have now been separated out into Rules 6 and 9. Rule 6 governs early meetings of counsel and discretionary status conferences. Rule 9 governs pretrial procedures. Other than the sensible division of old Rule 9 into two rules, there are no substantive changes.

Only minor changes have been made with respect to trial procedure, except that governing the use of depositions. The filing of a trial brief is now optional, not mandatory. (Rule 10). In a non-jury trial, findings of fact must be submitted by all parties not less than seven days prior to trial.

Once trial is concluded or there has been a final disposition, the court has at long last clarified what constitutes entry of a judgment by stating specifically in new Rule 14.10.5 that an opinion or order does not constitute a judgment pursuant to Rule 58 unless specifically so ordered by the judge. Non-productive disputes on appealability may be minimized.

Costs, Attorneys' Fees and Execution

Post-trial procedures have been substantially modified by new Rule 16. A prevailing party now has 15 days rather than 10 in which to file a bill of costs. The hearing on the bill of costs takes place before the Clerk, as before, but not less than 14 or more than 21 days after service of the bill of costs. A party opposing a bill of costs now has the time and right to file written objections to a bill of costs, provided the objections are filed not later than seven days before the Clerk's hearing.

Items taxable as costs remain substantially the same with only one exception. In the past, the expenses of only deposition originals were taxable as costs. Now the cost of an original and one copy may be taxed. Further, upon order of the court, summaries, compilations, polls, surveys, statistical comparisons, maps, charts, diagrams, photographs, models and the like may be includable as costs as well. The procedure for obtaining such an order is not clear, although prudence would dictate that the issue be raised at or before the time of entry of the judgment.

New Rule 16.10 now provides an answer to the question: How does a prevailing party seek attorneys' fees after judgment? Rule 16.10 specifically provides that it shall be by motion served and filed within 30 days after entry of judgment and that the motion shall be handled as any other motion in accordance with new Rule 7.

Finally, enforcement of judgments is governed by Rule 19, which represents a compromise between the existing procedure and the new California Enforcement of Judgment Act. While state law now provides that registered process servers can serve writs of levy, only the U.S. Marshal is authorized to enforce federal writs of execution, unless an order is specifically obtained naming another person, including a process server or attorney. The court has indicated that orders designating persons other than the U.S. Marshal will be allowed in most cases, but that at least provisionally, the court wishes to make a case by case determination in order to see what problems may arise.

Admission to Practice

While the Central District has so far refrained from adopting a federal bar exam or a trial experience requirement, new Rule 2 does provide new standards for admission to practice in the District, both generally and *pro haec vice*. An applicant must now declare under penalty of perjury, not merely that he or she is admitted to practice law in this or another state and is not under suspension, but also that the applicant is familiar with the Federal Rules of Criminal Procedure, the Federal Rules of Civil Procedure, the Local Rules, the Local Criminal Rules, and the Federal Rules of Evidence in their entirety. The applicant must further disclose not only if he or she is under suspension or has been disciplined by another bar, but also whether any disciplinary proceedings are pending. Finally, the court has indicated that the long-standing provisions of the rules creating a standing committee on discipline will now be implemented, and that members will be appointed for a two-year term (a change from prior practice in which no term was specified), and that the Committee will be active in enforcing competency and ethical requirements in the District.

New Rule 2 also impacts upon unincorporated law firms. Previously, a law firm which was not incorporated could technically appear in the United States District Court. The provisions of the former rules governing law corporations have now been extended to unincorporated law firms, such that law firms are no longer able to appear at all, and all appearances are made exclusively through individual attorneys. As with prior practice, any member of a law firm, whether incorporated or not, may appear in place of another member of that law firm without any substitution of attorney, provided only that he or she is admitted to practice.

Conclusion

As in the past, all attorneys are admonished to check with the judge to whom the case is assigned to see what special rules may apply. It is the intent of the new rules to supplant large numbers of individual judges' rules, but individual district judges retain the right to control their own calendar, or to modify provisions of the local rules in particular cases.

— David M. Stern

The author wishes to express his appreciation to Christina L. Harwell, Esq., attorney for the United States District Court Clerk, for her assistance.

Update: Time to Trial in Southern California Courts

The U.S. District Court in Los Angeles, long recognized to be a faster means to trial than the Superior Court, has actually cut its time to trial in half over the past two years.

In March, 1982, *ABTL Report* published its first survey of time to trial in Southern California courts. An updated survey shows that in addition to the dramatic improvement in the U.S. District Court for the Central District of California, the Southwest District of the Los Angeles Superior Court has also reduced waiting time to trial by one-half is now the second speediest civil docket in the Los Angeles County Superior Court system.

The Los Angeles Superior Court's Central District showed a slight improvement in reducing time to trial, but a number of other branch courts, especially Compton and Norwalk, suffered dramatic increases in the delay from the filing of the at-issue memorandum until commencement of trial.

The ABTL survey, based on statistics released by the various court clerks, shows that the median time to trial from the filing of the complaint to commencement of trial in the Federal Court's Central District of California is currently 15 months, down from a 31-month wait in December, 1981. The District Clerk's office credited much of the improvement to the addition of more judges and the fact that senior status judges were now handling a full caseload instead of the half-load they formerly had.

Also showing dramatic improvement in cutting delays was the Southwest District of the Superior Court located in Torrance. In the last ABTL survey, plaintiffs in Torrance seeking a jury trial waited a median of 44.5 months after filing of their at-issue memorandum. That backlog has been reduced to just 21 months. The waiting time for non-jury trials was also reduced from 33 to 22 months.

The Superior Court's Central District also showed moderate improvement, reducing the waiting time for jury trials by an average of 7 months over the past year and one-half. Non-jury trials, however, suffered an increase in waiting time to 44 months from 40 in 1981. However, the real increase in backlog appears to be occurring in certain branch courts which traditionally had a reputation of having a comparatively lighter backlog. The wait for jury trials in the South Central District of the Superior Court in Compton increased by 100% from 21 to 43 months from the filing of the at-issue memorandum, while the wait for a non-jury trial grew by a smaller margin from 22 to 29.5 months. Sharp increases in the waiting time for trial also occurred in branch courts in Norwalk, Pomona and Long Beach, where the delay increased by as much as a year.

The Superior Court's Northeast District in Pasadena continues to have the longest wait for a jury trial in Los Angeles County — 51 months from the at-issue memorandum. The wait for a non-jury trial in Pasadena is less than half of that, or 20.5 months. Both the Central District and the West District in Santa Monica have the longest wait in the county for non-jury trials, 44 months.

Asked about the dramatic reduction in the Southwest

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U.S. DISTRICT COURTS[3]

	Months from issue to trial (median)
Central District:	15
Northern District:	13
Southern District:	16
Eastern District:	16

LOS ANGELES SUPERIOR COURT[1]

Number of months from filing of at-issue memorandum to commencement of trial (median)

	Jury	Non-Jury
Central District	41	44
West District (Santa Monica)	41½	44
East District (Pomona)	48	40
North Central District (Burbank-Glendale)	18½	10½
Northeast District (Pasadena)	51	20½
Northwest District (Van Nuys)	44	29
South District (Long Beach)	39	24½
South Central District (Compton)	43	29½
Southeast District (Norwalk)	31	26
Southwest District (Torrance)	21	22
TOTAL:	36	31

OTHER SUPERIOR COURTS[2]

	Number of Months from filing of at-issue to commencement of trial
Orange County:	19
San Diego County:	14
San Bernardino County:	6
Ventura County:	5
Santa Barbara County:	17
Riverside County:	18

Cases Going to Trial in Southern California Courts:

6,411 civil cases were terminated in the U.S. District Court for the Central District of California during the 12-months ending June 30, 1982. Only 262 were terminated during or after trial. Of the cases going to trial, 79 were jury trials and 183 were judge trials. This means that 4.1% of the civil cases disposed of went to trial: 1.2% went to jury trial and 2.9% went to judge trial.[3]

5,657 civil cases were disposed of in Los Angeles County Superior Court during the month of July 1983. Of these, 334 (5.9%) went to trial. There were 265 judge trials (4.7%) and 67 jury trials (1.2%).[1]

1 From Los Angeles County Monthly Conspectus for July, 1983, issued by Los Angeles Superior Court on September 15, 1983.

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

3 From Annual Report of Director of Administrative Office of U.S. District Courts for the 12 months ending June 30, 1983. (Condemnation and certain other civil matters excluded from statistics.)

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narrative fashion regarding the facts. Set forth those facts in a declaration. Use simple English rather than legalese. Set forth the facts in a straight time sequence with a beginning, middle, and end. Lay the necessary foundation for all documents which are to be attached to the declaration. Do not rely by reference on documents attached to the complaint. If documents attached to the complaint are important, lay the foundation and attach copies to a declaration.

For example, suppose your case is based upon a promissory note. Your verified complaint probably says that the defendant "made, executed, and delivered" the promissory note — that is legalese. Your declarant should say that the defendant "signed" the promissory note in the presence of the declarant. If he did not "sign" the promissory note in the presence of the declarant, counsel will have to prove the signature on the promissory note per Evidence Code section 1400, *et seq.*

Another example: Your verified complaint probably says that the defendant "became indebted to plaintiff in the sum of $20,000 for goods, wares, and merchandise delivered within the last two years." That is legalese. The declarant should state the product that he sells, the business of the defendant, the date or dates of the orders or purchases, the identity of the plaintiff and defendant's agents involved in the orders or purchases, and lay a foundation for the introduction into evidence of the plaintiff's ledger sheets and the invoices, and/or purchase orders involved in the transaction. The declarant must also comply with Evidence Code section 1271, *et seq.*, in proving these facts.

The final major error made by plaintiff's counsel is the decision to only present a "bare bones" prima facie showing rather than setting out the entire factual case in loving detail. This is tactical short-sightedness and can be fatal. Why?

There is a trend among counsel to present the "bare bones" prima facie showing with a hope of "drawing out" the defense and then coming in with a "reply" declaration and points and authorities to "demolish the defense." The problem with this approach is that there is no right to a "reply" brief in the attachment code. It simply does not exist. (The author will discuss the only exception to this statement later under Claims of Exemption.) The plaintiff is required to put forth his entire case. The defense then puts forth its entire case. Then there is a hearing. Too many plaintiff's counsel are relying on the right to mythical "reply" which has never existed in attachment hearings.

Defense papers fall into two categories: First, there is the attack on plaintiff's prima facie case. Second, there is the claim of offsets. If the defense papers are an attack on the prima facie case, it is commonplace for the defense to be able to poke a fatal hole in the "bare bones" prima facie showing. Plaintiff's "reply" brief is really a resubmission of its prima facie case, only this time beefed up rather than bare bones. However, besides the fact that they have no right to reply, this "reply" is filed one to four days before the hearing. As a matter of law defendant is entitled to *20 days notice* of plaintiff's case. Plaintiff's motion for a continuance will be denied upon opposition by the defendant.

Thus, plaintiff's counsel is well advised not to regard the attachment hearing as a pleading hearing. The time must be taken to set forth the full, complete, detailed, evidentiary case.

Filling Out The Forms

An undue number of attachments are denied because counsel has not given careful, detailed thought to filling out the forms. The following points should be observed:

It is strongly recommended that a separate notice be filed for each defendant. This will avoid the problems involved in having a proceeding against multiple defendants — some individual, some corporate, some partnership — and making sure that all of the boxes are properly checked. It will avoid the problem of losing jurisdiction on some defendants by listing them as "et al." It also makes the court's job easier where there are separate notices for each defendant.

Section 3 — It is helpful to the court if after the box "Attached Affidavit," counsel would put in the name or names of all parties whose declarations are attached.

Section 4 — Trade, Business, or Profession. It is commonplace for counsel to check this box and then completely forget to set forth any facts in the declaration regarding the trade, business, or profession of the defendant. This box is similar to a pleading. It is a conclusion that the defendant is engaged in a trade, business, or profession. It informs the court that this is one of the issues. However, nowhere in Section 4 are there any facts to support that conclusion. Those facts must be supplied by a declaration.

Section 5 — Amount to be Secured. This section should contain an exact sum due and owing. It is usually insufficient to say "a minimum of $20,000" or "in excess of $20,000." This leads to a collateral point. All too often in the declaration, the declarant will refer to dozens of invoices separately and then forget to state to the court the total of the invoices. The court will not do any mathematical calculations. This is the responsibility of counsel and the declarant. Thus the declarant should total the exact amount due in the declaration, and that sum should be set forth in Section 5.

If plaintiff is claiming interest, then the exact amount of interest must be set forth in Section 5 and the mathematical calculations must be contained within the declaration or the interest will not be allowed.

If attorney fees are claimed, then the declaration should state that the fees are calculated per Local Rule 402. If fees are requested in excess of Rule 402, then there should be a declaration by the attorney setting forth why such excess fees are requested at this early stage of a case.

Section 7 — Description of the Property of the Defendant. A writ will issue only as to property specifically described in this section. The problem lies with real property. The sheriff or marshal cannot attach property by address only. The "real name" of real property is its legal description, not its address. Addresses often change, especially on large pieces of commercial property, while the legal description remains the same. Therefore, the legal description must be included in section 7 or a writ will not issue against the real property.

Section 14 — Identity of Plaintiff. A common error is for a corporate plaintiff to be identified in this section by the name of an officer only. Clearly, plaintiff should be identified as the corporation by the corporate officer. In other words, the first line under the date is "ABC Corporation" and the line underneath that is "John Jones, President."

Section 15 — The Declaration. The major problem here is that "John Jones" in the above example having signed himself as "President" on line 14, again signs line 15 as "John Jones, President" or adds "President" after his typed name. Line 15 is a declaration. It is signed by an individual in his individual capacity. He cannot cloak himself with some kind of corporate immunity by adding the word "President" to his signature or after his typed name.

Many applications must be denied for failure of counsel to have the declaration conform to Code of Civil Procedure section 2015.5 when they are dealing with an out of state declarant. This problem arises on the application and also on the supplemental declarations. Take a hard, long look at Code of Civil Procedures section 2015.5.

Two final points. First, refrain from signing line 15 unless the attorney can prove how he has firsthand knowledge of everything contained in the application. Finally, to the extent that the person signing on line 15 is not the party who signed on line 14, then a separate declaration will be required showing the basis for the declarant to have signed on line 15.

Selected Substantive Problems

Trade, Business or Profession. It is commonplace for plaintiffs to rely on the simple statement that the defendant was an "officer" or a "shareholder" or both as their total proof of trade, business or profession. This is insufficient. The essence of trade, business or profession is that the defendant is engaged in the *day-to-day business management* of the company *in addition* to being an officer or a shareholder. What proof does plaintiff have that the defendant was engaged in the day-to-day management of the company? Is the defendant a full-time employee of the company? Was the defendant the one with whom the business transaction was negotiated? Was the defendant present each time the plaintiff went to the company to discuss business matters? Did defendant partake in the discussions? Was the defendant the one the plaintiff spoke to each time there was a telephone conversation between the parties? These are some of the points that should be addressed on this topic.

Finally, how is the wife of "Mr. Jones" involved in a trade, business or profession when the only proof set forth is that her name is "Mrs. Jones"? This author estimates that in a minimum of nine out of ten times the plaintiff is totally unable to prove the trade, business or profession allegations as to "Mrs. Jones."

Proof of the Underlying Debt. This point was covered earlier, but it is worth restating. Declarations should prove the underlying debt by setting forth the foundational facts for all invoices, purchase orders, ledger sheets, and the monthly billings, and these documents should be attached to the declaration.

Who is the Defendant? If the defendant is listed in the caption of the complaint as "John Jones dba ABC Company," do not forget to prove that ABC Company is "John Jones." It is commonplace for plaintiffs to make said allegation in the caption, then they supply the court with ledger sheets, invoices, purchase orders and billings that all say "ABC Company." Query: Why should "John Jones" be liable?

Claims of Exemption

The only exception to the previously made statement that plaintiff has no right to a "reply" brief is in the area of claims of exemption. This is also in the area of greatest potential for malpractice by the plaintiff. Why? Because, if a claim of exemption is filed, then plaintiff *must* file a "reply" or the consequences are disastrous. A writ of attachment will not issue against any property claimed to be exempt if opposition is not filed. Further, if defendant is clever enough to claim all property listed on the application as exempt and plaintiff fails to oppose, then no hearing can be held as a matter of law.

Plaintiff is also in great danger in the following two instances: Defendant claims the home is exempt. Plaintiff does not oppose because he "knows" that there is a $45,000 claim of exemption allowed by law and he only wants the excess. However, defendants usually claim the *entire home as exempt.* They rarely claim just the $45,000. Therefore, unless plaintiff opposes he will not be able to attach the excess over the $45,000 statutory exemption.

Plaintiffs "know" that corporations are not entitled to a claim of exemption. However, plaintiff must *oppose* the corporate claim of exemption. If they do not oppose it, they leave the court with no ability to deny the claim.

Defense of Offsets

The major problem with the defense of offsets is the defendant's mistaken belief that merely by filing a "verified cross-complaint" they have defeated the writ of attachment. Defendants must prove, not merely plead, their defense of offsets. Merely relying upon a verified pleading is insufficient proof of the claim of offsets.

The next problem is the mistaken belief that the attachment cannot issue "as a matter of law" because there is now a "disputed factual issue" upon the filing of a declaration claiming offsets. Defense counsel is thinking summary judgment rather than thinking trial. The attachment hearing is not governed by the rules of summary judgment. We resolve all issues of conflicting fact. If after resolving all issues of conflicting fact, we find the plaintiff has established the probable validity of its claim, then the writ will issue despite the claim of offsets. Thus the defendant must prove its offsets. How?

The best way to prove offsets is to show the existence of a "paper trail." Prove to the court that this is a legitimate claim that existed and was known to plaintiff prior to the filing of the cross-complaint. Attach letters and memoranda between the parties setting forth the nature of the problem prior to litigation. If there is no "paper trail," then some effort should be made to explain why plaintiff was not made aware of the problem prior to the litigation commencing.

Finally, it may be necessary for defendants to have declarations from third parties in order to really prove that the product was defective or that there has been a loss of business due to plaintiff's alleged defective product.

Conclusion —Late Papers

I deliberately conclude this article, for emphasis, on a sour note — late papers. Don't file them. They will not be read or considered. This applies to both initial papers and papers filed per a court ordered briefing schedule. If there is a successful motion to continue to allow the late papers to mature, then the court will entertain a CCP§ 128.5 motion for filing late and causing unnecessary delay. I recently had counsel, who filed late opposition, ask me in open court, "When were the papers due?" I strongly suggest that all counsel read the attachment code before appearing in the attachment department. Note that if a hearing is on Thursday, opposition papers are due the preceding Friday, not Monday.

Setting aside this sour note, hopefully the suggestions above will help counsel in their attachment battles.

— Robert W. Zakon
Superior Court Commissioner

The President's Letter

Continued from Page 1

The Federal Commission has not performed as intended. The Federal Salary Act provided for quadrennial salary review and adjustment beginning with fiscal year 1969. The Commission made no recommendations until 1976 and these were not followed. Increases went into effect in February 1977, but were notably less than the Commission had recommended. (Marilyn M. Roberts, *Judicial Compensation Commissions*, 1979).

Current Salaries:

Pursuant to Executive Order 12387, effective October 1, 1982, current salary levels for judges at the District and Circuit Court levels are as follows:

District Judges	$73,100
Circuit Judges	$77,300

Executive Order 12330, effective October 1, 1981, had previously set the same judges' salaries at these levels:

District Judges	$70,300
Circuit Judges	$74,300

(5 U.S.C. Section 5332, Schedule 8)

The October 1, 1982 increase represents an approximate four percent increase for judges at these levels. Given an annual inflation rate of considerably more than four percent, one can immediately see that the actual buying power provided by these salaries is decreasing with each passing year. Thus, it should not be surprising to us that more qualified people than ever before are turning down judicial appointments, citing much higher salary potential in the private sector as the primary reason for their decision.

Determination of California State Judicial Salaries

In California, the setting of judicial salaries is done by the State Legislature. A bill passed by the Legislature late in the 1983 session would have increased salaries for Appellate and trial court judges. Although Governor George Deukmejian said he supported the concept of judicial raises, he vetoed the measure. The *Los Angeles Times* reported that the Governor "objected to a provision that would have enabled judges to receive an additional salary increase whenever state employees received a leave for disability or were given an allowance for uniforms."

Among other proposed increases, the bill would have given Superior Court judges a $3,796 yearly increase and Court of Appeal judges a $4,344 increase. Judges currently receive annual cost of living increases which are based on the average raise received by state employees. But a general judicial pay hike has not been granted by the legislature since 1976. (*Los Angeles Times*, August 24, 1983).

California State judicial salaries vary considerably within the various levels, due to the California Supreme Court's rulings in *Olson v. Cory* (App. 156 Cal. Rptr. 127). The gist of the decision is that judges are entitled to have their salaries calculated based on the law in existence at the beginning of their terms. Thus, we have two categories of judges (*Olson v. Cory* judges and others), each earning different salaries within the same judicial level.

Current salary levels:

Superior Court	$ 66,190 (*Olson v. Cory* judges)
	$ 63,267 (other judges)
Court of Appeals	$104,334 (8 Justices)
	$ 75,745 (22 Justices)
	$ 72,401 (40 Justices)

(Los Angeles Daily Journal, August 31, 1983)

Assembly Speaker Willie Brown (Dem. - San Francisco) said that he would introduce a separate bill to increase judicial salaries. In speaking to the press (*L.A. Times*, August 31, 1983) he cited numerous examples of capable attorneys who had turned down judicial appointments due to the much higher salaries they could command as private attorneys.

Implications

It is a fact that private practice often results in considerably higher salaries than can be reasonably offered to public officials. Such is the nature of a free market economy. This cannot be avoided and we should not attempt to do so. But it is also a fact that, more than ever before, competent individuals are leaving judicial office or turning down offers of judicial appointment precisely due to the salary differentials. This is a problem which must not be ignored.

The smooth functioning of our legal system is dependent upon having the most competent men and women occupying the judicial bench as can be found. Certain individuals will choose private practice over judicial appointment no matter what level of compensation is offered. But a great deal of responsibility rests on the shoulders of those who do choose to serve as judges in our courts. As officers of those courts, we would do the legal system and the legal profession a great service by ensuring that the compensation offered them is commensurate with the job they are being asked to do.

—Laurence H. Pretty

Update: Time to Trial

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District, Torrance Supervising Judge George R. Perkovich, Jr. said that the improvement started approximately a year ago when he stopped granting requests for continuances unless absolutely necessary. Judge Perkovich added that the arbitration system has also substantially reduced the Torrance backlog.

Torrance's waiting time for civil trials was actually better than the statistics compiled by the clerk's office, according to Judge Perkovich. "A willing lawyer who does not ask for a continuance in Torrance can get a trial in just 11 months after the filing of his at-issue memorandum," he said, noting that this improvement in Torrance came despite the loss of one trial judge. "I have two or three less judges than the other branch courts and we still do more cases."

Judge Perkovich observed that the increased delays in other branch courts, such as Compton, were principally due to a heavier criminal caseload in those courts (which take priority over the civil trial calendar) and the fact that new judges were traditionally assigned to Compton.

Elsewhere in Southern California, Ventura remains the quickest venue for processing disputes with trial commencing only 5 months after the filing of the at-issue memorandum. San Bernardino County Superior Court is not far behind with only a 6-month wait.

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