Sanctions

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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Interview: Sanctions—The Views from Both Sides of the Bench

Sanctions are casting an increasing shadow over business litigation. Almost every motion has both the parties requesting that sanctions be levied against their opponent. Judges are granting sanctions more frequently. These are no longer mere $350 slaps on the wrist, but in the tens and occasionally even hundreds of thousands of dollars.

ABTL Report discussed this growing concern with a judge and business litigator.

The panelists are the Hon. Pamela Ann Rymer, Judge of the United States District Court for the Central District of California, and Richard L. Fruin, Jr., a partner at the law firm of Lawler, Felix, & Hall. Mr. Fruin is also Chairman of the Sanctions Committee of the American Bar Association's Judicial Administration Division and Co-chairman of the Discovery and Sanctions Sub-committee of the ABA's Litigation Section. Judge Rymer and Mr. Fruin were interviewed by ABTL Report Editor Mark A. Neubauer.

ABTL Report: There is a growing perception of the increased use of sanctions in the federal court. Is that perception correct, Judge Rymer?

Hon. Pamela Ann Rymer

Judge Rymer: The perception is probably correct. There's clearly an increase in the number of requests for sanctions. I would say that perhaps 30% of the motions I get include a request for attorneys' fees or sanctions, and that troubles me. There is a tendency to have a request for sanctions included almost as boilerplate.

ABTL Report: As a litigator, do you find yourself doing that, Dick?

Fruin: I don't request sanctions as boilerplate because, unless the circumstances indicate that you are likely to obtain them, asking for sanctions is not cost-effective and furthermore impedes future cooperation between counsel. However, there is an increase in sanctions in both state and federal courts; it's a phenomenon which is probably only about four or five years old.

ABTL Report: What prompted this increase?

Fruin: In California state courts prior to 1978, it was uncertain whether trial judges had authority to award sanctions. In 1978, the California Supreme Court, in *Baugess v. Paine*, 22 Cal.3d 626, 150 Cal.Rptr. 461 (1978), said the trial courts did not have statutory authority or inherent power to impose money sanctions. The Legislature reversed that result two years later in the passage of what's now Code of Civil Procedure §128.5. Section 128.5 was a green light to sanction requests.

Richard L. Fruin, Jr.

There have been parallel statutory changes in the federal system. 28 U.S.C. 1927 was amended in 1980 to permit the recovery of legal fees against an attorney who unreasonably and vexatiously, in that quaint phrase, "multiplies the proceedings." Subsequently, amendments to Rules 11 and 37 of the Federal Rules of Civil Procedure, have encouraged litigants to think that they can recover sanctions if they make an adequate showing.

ABTL Report: What prompted some of these changes, Judge Rymer?

Judge Rymer: No doubt a combination of things, including concern about the quality of advocacy, increasing abuse and misuse of litigation, and lack of apparent alternatives.

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ABTL Report: Is that willingness to impose sanctions because of Rule 11, or are there any policy discussions going on either here in the Central District or on the Ninth Circuit level?

Judge Rymer: Quite a bit of the Ninth Circuit Conference last year was devoted to this subject as well as to the possible amendment of the federal rules with respect to offers to settle. I am not aware of any "policy discussions" in the Central District. However, some impetus may be coming from reported opinions on Rule 11, of which there are several, mostly out of the Northern District.

ABTL Report: Is part of this a response to Chief Justice Burger's attack on the quality of trial lawyers in the United States? In other words, the award of sanctions is one way to get lawyers to clean up their act?

Judge Rymer: I don't know whether it is responsive to what Chief Justice Burger has said or whether what he has said is responsive to a problem, and I am not sure that I share the perspective. I am not sure either that financial sanctions is the ideal way to approach a problem of adversary skills if that is presumed to be the problem. I think education is the way to solve that problem, more so than simply imposing sanctions. But they may have teeth to the extent they are related to integrity of the system. What the Chief Justice observed is probably an important factor.

When to Award Sanctions

ABTL Report: Under what types of circumstances would you award sanctions?

Judge Rymer: I have awarded sanctions in a situation where counsel plainly did not meet the Rule 11 requirements for investigation prior to filing the pleading. In that instance there had been no consultation with one of the clients or investigation prior to filing a class action in his name, which would have demonstrated that there was no possible viable class action. The result in this case of major business litigation was unnecessary discovery and unnecessary law and motion practice. In my judgment, that was a classic example of the kind of conduct that Rule 11 was intended to reach. Others are where counsel misleads the court as to the facts or law; where a motion for summary judgment is brought on a record which is totally factual; or where claims or arguments previously made and rejected are reasserted in subsequent papers.

ABTL Report: Dick, as a lawyer, what circumstances do you think justify the imposition of sanctions?

Fruin: There are different categories of sanctions. First, sanctions may be assessed for the filing and maintenance of the claim itself. Rule 11, and possibly C.C.P. Section 128.5, permits that. Sanctions in that case may be viewed as an alternative to a separate malicious prosecution action. Secondly, sanctions may be imposed for a frivolous motion or a frivolous tactic committed in the course of a litigation. Finally, there are sanctions imposed for the failure to comply with the procedural rules in conducting litigation. The lawyer has certain administrative responsibilities such as preparing meet-and-confer statements, MSC statements and the like. Failure to meet those responsibilities could result in sanctions.

Frankly, I have concern about the use of sanctions as a substitute for malicious prosecution. I think the use of sanctions for frivolous motions or frivolous tactics are entirely appropriate if properly handled by the judge. Sanctions imposed for procedural omissions or derelictions quite often are helpful in getting the parties to settle down, to cooperate and conduct themselves properly, with a minimum of unnecessary expense.

ABTL Report: Do you ever feel that sanctions should be awarded to encourage lawyers to do things more by stipulation and cooperation?

Judge Rymer: One possible solution other than sanctions is for more active judicial case management. I have found that quite often an agreement can be worked out in advance and I encourage counsel to avoid the unnecessary motion and the unnecessary court time for ruling on it.

ABTL Report: Do you ever find yourself in a situation where you get very frustrated over the lack of willingness to get the other party to stipulate and feel that sanctions should *have been used to prod the other party into recognizing its obligations to stipulate in good faith where they have no real opposition?*

Fruin: I feel that way most of the time, but unfortunately the law does not require the other side to stipulate nor do I think that sanctions are properly used to force stipulations. Case management can be very helpful, but, of course, that possibility is not available in state court.

ABTL Report: But, without sanctions, aren't you imposing the cost of litigation upon the non-erring party? You hear this from clients all the time.

Judge Rymer: But isn't that the American system? You are nearly always imposing the costs of the litigation on the party, win or lose. They bear their own costs and I do not think that you can insert at this point in time an *ad hoc* or sanction system and do it fairly.

ABTL Report: What about discovery motions? Do you find situations where neither side will agree to deposition dates or similar needless quarrels?

Judge Rymer: I have found very little of that, but that may just be fortuitous and may have something to do with management. Again, I think that many of these problems ought to be averted by judicial management.

ABTL Report: How would they be averted?

Judge Rymer: By working out an agreed schedule of discovery which is narrowly tied to identified issues in a rational order, looking toward motions which are potentially either partially or totally dispositive. Also, being available to solve problems before they escalate.

ABTL Report: With discovery motions, do you ever find situations either where sanctions should be employed more frequently or are not employed frequently enough?

Fruin: Sanctions are desirable in a discovery context, provided that the sanction is relatively small. If the sanction is reduced to the level of an infraction, such as a traffic fine, then I think that they do assist the parties in conducting themselves in a proper way. In the Federal Court, of course, you have to go through a lengthy and expensive procedure including the preparation of an obligatory stipulation merely to get a discovery dispute before the court.

How to Avoid Sanctions

ABTL Report: What should lawyers do to avoid the imposition of sanctions? Are there any traps, key words or tactics that attorneys should be aware?

Judge Rymer: I do not know if I can answer that question because it is somewhat individual to the judge, but I think sanctions ought to be, for the lack of a better word, process oriented. One way that lawyers can avoid sanctions is to comply with the clear process that has been set up, particularly in the Central District. You have, first of all, local rules which are fairly clear and pretty easy to understand. They may be difficult to comply with and they may be onerous, but they are indeed clear in what they prescribe. So for starters, you can read them and follow them, particularly the Rule 9 pre-trial proceedings. I think that's the main thing. Another way is to think through the facts and legal theory of a case as much before it is brought, or responded to, as at the time of trial. Go directly to the jugular, to what is really at issue and be prepared to be forthright about your position with yourself, your client and the court.

ABTL Report: Do you find yourself getting frustrated with lawyers who do not follow Rule 9 and other local rules?

Judge Rymer: If I have a pre-trial conference on Monday, I prepare for it over the weekend. I spend a lot of time. My staff spends a lot of time and if the work is not done by the parties, all of those hours are wasted. The same thing is true with motions. I have now made a policy decision. My clerks are no longer going to call up counsel and inquire if the papers are late. I am literally not going to consider any paper that is not filed on time, and will fully rely upon the local rule which says that we may deem a paper that is not timely filed or to which there is no opposition as consent for the motion.

ABTL Report: What do you do in a circumstance — for example a Rule 9 stipulation — where both sides have ignored the pretrial and, as a result, your time has been wasted or they file the Rule 9 report on a Thursday for a Monday pre-trial?

Judge Rymer: I am going to issue an order which indicates that there are going to be sanctions for every day that it is not here.

ABTL Report: So sanctions in that type of circumstance are in order?

Judge Rymer: Yes, I think that is process-oriented. I think that is in order and without a terrific amount of attention to hearing explanations.

ABTL Report: What should lawyers do when, for example, they do not get cooperation from their opposition in formulating a Rule 9 order? Should they just go ahead and file their own timely order?

Judge Rymer: My advice would be that, even though the local rule puts the monkey on the plaintiff's back, everybody has a mutual obligation to comply with Rule 9 proceedings.

ABTL Report: Dick, do you think there are any traps lawyers fall into that open themselves up for sanctions?

Fruin: Litigators should try very hard to establish a cooperative spirit with opposing counsel, even to the point

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Letter from the President

Court congestion and trial delay continue to be the subject of commentary, debate and consternation. These conditions are commonly attributed to an increasing population base, a proliferation of lawyers and the expansion of personal rights, fiduciary duties and legislative mandates. As trial lawyers, we have a special interest in understanding and resolving the prolongation of litigation. While the resolution of this problem is hardly at hand, we are beginning to get a better handle on the problem.

A recently published report by the Rand Corporation entitled *"Managing The Unmanageable — A History Of Civil Delay In The Los Angeles Superior Court"* provides new perspectives. This report is based on an historical analysis of the caseload of the Los Angeles Superior Court from its beginning in 1880 to the present time. This research undercuts the popular notion that trial delay is a new phenomena and rejects the proposition that increased filings are the primary cause of court congestion. In its report, Rand concludes that the primary cause for delay is not increased case filings, but the increased time that it takes to try cases.

Charles S. Vogel

Using filing records from about 1920 through 1981, the study reveals that civil delay has been a long term problem. Although the time between filing or requesting a trial date and the scheduling of a hearing has fluctuated over the last sixty years, the increased waiting time has been most dramatic since World War II. In 1940 the time to trial was six months; in 1981 it was forty months. Although the number of civil filings has actually fallen in the last two years, the current trial delay in the Central District is fifty-nine months between the date of filing and the time of trial. Ran does not conclude that increased filings have not contributed to the delay to some degree. However, Rand emphasizes that even though the absolute number of filings has increased with the growth of population, the number of filings per capita has remained fairly even. Based on an empirical analysis of the available court records, Rand makes this interesting observation:

> "Generally, over the past several decades no more than one-half of one percent, or one in 200 people has filed civil suits. Between 1970 and 1980 filings per population steadily increased, but in 1980 the rate of filing per population was still lower than in 1930. The 1940's, 1950's and 1960's all experienced persistent and significant increases in delay while the rate of filings per population remained relatively steady."

It appears, therefore, that court congestion is not so much a product of population growth as it is the result of other operative forces.

Traditionally, the court has dealt with trial delay by adding judges. When the court was founded in 1880, there

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of turning the other cheek more than once. You should avoid tit-for-tat tactics: it is not cost effective and jeopardizes whatever *modus operandi* you can establish with the other side. It does not get you anywhere. You should be very careful that you actually do need the discovery from the other side before you ask for it. I try to rely upon my own client's resources and third parties to learn many of the facts that 15 years ago I might have asked the other side to produce for me.

ABTL Report: What are the things you should do to create a right to sanctions in the form of award of your attorneys' fees trying to get around the American rule?

Judge Rymer: Exceptions aside, procedurally you have to do the same sort of thing you do, hopefully, with any motion: have a good record. You should not come in and cry sanctions the first time your phone call is not returned. But if you are genuinely faced with a serious situation in which you believe that there is an abuse either of discovery or Rule 11 or §1927 taking place, then you ought to come in with a very solid record and a very solid substantiation for the amount of attorneys' fees involved in the moving party's side.

Boilerplate Requests

ABTL Report: You mentioned earlier that approximately 30% of your motions now carry some sort of boilerplate request for sanctions. Are the requests for sanctions becoming a part of litigation strategy as a matter of course?

Judge Rymer: No, because these requests are not taken seriously. By definition, if I say it is a boilerplate request, it is the last line. It is tagged on and says something like "This motion has no merit and therefore we request an award of attorneys' fees."

ABTL Report: Are lawyers making a greater effort, though, to develop the facts and law in support of their requests for sanctions?

Judge Rymer: No, they are not to me. I have just had a handful of what I would regard as serious sanctions motions. One should not cry "wolf" on sanctions. Perhaps we should define sanctions a little more carefully. I do think there is a difference between the very small award of sanctions — which is kind of process-oriented, say, for example, a failure to get a pre-trial paper in on time or that kind of thing, where $250 or $200 sanctions to an attorney are involved — from the major award of attorneys' fees for clearly significant involvement in something in violation of Rule 11.

ABTL Report: What would be an example of that?

Judge Rymer: In the example I gave of a major business litigation, there were five or six counsel involved and a need to take discovery to oppose a class certification motion, all of which was generated, it was alleged, because a series of papers filed in violation of Rule 11. The potential award was substantial and it was treated as a substantial motion, seriously made, and seriously supported. But I do have a real concern about knee-jerk requests for sanctions and about the downside of having a separate entire mini-trial on the lawyer's responsibility a matter of routine.

ABTL Report: Are the judges uniform in their application and use of sanctions?

Judge Rymer: My guess is no and that, too, is a problem. I think there should be consistency and predictability, that is, more than just predictability and consistency from one judge.

ABTL Report: Are there discussions among the Central District panel as to when sanctions should be employed to try to develop that consistency?

Judge Rymer: None that I have been a part of.

ABTL Report: Do you think there should be a uniformity?

Fruin: There should be something close to uniformity with respect to the process-type sanctions. With respect to the other categories of sanctions, I don't think there can be uniformity given the variety of circumstances which could justify the imposition of sanctions.

Due Process

ABTL Report: Should a substantially high amount of monetary sanctions require the greater due process of a full trial as opposed to a hearing on a written motion?

Judge Rymer: No, I think due process is due process, regardless. In the cases of sanctions for violation of Rule 9, for example, there has already been, in almost every case, at least two, three or four orders. You have the local rule; you have the judge's order to comply with the pretrial rules. So if there is a violation of that and the sanction is nominal, I think there have already been two clear orders that have been violated. Generally speaking, I think you will have a third order: you did not comply the first time, come back and comply tomorrow. So there you have really had due process. But I think it is important to have a hearing. I would not impose sanctions short of an ability to make a summary contempt finding, without giving counsel the opportunity to think about it, tell his client, appear and argue it.

Fruin: You are mixing apples with oranges and apples. The term "sanction" means different things in different contexts. To impose a sanction for a violation of a local rule may not require a hearing. However, any sort of summarily imposed sanctions where there is no bright line that counsel was supposed to follow does require due process procedures, including notice of the charge, opportunity to respond, hearing on the records and appropriate findings. That is what C.C.P. Section 128.5(b) requires. So I agree with Judge Rymer that due process is due process. But, depending upon the context in which the sanctions arise, the procedural requirements may be different. When you talk about sanctions as a substitute for malicious prosecution, for instance, there are many questions raised which do not occur with respect to sanction for discovery failure or for a frivolous motion.

ABTL Report: For example, the right to trial by jury.

Fruin: That is correct. For instance, a malicious prosecution claim requires proof of four elements. But if the claim is decided on motion by the judge before whom you've tried your main case, there's only two elements: (1) Did you lose the trial? (2) Did you bring the claim in good faith? In theory, of course, a judge may distinguish between the merit of your claim and the reasonable cause or reasonable justification for presenting it. But

when a judge had a full calendar, did not think the trial was necessary and did not particularly like the way counsel presented it, then I think the judge might be more inclined to impose sanctions than otherwise.

ABTL Report: Assuming it has reached the decision that monetary sanctions are appropriate, are there any rules of thumb the Court employs in deciding how much those sanctions should be?

Judge Rymer: I cannot answer whether there is a rule of thumb, but would interpret the guide as being whether the attorneys' fees are substantiated under the normal rules. There may be an informal rule of thumb for the perfunctory kinds of violations in pre-trial proceedings or something like that, but I do not think there is any kind of scale for Rule 11 violations and I do not think there should be or could be.

ABTL Report: Do sanctions against an in pro per *have a different standard?*

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Judge Rymer: Yes, I think they do.

ABTL Report: Should the court be more patient with an in pro per?

Judge Rymer: Yes, because you have to give more warnings, you have to give more advice before you administer sanctions.

ABTL Report: Once you get an award of monetary sanctions, how do you get them paid?

Fruin: When the Court awards sanctions, I ask the Court to specify that the sanctions be paid within a certain time or upon the occurrence of a particular condition. Usually the Court does that. I then frame it as part of the Court order and if the sanctions are not paid in that time I have the order provide for some other sanction such as a in limine order or dismissal directed to the merits.

ABTL Report: Do you normally put a time frame when you award sanctions?

Judge Rymer: Always. I also state the condition, that is, the sanctions will be paid by the attorney or client or jointly, and by a certain date, or a dismissal will not be lifted until the sanctions are paid, or whatever other conditions are appropriate.

ABTL Report: Do you ever refer sanctions to the disciplinary committee of the Central District?

Judge Rymer: Well, I never have. I have never had the occasion presented. I do not know that anyone else has recently.

Fruin: Theoretically it would be a good idea to refer lawyer misconduct to independent disciplinary committees. Presumably if the lawyer is straightened out then the pattern does not reoccur. But practically, if there are many such referrals, the disciplinary committees would be overwhelmed. Each referral presumably would require examination of the court file, hearings, preparation of findings and making recommendations back to the federal judge — a time consuming, slow, expensive process.

ABTL Report: In light of the increased use of sanctions, do you feel the appellate courts are going to become more involved in reviewing or setting standards for them in the future?

Judge Rymer: That's inevitable.

Fruin: I think that for the most part sanction orders which go up for appellate review will be slipped under the rug in a memorandum opinion which is not published. The appellate courts will not reweigh the evidence but will defer to the trial judge's finding that there was no reasonable basis for the challenged conduct. There will be the appearance of appellate review, but not its substance. Because of the absence of effective appellate review, I think sanctions are a real threat to the trial lawyer.

Judge Rymer: Dick, do you think that sanctions ought to be used as a tool to redress incompetence, to redress the ethical problems; to redress wrongful, intentional violations of court orders and procedure? Or all of those?

Fruin: Sanctions ought to be used to reimburse the party who has been put to additional expense, where an adequate showing is made of intentional misconduct. I don't think sanctions ought to be used to shift legal expense caused by mere incompetence of a lawyer.

Sanctions Create Conflicts

ABTL Report: Does the increased use of sanctions create a conflict for the lawyer?

Fruin: There can be a terrible conflict between the client and counsel when an opponent or the court requires a party in the main action to show justification that a claim was prosecuted in good faith. And the procedure also distorts the proper judicial role. Let's assume that the court, after conclusion of the trial, entertains a motion as to whether the claim, cross-claim or defense was maintained on a reasonable basis. The lawyer then must stop in the middle of the litigation process — after all, there is still the appeal opportunity — and justify the suit to the judge and opposing counsel. Both the lawyer and the client are faced with the possibility that sanctions may be imposed against them. The lawyer as the presenter of the opposition to the sanctions motion has the opportunity to shade the facts against the client as to the responsibility and justification for maintaining the suit. Whenever a lawyer finds himself in the position of being able to shade the facts adversely to his client, he must remove the conflict by withdrawing from the representation, at least as to the sanctions motion. The client is then required to get separate counsel to defend the sanctions claim. At the same time, he may be relying upon his original counsel to proceed with the appeal.

Then you get into questions of whether the judge who is supposedly ruling upon the merits of the claim actually is in the best position to rule upon a party's motivation. It may be difficult for a judge, after deciding that a claim has no merit, to think that nonetheless there was reasonable basis for litigating the claim in the first place.

If sanctions are imposed, there are unresolved problems with respect to any subsequent action for malicious prosecution. Is the sanctions award collateral estoppel with respect to the claim for malicious prosecution? Presumably if the sanction motion is granted, the sanctions actually paid would be an offset to any compensatory award in a subsequent successful malicious prosecution action, but of course the winner of the sanctions motion could still seek punitive damages in any subsequent malicious prosecution action.

ABTL Report: What about the conflict that arises in a situation where you have a tenuous but plausible argument to oppose a motion. Your risk of sanctions turns on whether your "plausible" argument is reasonable in the eyes of the beholder, i.e., the judge? Does a lawyer have an ethical obligation to advise the client of the risk of this sanction?

Fruin: I think so.

ABTL Report: Does the risk of sanctions create a clear conflict any time it is raised?

Fruin: I do not know that it creates a conflict if you have advised a client that there is a possibility of sanctions. The client presumably can make the decision as to whether to proceed on a course which could lead to sanctions. If the lawyer does not raise the possibilty that sanctions could be awarded against the client, it could possibly constitute malpractice.

ABTL Report: Judge Rymer, do you feel the application for sanctions creates a conflict between the lawyer and his client or her client?

Judge Rymer: I think it probably depends upon what kind of application for sanctions you are talking about. I think if it is the situation just described, then obviously there is a conflict. However, there is also a way out, and that is to be up front with the court about stretching the law. Also, of course, the attorney-client privilege is implicated.

ABTL Report: Is the Court sympathetic to that conflict?

Judge Rymer: This potential conflict presents a major problem in the entire area of imposing sanctions, because it is very difficult to separate a sanction against an attorney and a sanction against the client. This creates a major philosophical problem that I am not sure we have even begun to fully explore.

ABTL Report: What about the conflict for the Court that Dick raised: Having already decided the case on the merits, should that same judge decide whether the loser acted in good faith or not?

Judge Rymer: I suppose if you think there is a problem, another judge can hear it. I do not think there is a major difficulty in deciding that a case does not have merit and at the same time saying there was no unreasonable failure to comply with Rule 11. Rule 11 doesn't involve a good faith determination and should not be merits related, in the sense of looking backwards after trial. But you are reaching over into malicious prosecution.

Do You Sanction Attorney or Client?

ABTL Report: What about the choice of awarding sanctions against the attorney, the client or both? What standard should be employed to make that determination?

Judge Rymer: That's the most difficult question we face. I do not have an answer to what standards should be used. There is conduct purely associated with the attorney that is fairly easy to identify, particularly violations of Rule 9. It is an attorney who is too busy or just has not done this or that. Most of the conduct which could run afoul of Rule 11 is also a matter of attorney responsibility. I do not believe that it is fair to penalize the client unless it is absolutely certain that there is complicity. Then you start to get into the more substantive violations such as whether a pleading is filed for an improper purpose, or discovery is being irresponsibly sought or thwarted. These begin to present serious questions of against whom the sanction is really being imposed and against whom it should be imposed. I think that perhaps may require a mini-trial to find out whether the client is participating in abuse or encouraging it, and that, it seems to me, is not the function of a sanction procedure.

Fruin: Sanctions have to be assessed against the client, except sanctions for violation of a procedural rule. If a pleading is not timely filed, if it is not properly formated, if there was no appearance at a scheduled hearing, that is clearly an attorney's responsibility. The sanction, however, should be in proportion to the deviation from the rule. But a sanction imposed on summary basis and not for violation of a particular procedural rule, has to be imposed against the client. Otherwise, the court's going to have to make inquiry to determine whether the fault lies with the counsel or with the client. And, as I said earlier, such inquest impinges upon the attorney-client privilege and creates a conflict between counsel and the client.

Letter from the President

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were two judges. Today, there are 214 judicial officers exclusive of court commissioners. This increase is not really surprising, but it is interesting that the filings per judge — the per judge caseload — have decreased. With the number of cases per judge declining, the expansion in trial delay cannot be explained by simply comparing the number of judges with the number of case filings. This incongruity is explained by the fact that a greater number of cases consume an historically disproportionate amount of court time per case. Consequently, in terms of real judge time, there is a shortage of judges to handle the court's current caseload.

Trials take much longer than in the past because the composition or nature of litigation has changed. In the early days, most cases were debt collection matters. Today's cases take on the complexities of an expanding tort law and the intricacies of modern commercial practices. Moreover, the legislature and appellate courts have stimulated a demand for access to the court by addressing a broader spectrum of social problems that previously were ignored or went unrecognized. These creative changes have encouraged lawyers to refine their forensic skills, liberally employ expert witnesses and regularly engage new litigation support systems (computer organization of documents, video taped depositions, jury attitude studies and surveys). In addtition, the bar has experienced an explosion of continuing legal education programs designed to improve the general advocacy of lawyers and advance specialty bars. This has resulted in the pooling of information about emerging fields of practice allowing more lawyers to participate in the "frontier" areas of the law. This combination of expanding rights and intensified lawyering simply calls for more trial time which overloads existing judicial resources.

The Rand report is basically a discourse on the historical development of a trial courts caseload. It does not purport to provide solutions, but does advance our understanding of the civil justice system and trial delay. In its conclusion, Rand hypothesizes that automated management systems could improve the allocation of judicial resources and measure the effect of any procedural changes for reducing court congestion. Finally, the report instructs us that we must on the short term — and probably on the long term — continue to expand the size of the court.

It would be imprudent to assume that judges will be added in adequate numbers or with sufficient frequency to adequately respond to the problem. Over the last several years, the Los Angeles County Board of Supervisors has generally opposed the addition of judges to the court. Notwithstanding the large backlog of cases in 1982, the Board refused to support court sponsored legislation to add fifteen judges. One Supervisior expressed his frustration by demanding implementation of a seventeen point court reform program. At the heart of that program were proposals for significant revamping of the jury system, including judicial voir dire, reducing the number of peremptory challenges and decreasing the size of the jury from twelve to eight. No jury reforms were implemented and no judges were appointed. 1982 ended in a stalemate.

In 1984 the court's application for more judges began on a more positive note. The Board of Supervisors supported legislation to add eighteen judges to the court (fewer than the forty-two judges justified by the generally respected Judicial Council caseload formula). Once again the problems of the court were caught up in the overall budgetary concerns of the County. Although the County only pays $9,500 of the $67,000 salary for each judge, it bears almost the entire cost of providing the courtrooms and supporting staff. The court's own figures show that the total average cost per court day (250 days) for all divisions is $2,318.00. However, the Presiding Judge publicly committed to assign the eighteen new judges to civil courts where the average daily cost of trial is $898.00. This concession made little impression. After three months of debate and discussion, the Board finally agreed to fund only eight new judgeships.

This brief reveiw of the effort to accommodate the problem of delay by increasing the size of the court shows why that solution is unreliable. Not only is the response too late and too little, it is accompanied by demands for reform that imply that the bench and the bar are inept, unwilling and unworthy. It is clear that the competition

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for public funding has produced an inhospitable atmosphere for requesting more judges and continues the general castigation of the civil trial sysetm.

It is predictable that these issues will continue to be hotly debated in and out of the legal community and that momentum for change will intensify the climate for reform. Undoubtedly the Rand report will shed some light on these discussions. However, it and other such studies keep this issue on the public agenda, forcing the bench and bar to take positions on proposed solutions. Thus far there appear to be only three possible choices for repairing trial delay. These include (1) adequate and timely expansion of judicial resources (*i.e.*, more judges), (2) radical reform of the jury system (*i.e.*, reduce the size of the jury) and (3) implementation of procedural disincentives to litigation (*i.e.*, cost shifting).

Continuing constraints on finite public finances create a political climate in which the local legislative government simply refuses to go along with the traditional expansion of the court to accommodate a growing caseload. Moreover, the historical analysis of the Rand Corporation proves that the political process is incapable of expedititiously adding enough judges to effectively deal with the problem. We can have no confidence that either the public or a reluctant Board of Supervisors will view the addition of more and more judges as an ultimate solution.

Calls for significant jury reform have no better chance for implementation than the request for continued expansion of court resources. First, jury reform in terms of its size, selection and application requires legislative or constitutional change. Consequently, the California Trial Lawyers Association, with its significant influence in Sacramento, will prevent any legislative sorcery that changes the jury system that has served it (and most of us) so well for so long.

Reform-minded Supervisors have warned that they may take the jury issue to the public by referendum. I consider it unlikely that the community would readily give up a right to a civil jury trial, and I believe the public may perceive such tinkering as an effort to remove government from the people — it would undoubtedly offend the public's sense of justice as contrary to the accepted idea that the jury is the cornerstone of all personal liberty. Concerned organizations will surely raise these issues in thirty second TV spots and other in-depth advertising. In any event, most lawyers will not support any radical reforms abolishing civil jury trials, and it must be recognized that anything less than that will not have a meaningful impact on trial delay. In short, jury reform isn't going anywhere in the foreseeable future.

Assuming that court expansion and jury reform are not viable solutions, what prospects are there for effectively dealing with court congestion and trial delay? The meaningful proposals all involve a transfer of economic risk to discourage some litigation. Among the better known of these proposals are the recovery of attorneys' fees by the prevailing party, the imposition of higher interest rates on judgments, the adoption of user fees, the increase of jurisdictional limits of Small Claims Court and Municipal Court, and the adoption of legislative limitations on the amount of recoverable damages. Some or all of these proposals are anathemas for many special interest lawyers. Nonetheless, they provide a meaningful starting point for demonstrating that lawyers have a genuine interest in solving the problem — and solve the problem we must.

It is clear that the commentary, debate and consternation over the civil trial system is escalating. Potentially, a showdown may take place in arenas beyond the influence of lawyers. Six of the nation's largest think-tanks have recommended to President Reagan that the civil jury system and practice of law be reformed. They urge the use of mediation instead of trials, charging private parties the full court costs of lawsuits and allowing non-lawyers to handle constracts, divorces, will and real estate settlements. Among the groups urging these reforms are the Brookings Institute, the American Enterprise Institute and the Hoover Institution. These organizations are not without influence and the dilemma in the civil courts will not escape their notice.

It is far more sensible for lawyers to address these issues now by formulating disincentive devices to unblock the caseload and preserve the primary attributes of the civil trial system. Reasonable compromises must be pursued. As a first step, I favor a division of punitive damage awards, two-thirds to the prevailing plaintiffs (and counsel) and one-third to the courts. In my view, this modest beginning would help finance the courts without adversely affecting the litigants or their lawyers. Of course, some will oppose this reform, just as some oppose all reform. But if we really believe that "justice delayed is justice denied," we are obligated to make that an achievable goal. We cannot allow ourselves to be removed from the process for change by simply defaulting. We have a professional obligation to contribute our best ideas even if it involves sacrificing our comfort with the past and our immediate self interest in the present.

—Charles S. Vogel