

Letter from the President

The Board of Legal Specialization of the State Bar recently invited comment on its proposed "Standards for Certification and Recertification in Civil Litigation." The proposed standards were reviewed by your Board of Governors and it was the unanimous view of those present that the proposed standards were not acceptable. Accordingly, I prepared, and sent the following letter to the Board, expressing the opposition of this Association.

In general, ABTL believes that attempts to certify a Civil Litigation specialty would be counterproductive and would increase the cost of litigation and the burdens on the courts without increasing the quality of representation of litigants.



Laurence H. Pretty

The concept of certification as it has been previously applied has been confined to bodies of substantive law, such as family law, and not to technique or procedure cutting across different substantive areas. We believe that attempting to extend the concept of certification outside the area of defined substantive bodies of law would not benefit the public or the courts and would, to the contrary, be potentially misleading and harmful.

In particular, we foresee the following problems that attempted certification of a Civil Litigation Specialty would create:

1. The proponents of the standards have not presented statistical or empirical evidence that co-relates the proposed standards with competency of performance as a trial lawyer. It is a matter of everyday observation in the courtroom that there can be veteran trial lawyers whose courtroom performance is less impressive than that of relative newcomers. If veteran trial lawyers wish to advertise their length of experience, they are free to do so. However, the state should not lend its official imprimatur of certification which could, in some instances, lead members of the public into esteem of some trial lawyers' abilities which may be unjustified.

2. The proposed standards adopt an erroneous premise in supposing that a single set of standards can be suitable for widely varied substantive areas of civil litigation. For example, certification standards weighted towards personal injury litigation are unlikely to help members of the

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Appellate Practice: A Consumer's Perspective

This is a consumer's impressions about briefs and oral argument. Using the language of the business world, it is the lawyer's job to sell or communicate the righteousness of his client's cause with many other earnest competitors for our attention. Those of you who practice in the federal courts are aware of our rising case loads. In the last two years case participation per judge has increased from 184 to 286 annually. At the same time, the number of cases filed in our court has increased by 19%. The result of our increased output, in response to an overpowering case load, is that we have less time to spend on your cases than did our predecessors.

Until you file fewer appeals, or we get more judges, all of us will have to accommodate ourselves to this reality: an increasing workload, given the same number of workers, equals less time available per unit.



Hon. Arthur L. Alarcon

This condition, in turn, places a greater burden on appellate lawyers to produce briefs of the highest professional standards to assist judges in producing dispositions which are well reasoned and correct. Because of our crowded argument calendars and mounting filings, you have an ever increasing responsibility to your clients to write carefully, clearly and briefly to gain our

concurrence in the justice of your cause.

With the foregoing solemn sermon in mind, I will proceed to set forth some of my observations after five years of reading briefs and hearing oral argument as a circuit judge.

Make A Record

Justice Tobriner of the California Supreme Court once observed that trial judges spend their careers searching for the truth, while appellate judges look only for error. We simply cannot reverse a judgment unless error appears on the record.

Those of you who confine your labors to litigation exclusively and leave to others the handling of the appeal should be mindful that many errors can be disregarded by appellate judges if a proper objection is not made in the trial court.

Let me set forth some examples of trial attorney omissions we see frequently:

1. Affirmative defenses and matters in evidence such

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Civil RICO Divides Central District

Whether you have pleaded a civil RICO claim could well depend on the judge you draw. Five Central District judges have issued published decisions dealing with civil cases brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 8 U.S.C. 1961-68, and their decisions vary widely.

The six decisions and their judges are:

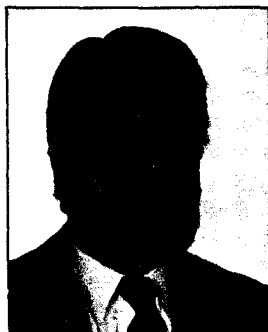
Harper v. New Japan Securities International, Inc., 545 F.Supp. 1002 (C.D. Cal. 1982) (Judge Tashima) ;

Johnsen v. Rogers, 551 F.Supp. 281 (C.D. Cal. 982) (Judge Hall) ;

Liston v. USLIFE Corporation, et al. (1982-83) Fed.-Sec.L.Rep. ¶99,033 (CCH) (C.D. Cal. 1983) and *Lickhalter v. System Development Corp.*, [1983-84] Fed. Sec.-L.Rep. ¶91,459 (CCH) (C.D. Cal. 1984) (Judge Kenyon) ;

Hokama v. E. F. Hutton & Company, et al., 566 F.Supp. 636 (C.D. Cal. 1983) (Judge Pfaelzer) ; and

Jensen v. E. F. Hutton & Co., Inc., (1983-84) Fed.Sec.-L.Rep. ¶99,674 (CCH) (C.D. Cal. 84) (Judge Byrne).



David C. Wheeler

All six cases involved federal securities fraud claims as the "predicate offenses" on which the RICO claims were based. Judges Tashima and Pfaelzer dismissed the civil RICO claims. Judge Hall refused to permit amendment of a complaint to add a RICO claim. Judges Kenyon and Byrne permitted civil RICO to survive attack at the pleading stage.*

RICO Elements

The essential elements of a civil RICO claim are a "pattern of racketeering activity," an "enterprise" through which it is conducted and injury to plaintiff's "business or property." Although Congress' concern in enacting RICO was to combat organized crime, it did not expressly so limit the application of RICO. Rather, RICO is expressly not limited to organized crime: "racketeering activity" includes a large number of different acts, among them securities fraud and mail fraud; a "pattern" consists of two acts of "racketeering activity;" an "enterprise" consists of any association of individuals or entities. 18 U.S.C. 1961.

"Organized Crime"

The breadth of RICO led Judge Pfaelzer to conclude that "RICO, if interpreted literally, provides an added

*An informal survey conducted by Jan Harris indicates that Judges Waters, Hauk, Rafeedie and Gadbois have also dismissed civil RICO claims.

cause of action for treble damages in any securities case involving two or more unlawful sales." 566 F.Supp. at 643. To avoid this "extraordinary result," she ruled in the *Hokama* case that "insofar as civil liability actions predicated on federal securities law violations are concerned, plaintiffs must allege some link to organized crime, however defined." *Id.*

The Second Circuit has expressly rejected this analysis. *Moss v. Morgan Stanley*, 719 F.2d 5121 (2d Cir. 1983). The Seventh Circuit has also held that civil RICO applies to business fraud. *Schacht v. Brown*, 711 F.2d 1343, 1353-56 (7th Cir. 1983). As Judge Pfaelzer recognized, the Ninth Circuit has rejected the requirement of an "organized crime" nexus in criminal RICO actions. *U.S. v. Campanale*, 518 F.2d 352 (1975). Accordingly, it seems unlikely that the "organized crime" requirement will survive.

"Racketeering Enterprise Injury"

Both the *Harper* and *Johnsen* cases hold that no civil RICO claim exists unless "racketeering enterprise injury" is present. Both cases are based on the assumption that Congress could not have intended to create a treble damages remedy where "the injury to which plaintiffs refer is merely the direct injury caused by the predicate acts of securities fraud." *Johnsen*, 551 F.Supp. at 285; *Harper*, 545 F.Supp. at 1007. The logic of this position is appealing. The federal securities laws already provide a civil remedy. Congress could not have intended to provide for treble damages under RICO for "garden variety" violations of the federal securities laws. Thus, RICO damages are available only where the injury to plaintiff is "of the type the RICO statute was designed to prevent" or where "a commercial injury (is) caused by the conducting of an 'enterprise's affairs through a pattern of racketeering activity.'" 545 F.Supp. at 1007; 551 F.Supp. at 285.

However, there are serious problems with the "enterprise injury" approach. First, it presents difficult questions of legislative interpretation. Second, as several courts have observed, it is very difficult to understand or apply the concept. The *Harper* standard of injury "of the type the RICO statute was designed to prevent" has a flavor very much like "organized crime." The *Johnsen* standard of injury caused by the existence of a "pattern" and an "enterprise" rather than by the predicate act is, at best, unclear. See, e.g., *Schacht v. Brown*, 711 F.2d 1343, 1359 (7th Cir. 1983).

Moreover, limitation of civil RICO actions through the "enterprise injury" concept creates an anomalous result. If the elements of "racketeering activity," "pattern" and "enterprise" are present, the criminal RICO statute has been violated. 18 U.S.C. 1963. RICO criminal penalties are far more severe than, for example, the criminal penalties for securities fraud. Thus, Congress intended to increase criminal penalties significantly where the elements of a RICO violation are present. It is unlikely that Congress did not also intend to increase civil remedies where exactly the same RICO elements are present. Congress certainly did not express any such intent.

In denying a motion to dismiss RICO claims, the *Jensen* court expressly rejected the "racketeering enterprise injury" requirement. The *Liston* and *Lickhalter* courts also rejected the requirement, but held that, in any event plaintiff had pleaded "racketeering enterprise injury."

"Enterprise"

In *Jensen*, the court also considered the "enterprise" element. Plaintiff in *Jensen* alleged that E. F. Hutton and an E. F. Hutton employee together constituted an enterprise that had defrauded him by churning his accounts. Defendants argued that the claimed enterprise was identical to the pattern of racketeering activity and that plaintiff had accordingly failed to plead all of the elements of a RICO claim. The court rejected this argument, ruling that plaintiff had adequately pleaded an enterprise composed of Hutton and its employee separate from the churning activity because it could be inferred from the complaint that "the enterprise also engaged in distinct acts of providing legitimate services to investors."

An enterprise must exist "separate and apart from the pattern of activity in which it engages." *United States v. Turkette*, 452 U.S. 576, 585 (1981). As the *Jensen* court acknowledged, there is a split in the circuits over whether

the "enterprise" and "pattern" elements may be proved by the same facts. The Second Circuit holds that they can be, and the Eighth Circuit that they cannot. *Moss v. Morgan Stanley*, 719 F.2d 5, 22 (2d Cir. 1983); *U.S. v. Bagaric*, 706 F.2d 42, 55 (2d Cir. 1983); *Bennet v. Berg*, 685 F.2d 1053, 1060 (8th Cir. 1983).

Although the Ninth Circuit has not considered this "enterprise" issue, there is some indication that it may use the "enterprise" element to restrict civil RICO actions or limit civil RICO defendants. In *Rae v. Union Bank*, 725 F.2d 478 (9th Cir. 1984), Union Bank and certain of its employees were sued for a civil RICO violation. The complaint did not specify the "enterprise," although plaintiff "apparently" argued that Union Bank was the enterprise. The court held that Union Bank could not be both an "enterprise" and a civil RICO defendant. *Id.* at 481.

It is unclear whether, under the *Rae* holding, a plaintiff can turn a garden variety securities fraud case into a RICO action simply by pleading a separate enterprise composed of both the corporate and individual defendants. If E. F. Hutton and its employee constituted an enterprise under the *Jensen* facts, then the enterprise element certainly is not a significant limit on RICO actions. However, under *Rae* and *Bennett*, an "enterprise" test may be used to impose significant limitations on RICO actions.

"Rico Fraud"

In the *Hokama* case, Judge Pfaelzer expressed concern that RICO literally seems to apply to "any securities fraud case involving two or more unlawful sales." However, the reach of RICO may not be so broad.

As the Supreme Court observed, "(t)he pattern of racketeering activity is . . . a series of *criminal acts*." *Turkette*, 452 U.S. at 583. The Ninth Circuit also has indicated that "(t)he acts constituting racketeering activity must themselves be *criminal offenses*." *United States v. Campanale*, 518 F.2d 365, n.36. The Second Circuit has stated that the question of what constitutes "RICO fraud" is "complex and far reaching." *Moss*, 719 F.2d at 18, n.14.

The Second Circuit has not decided the "RICO fraud" issue, and none of the Central District cases discusses the "RICO fraud" element as a limitation on civil RICO actions. However, the "RICO fraud" concept, as well as the criminal standards of willfulness (securities fraud) or specific intent to defraud (mail fraud), may be used as limitations on civil RICO actions.

Conclusion

Not surprisingly, there little agreement in the Central District as to the viability of civil RICO actions. But until the Ninth Circuit resolves the issues, the different local applications of RICO may well continue. It is unlikely that the "organized crime" test will survive. The "racketeering enterprise injury" test has serious flaws. No Central District court has yet used either the "enterprise" or "RICO fraud" test to limit civil RICO actions, both tests offer potentially useful defenses.

David C. Wheeler

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P.O. Box 67C46
Los Angeles, California 90067

OFFICERS

Laurence H. Pretty
President
(213) 380-6800

Charles S. Vogel
Vice President
(213) 553-8100

Elihu M. Berle
Secretary
(213) 626-6700

Robert A. Shlachter
Treasurer
(213) 277-1226

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11th Annual Seminar Set

"Business Jury Trial" is the topic for consideration at the 11th Annual ABTL Seminar to be held October 26-28 at Vacation Village in San Diego.

More information will soon be forthcoming.

public in finding litigators having the different expertise and experience most appropriate for complex business litigation.

3. The proposed standards have the potential to create conflict between a client's interest and the lawyer's interest. A lawyer who did not yet have his number of jury trials, or number of trial days, required for certification would be under pressure to make a jury demand or resist settlement where it might not be in the best interests of the client.

4. Administration of the certification program would require a burdensome and very costly bureaucracy. The proposed standards require extensive background information on each applicant for certification which could require verification if the program is not to become an invitation for fraudulent applications. In addition, it can be anticipated that there would be appeals from denial of certification and possible court proceedings which would aggravate the burdens of administration and expense.

5. The program for a written examination raises questions concerning the content of any such written examination and who would grade it. If the written examination should be at a very basic level, it is hard to see how it would improve lawyer competence. If it is at an advanced level, it would need to be broken down by substantive specialty because, for example, the litigation techniques that a skilled personal injury lawyer might follow have some significant differences from those that would be pursued by a skilled antitrust trial lawyer.

6. The proposed certification would discriminate against younger lawyers, particularly those in law firms having more than three or four members.

In summary, we believe that any advantages of certifying a Civil Litigation specialty are illusory and would be heavily outweighed by the foregoing disadvantages.

In our own area of business litigation, most clients are sufficiently sophisticated that they would be unaffected in finding a business trial lawyer by a listing as a "Civil Litigation Specialist" in the Yellow Pages or other directories. Thus, we see no need for certification in our area. If there is a need at all, it appears to us that it could only exist in the area of helping members of the general public who may become involved in personal injury matters, such as auto accidents, in finding someone familiar with that type of matter. Such a need can, we believe, be adequately responded to by lawyer advertising by those engaged in personal injury matters or, if certification is to be pursued at all, by creating standards for certification as a Certified Personal Injury Specialist.

Specific Comments on the Proposed Standards

We have the following comments concerning specific paragraphs of the proposed "Standards of Certification and Recertification in Civil Litigation:"

In paragraph II.B.1, in which standards are set forth for substantial involvement in a specialty field, it is stated that an applicant must have been "a principal counsel of record" with respect to his qualifying activities in various proceedings thereafter set forth. The limitation to "principal counsel of record" would have a serious disqualifying effect on highly experienced litigators in multi-lawyer commercial firms. For example, a major antitrust lawsuit may occupy the litigation activities of a team of lawyers over several years of discovery and several months of

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"Standards for Certification and

(Ed. Note: The following is an edited version of the proposed "Standards for Certification and Recertification in Civil Litigation" as presented for comment by the Board of Legal Specialization of the State Bar.)

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No lawyer shall be required to obtain a certificate as a civil litigation specialist before he or she can practice law in the field of civil litigation or act as counsel in any particular type of litigation case. Any lawyer, alone or in association with any other lawyer, shall have the right to practice in the field of civil litigation and to act as counsel in every type of litigation case even though he or she is not certified as a civil litigation specialist.

I. General Requirements.

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B. An applicant shall be recommended . . . when the applicant is found to have complied with the applicable standards by not less than three (3) members of the civil litigation Advisory Commission, unless there is a negative vote of one (1) such member in which case the affirmative vote of at least five (5) such members shall be required.

C. A certificate of specialization shall expire five (5) years after the date thereon; . . . However the Board may waive this five-year requirement in the event of judicial service during the certification period.

II. Standards for Certification.

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B. Substantial Involvement in the Specialty Field.

1. An applicant must have been a principal counsel of record in the following proceedings:

a. Twenty-five (25) qualifying trial days within ten (10) years last preceding the application.

The qualifying trial days shall have occurred within five (5) qualifying trials, of which not less than three (3) have been jury trials.

A qualifying trial is a contested civil proceeding in superior or federal court, tried to submission and involving the presentation of live testimony for more than one full day.

A qualifying trial day is a full day of hearing which consists primarily of examination of witnesses.

Two arbitrations or administrative hearings, each of at least two full days duration may be substituted for each of the non-jury trials.

b. Ten (10) substantial law and motion matters (which may include post trial motions) within the ten (10) years last preceding the application.

A law and motion matter within the scope of this requirement must include briefing, argument (if such is had), submission and decision.

Appeals (including writ proceedings) in the courts of appeal or Supreme Court may be included as law and motion matters where the applicant had substantial involvement in the appeal, on the basis that briefing and oral argument at each level of appeal may each serve as an equivalent for one item.

A brief description of each matter shall be stated in the application, and the Commission may require submission of the motion papers so as to evaluate their substantiality.

c. Fifteen depositions of adverse parties or major witnesses not on the applicant's side, during the last five years.

d. Five settlements during the last ten years, in matters which would meet the jurisdictional limits if filed in the federal or superior court.

C. Special Educational Experience.

An applicant must show that within the five (5) years, immediately preceding application he or she has attended and/or instructed and completed educational programs approved by the Board for specialists in civil litigation, as stated below.

1. An applicant for certification shall complete at least twenty

Recertification in Civil Litigation"

four (24) units of approved education courses, eighteen (18) of which shall be in the areas of trial and pre-trial practice and six (6) of which shall be in the area of damages and similar matters.

2. Each applicant shall also complete an additional twelve (12) units of approved educational endeavors for an aggregate of thirty-six (36) units.

a. An instructor in an approved program shall receive credit under Section II.C.1 and/or II.C.2 at the rate of six (6) hours for every hour of teaching of a program for the first time and two (2) hours for each subsequent hour of teaching the same program.

b. One-half (1/2) of the educational requirements for certification may be satisfied by listening to a complete audio reproduction, or viewing and listening to a complete audio video reproduction of an approved educational program, and submission of an affidavit or declaration certifying thereto . . .

D. Written Examination.

1. An applicant must pass a written examination applied uniformly to all applicants prior to certification to demonstrate knowledge and proficiency in civil litigation sufficient to support a representation that the attorney has a basic knowledge of the procedures and substantive law common to specialists in the field to the public and to the legal profession.

2. In lieu of such an examination, an applicant may demonstrate the requisite knowledge, proficiency and experience by fulfilling all of the following requirements:

a. A minimum of seventy-five (75) per cent of the applicant's time is spent in a civil litigation practice.

b. Completion, at any time, of fifty (50) qualifying trials . . .

E. Independent Inquiry and Review.

1. After the applicant has satisfied all other requirements . . . the Advisory Commission shall cause an independent inquiry and review of the applicant to be made . . . (T)he Advisory Commission shall recommend certification or denial of certification to the Board.

2. The inquiry and review shall consider information furnished by references and any other information relevant to demonstrate performance.

a. Such information may include, but is not limited to, the applicant's work product, problem analysis, and statement of issues and analysis.

b. If the Advisory Commission . . . desires further information, they may request . . . an oral interview.

3. References.

Each applicant shall be required to submit the names of 10 references who have had an opportunity to observe the work of the applicant. Each reference shall be asked to submit names of 2 additional references familiar with the applicant's competence. References shall include judges before whom the applicant has appeared and opposing counsel. The references shall not include any attorney who is a relative, or currently a partner or associate of the applicant.

a. The commission shall seek additional references from other persons familiar with the work of the applicant taken from a list of persons maintained for this purpose.

b. [T]he names of those seeking to qualify shall be published in the *California Lawyer* and within 90 days of such publication, any lawyer in the state may comment upon the applicant's qualifications.

e. In the event that two (2) references indicate that the attorney has not reached the standard of a proficient specialist, or if a serious question is raised in any other way concerning the applicant's qualifications, the Advisory Commission shall seek further information about such matters and then evaluate the same.

f. All references, communications, reference forms, and information gathered pertaining to the applicant shall be confidential.

III. Standards for Recertification.

A. Required Period of Law Practice.

An applicant for recertification shall have engaged in the active practice of law throughout the preceding five-year certification period; but practice of law shall not be deemed interrupted by any temporary absence not exceeding an aggregate of twelve (12) months. The Board may waive this five-year requirement in the event of judicial service during the certification period.

B. Substantial Involvement in the Specialty Field.

1. An applicant for recertification must show that during the current certification period, he or she has either:

a. Spent seventy-five (75) percent of his/her time in a civil litigation practice; or

b. Served as a principal counsel of record during twenty-five (25) qualifying trial days as defined in Section II.B.1.a; or

c. Completed three (3) qualifying trials as defined in Section II.B.1.a.

C. Special Educational Experience or Written Examination.

1. Educational Experience for Recertification.

a. An applicant for recertification shall, within the five (5) year period immediately preceding application for recertification, attend and or instruct not less than forty-five (45) units of educational programs approved by the Board for civil litigation specialists, or in the alternative, shall comply with subsection III.C.3.

b. An instructor in an approved program shall receive credit under Section II.C.2.a at the rate of six (6) hours for every hour of teaching of a program for the first time and two (2) hours for each subsequent hour of teaching the same program.

2. Limitations and Aggregation of Educational Hours for Recertification.

a. A specialist shall not receive credit for more than twenty (20) units of educational experience in any calendar year.

b. Up to one-half (1/2) of the educational requirements . . . may be satisfied by . . . a complete audio reproduction, or . . . a complete audio-video reproduction of an approved educational program of study and submission of an affidavit or declaration certifying thereto.

3. Written Examination for Recertification.

An applicant may substitute the successful completion of a written examination . . . for the educational requirements of Section III.C.1.

D. After a Specialist has satisfied all the other requirements established for recertification but prior to recertification the Advisory Commission shall conduct an independent inquiry and review the applicant. Upon completion and independent inquiry and review, the Advisory Commission shall recommend recertification or denial of recertification to the Board.

The process of independent inquiry and review for recertification must comply with Section II.E. of these Standards.

Contributors to this Issue:

Hon. Arthur L. Alarcon is United States Circuit Judge for the Ninth Circuit Court of Appeals and formerly a member of the California Court of Appeal.

Laurence H. Pretty, President of ABTL, is a partner in the firm of Pretty, Schroeder, Brueggemann & Clark.

David C. Wheeler, Associate Editor of *ABTL Report*, is a partner in the firm of Cox, Castle & Nicholson.

as immunity and *res judicata* must be pleaded and proved in the trial court. Failure to do so results in waiver. See *Santos v. Alaska Bar Association*, 618 F.2d 575, 576-577 (9th Cir. 1980). (Immunity and *res judicata* may not be raised for the first time on appeal.)

2. Error in the admission or exclusion of evidence cannot be raised on appeal unless a timely objection or motion to strike appears on the record, stating the specific ground of objection, unless the ground is apparent from the record. Rule 103(a) (1) of the Federal Rules of Evidence. (Don't rely on your assessment that anything is apparent from the record; we may not agree with you!)

3. Evidence improperly received under one theory at trial may not be successfully defended on appeal on alternate grounds where a finding of the existence of requisite foundational facts must be made by the trial court prior to admission. See *Giordenello v. United States*, 357 U.S. 480, 488 (1957). (A party cannot support admissibility on a theory raised for the first time on appeal because it would unfairly deny the other side an adequate opportunity to cross-examine the government's witnesses or adduce rebuttal evidence.) See also *Sims v. United States*, 405 F.2d 1381, 1383 (D.C. Cir. 1968). (Consideration of alternative bases for the admissibility of evidence received at trial refused because the argument was not presented to the trial court.)

4. Alleged attorney or judicial misconduct cannot be raised on appeal without a proper objection or motion unless it is so flagrant that the plain error rule applies. (Again, I would not gamble that an appellate court will clean up behind you by holding that your silence is excused by the plain error rule.)

5. Error in giving or failure to give an instruction may not be raised on appeal unless a timely objection setting forth the specific grounds therefor has been made in the trial court. Rule 5 of the Federal Rules of Civil Procedure.

Appellate courts are tolerant of the errors described above based on the theory that it is unfair to the trial judge and opposing counsel to sit back until an unfavorable judgment is rendered before raising issues which could have been cured by swift remedial action. If you fail to make a proper objection you risk an unsympathetic panel ruling against you on the grounds that, had you done your job, the trial court would have ruled properly and your client would not have suffered.

Brief Writing

My concerns about brief writing are not new. Unfortunately, the same problems continue to recur.

One. Use simple, clear language. Don't obfuscate or pettifog in setting forth your contentions in an effort to show your command of the English language. I may be too busy to look up a polysyllabic term you have used to impress us. (For example, don't use words like obfuscate, pettifog or polysyllabic. Why not say "confuse" or "imprecise.")

Two. Be blissfully brief. State your point concisely and once. Nothing is more irritating than to have the same question stated again and again in varying ways for forty-five sleep inducing pages of redundancy. Let me add an incentive to the production of short and pertinent briefs. The longer you make your brief, the more likely that most of the *pre* argument analysis of your case will be turned over to a law clerk who just finished the bar exam.

Three. Be accurate in summarizing the facts. A brief

writer should summarize facts with scrupulous accuracy. If you slant the facts, or ignore evidence which hurts your position, you can be sure your opponent will highlight in outraged detail the facts you have distorted or omitted. Misstating the record can irretrievably damage your credibility with the court. You don't want to waste precise time at oral argument trying to rehabilitate yourself.

Another rule frequently overlooked is that which requires appellate courts to accept as true every fact which supports the judgment and to disregard contradicting evidence submitted by the losing party. We read many briefs that set forth only the evidence presented at trial by the appellant. We are then asked to reverse on the ground that the trier of fact erred in entering judgment for the appellee in the face of such overwhelming evidence. That type of brief lightens our workload. We must summarily affirm, although in the hands of competent counsel, reversible error might have been readily demonstrable.

Please don't misunderstand me. When you can demonstrate that error was committed, it is vitally necessary for you to present a fair summary of the evidence on *both* sides. If the evidence at trial was evenly balanced, then the impact of error in the admission of evidence, or the instructions on the theory of the case or the defense, or misconduct in closing argument may have been more damaging than in a case where the evidence in favor of the prevailing party was overwhelming.

In setting forth the facts, *always* refer to the page and line of the record where the testimony appears. If you fail to do so, you place the burden on the appellate court to search through the entire transcript to find some verification for your claim. That is not our job. We may fail to do it for you, or we may try and be unable to locate support for your position. Now let me hasten to add that most of us will in fact search the transcript for the facts you rely upon even if you do not refer us to the record. We do so, however, with some discontent and lingering doubts about your competency and the integrity of your arguments.

Four. In discussing the law which applies to your case, always cite and analyze those authorities which do not appear to support your position. You have an ethical duty to do so. Rule 3.3(a) (3) American Bar Association, Rules of Professional Conduct. Section 6068(d), California Business and Profession's Code See *Shaeffer v. State Bar*, 26 Cal.2d 739, 747-748 (1945). (Counsel must direct the court's attention to a decision which contains a decision contrary to his position.)

If you fail to do it, you can be assured that your opponent will cite and discuss with enthusiasm all the law that undermines your contention. If opposing counsel misses it, one of my clerks will probably find it. If we discover these cases *after* argument, you have lost your opportunity to persuade us that these cases are either distinguishable, or should not be followed because of faulty reasoning, or that recent developments in the law support your position.

I have just finished working on a matter in which we were asked to adopt the law of another circuit. Counsel failed, to point out however, that the Ninth Circuit had expressly rejected this precise suggestion four times in the last twelve years. Opposing counsel enjoyed the opportunity to expose this appalling and fairly obvious dereliction of duty. Counsel's lack of candor placed a great strain on our collective judicial temperament. We are, unfortunately, human.

Five. Limit your issues on appeal. In every long trial, error is committed by one of the participants. With very few exceptions, only *prejudicial* error will result in a reversal. Use a scalpel and not a shotgun in shaping your appeal. If, after combing the record, you find 37 errors which range in gravity from minimal to devastating, don't argue with equal vigor and passion that each one standing alone, was prejudicial. You devalue your argument if you assert that error in overruling an objection to a compound or leading question compels reversal if you also argue that damaging hearsay evidence was admitted. (Has any court reversed because a trial judge erroneously permitted a witness to answer a leading or compound question?)

Try to limit your appeal to three or four most serious issues in the case that you feel best demonstrate prejudicial error. Present your strongest argument first. Don't hide it in the midst of a collection of your weakest points. If you put your best contention last, the court may lose confidence in your ability to recognize prejudicial error when you see it.

Six. Don't waste your time giving us a long string of citations for relevant case authority which clearly supports your position. Just cite the earliest case in point and the most recent in order to demonstrate the continuing vitality of the principle you are espousing. Be sure that you read the case you cite. Recently, I read a brief that cited a case for a principle of law that was important to the writer's client. No jump cite was given to the page where the legal question was discussed by the court. In reading the case, I learned the reason. The favorable position appeared in a headnote but not in the text! Always refer the court to the exact page where your point is covered. Don't rely on us to read the entire case to ferret out the discussion that you believe supports your view.

Seven. In citing a case that you believe contains helpful language in a matter involving comparable facts, always give the court a brief statement of the facts. By so doing, you can state with accuracy and confidence that the law expressed in the cited case should be applied to your cause because the facts are analogous. Too often, counsel find themselves in the embarrassing position of being unable to answer the court's question, "Counsel, what were the facts before the court in that case?" A citation without some discussion of the treatment of the issue is not very helpful.

Eight. Avoid the use of footnotes. Avoid the temptation of parading the brilliance and depth of your research into related areas of the law by crowding your brief with footnotes. If the point advances your client's cause, put the discussion in the text. Don't bury it. If the discussion is not relevant, leave it out. Footnotes force the reader to break his concentration on your discussion of an issue, to chase after an often extraneous diversion. One of my colleagues has stated publicly that he never reads footnotes before oral argument. If you want our undivided attention, put your comment in the text.

Nine. Long quotations are exasperating and distracting. Further, they sometimes appear to be a lazy person's substitute for analysis. If you must quote, select the precise sentence that advances or supports your discussion of the law. If you use an ellipsis to show that you have omitted part of the quotation, don't cheat. If you leave out language that hurts you, we'll find out. Whenever I see an ellipsis, I check to see what you've omitted. Your deliberate omission may emphasize what you have tried to avoid.

Ten. If you are relying on a statute, rule or regulation, include the relevant text in the body of your discussion. Don't assume that the judges have memorized 8 U.S.C. 651 (3) (c) or that they will enjoy being assigned the job of looking up the law and picking out the portion that advances your position. Make it easy for the judge to rule in your favor. Don't take the chance that a tired, aging judge may decide that your citation must not be too important or you would have set it out.

Remember also that most federal judges become generalists. Don't assume that we are as familiar with the buzzwords or the numbers of the statutes or regulations that are commonplace in cocktail conversations among the experts in your specialty. (My wife has pointed out that it is not very charming for me to ask my California criminal defense lawyer friends in her presence if they are going to pursue their *Rost* motion and 995 prior to the 1368 hearing.) Don't do the same kind of thing to a judge who may not have heard of or visited a "*scenes a faire*" before your copyright case. Err on the side of explaining too much. We need your help in getting to the heart of your problem.

Eleven. The rules of the Ninth Circuit require that you set forth the standard of review on appeal. Rule 13(b) (2) : Rules of the United States Supreme Court of Appeals For the Ninth Circuit. On each calendar we have at least one lawyer who has no notion of the standard that limits our review of his appeal.

Twelve. Conclude your brief with a half-page summary of your argument and a clear statement of the precise relief you want from the court. If you want us to instruct the trial court to do something upon remand, suggest to us the precise direction we should give to serve your client's interests.

Thirteen. Don't duck any of your opponent's contentions or arguments. You may think it is so weak it doesn't deserve an answer. We may find it persuasive after a first reading. If you ignore it, we may be persuaded that it is irrefutable.

Oral Argument

After listening to oral arguments for many years, I have compiled the following list which I would try to follow if I were to return to the practice of the law.

1. Don't waive oral argument unless you have abandoned all hope or would be willing to guarantee reimbursement to your client if your confidence in the ultimate success of your position is wrong.

2. Don't waste time in summarizing the facts. The judges have read the briefs.

3. Start by advising the court you'd be happy to address any questions before you proceed with your argument.

4. Begin your argument by outlining the dispositive issues you wish to address.

5. Don't argue every issue with equal fervor. Choose your sure winners. If you can't tell, you're in trouble.

6. Be ready to concede that some of your contentions may not be as compelling for reversal or affirmance as the rest.

7. Don't get angry at the judge who attacks your position. He or she may be your best supporter on the appeal.

8. Respond to the court's questions. If you are caught by surprise, admit it and ask for the opportunity to file a letter brief. Don't wing it.

9. Speak up if you wish to be heard. We are getting older.

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Letter from the President

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trial, with extensive litigation activity by second and third chair lawyers. They would receive no credit under the proposal. Yet, in the typical context of commercial litigation, this is how most trial lawyers receive their experience in the first ten years of practice, namely as counsel of record supporting the "principal counsel of record."

In paragraph II.B.1.a, a qualifying trial is defined as one "tried to submission." In business litigation, it is not unusual for a case that has been in trial for weeks, or even months, to settle before reaching submission. It seems unfair that the trial experience of the lawyers engaged in their trial should not count for certification as litigation specialists because the case settled. It would certainly not be in the interest of the public or the State Bar to discourage settlements by providing an incentive for cases to go to submission as a condition for trial lawyer certification.

Also in the same paragraph, it is required that the qualifying trial days, 25 of them, shall have occurred within five qualifying trials of which not less than three have been jury trials. We fail to see why trial competence should hinge on having had 60 percent jury trials in the qualifying trials. In business litigation, because the issues are often complex and the desire not to spin out trial days unnecessarily, jury trials are relatively rarely demanded. To impose such a high percentage of jury trials, or even any percentage of jury trials, is unrelated to competence of performance as a civil litigation specialist in the field of business litigation.

Paragraph II.B.1.b requires ten "substantial" law and motion matters. While we see no particular problem with the number, we suggest that the term "substantial" in relation to a motion is unduly vague.

Paragraph II.B.1.d requires five settlements during the last ten years. We can see a problem with this if, as is not uncommon, the existence of a settlement was required by the parties not to be publicly disclosed. This could pit the lawyer's interest in qualification against the client's interest in confidentiality.

Paragraph II.C. requires various continuing legal education experience. Our Association is strongly in favor of continuing legal education and it is one of our principal functions to provide it. However, the proposed requirements for legal education as a part of the standards for certification do not adequately spell out what specific courses would be required. We believe further definition is necessary in this area, concerning the types of courses and what would be approved bodies for providing such courses. We would not want to see the certification standards program merely becoming a vehicle for the promotion of required courses to the benefit of commercial educational organizations.

Paragraph II.D.1. proposes a written examination to show that the attorney has a basic knowledge of the "... substantive law common to specialists in the field . . ." We have serious doubts that there is any generic body of "substantive law common to specialists" in such diverse fields as personal injury law, antitrust law, securities law, or patent law, for example, that could be utilized as the basis for such a written examination. On the other hand, if the examination is to be centered on particular areas of substantive law, it appears to do no more than duplicate the Bar Examination which all applicants for certification must necessarily have already passed. In short, we have

very serious doubts about the written examination which are not answered by the proposed standard for certification.

We also disfavor the exemption, in paragraph II.D.2.b, from the written examination for anyone who has completed 50 qualifying trials. Very few business lawyers will have completed 50 qualifying trials until they are substantially along in their career. Perhaps this figure can be achieved earlier in a trial career by someone trying auto accident cases. On the other hand, we question whether trying 50 auto accident cases qualifies one as a civil litigation specialist to litigate a substantial business matter. We suggest that if there is to be a written examination, it should be applied equally to all.

Paragraph II.E.3. requires each applicant to submit the names of ten references, each of whom is further asked to submit the names of two additional references. We think that to have thirty references involved is excessive and beyond any reasonable number for assessing an applicant's competence as a trial lawyer.

Paragraph III sets standards of recertification after five years. We see no necessity for the recertification procedure, once the applicant has already met the standards for certification. If there is to be recertification, we suggest that it should be satisfiable by taking an approved number of continuing legal education courses within the five year period.

Our association sees no point in the promulgation of standards "For Initial Qualifications As A Lawyer Developing A Civil Litigation Specialty." We cannot conceive that any lawyer would wish to hold himself out to the public "as a lawyer developing a civil litigation specialty." We assume that any lawyer of competence who is active in civil litigation but not yet meeting the standards for certification in civil litigation, would simply practice in the civil litigation field without listing himself in directories as "A Lawyer Developing A Civil Litigation Specialty." To do otherwise would plant doubts in the minds of laymen that the lawyer concerned was a rank beginner.

Conclusion

To summarize, the Association of Business Trial Lawyers believes that the proposed standards for certification as a Civil Litigation Specialist should not be adopted.

—Laurence H. Pretty

Appellate Practice

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10. Make your argument as interesting as possible. Don't read and don't quote. Use your own words.

11. Quit if you sense you are ahead. You don't have to argue the allotted time.

12. Never argue credibility if you are the appellant. The court may view any contested facts or inferences in favor of your opponent.

13. Know your record and the exhibits. Be ready to cite exact pages and lines or exhibits by number to support your argument.

14. Be prepared to tell the court how you would like the dispositive paragraph to read if you could write the opinion.

15. Ask the court if there are further questions before you sit down. It's o.k. to thank the court for its courteous attention to your cause. Surprisingly, few lawyers do.

—Hon. Arthur L. Alarcon
United States Circuit Judge