

### Letter from the President

The California legislature has tackled several issues this session which will impact all business trial lawyers. First, the legislature passed the New Discovery Act which alters various rules in the trial lawyer's game. Secondly, the legislature is crafting certain reforms with respect to the expanding law of bad faith. Finally, standards governing all trial lawyers are being formulated which will directly affect your ability to serve as trial counsel in the future.

#### New Discovery Act

After much deliberation and amendment, the legislature adopted the New Discovery Act. Many of the revisions anticipated at the June ABTL meeting by Judge Norman Epstein, Judge Miriam Vogel and Judge Warren Deering, the panelists, have now been adopted. Nearly 700 lawyers and 70 judges attended this meeting. As an update to Bernie LaSage's article "Discovery: New Rules for the Old Game," published in *ABTL Report* (May 1987), the following points summarize amendments which appear in the final version of the "Act":

1. Under the Act, any number of Judicial Council interrogatories may be used. 2030(c)(1).

2. The statute allows two "supplemental" interrogatories in order to elicit later acquired information

bearing on answers previously made by any party. 2030(c)(8).

3. Limits and respective burdens of proof with respect to interrogatories in excess of 35 interrogatories have been addressed in the final statute. 2030(c).

4. The law will still prevent the combination of interrogatories and RFAs in a single document. 2033(c)(7).

5. While objections and privileges are waived by a late response to RFAs, the Act includes a CCP 473-type provision similar to the one included in the new interrogatory provision. 2033(k).

6. In the event of discovery abuse, nothing in the Act requires the court to impose sanctions against both the party engaging in a discovery abuse and the attorney. Sanctions may be imposed on the responsible party. The new sanctions rules require a monetary sanction against the unsuccessful party (or counsel) unless the court finds substantial justification for the unsuccessful position, or that sanctions would be unjust. (The one exception: a monetary sanction must be imposed when a motion

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### Interview: The Impact of AB 3300 on L.A. County Superior Court

Ninety percent of civil cases tried in just one year? That is the mandate under the Trial Court Reduction Act of 1986, Assembly Bill No. 3300, passed last September. How will AB 3300 affect the Los Angeles Superior Court? The Hon. Richard P. Byrne, Assistant Presiding Judge of the Los Angeles County Superior Court, will be directing Los Angeles' implementation of AB 3300. *ABTL Report* Editor, Mark Neubauer, interviewed Judge Byrne regarding AB 3300's impact and how it will influence civil litigation in Los Angeles County.

*ABTL: What is AB 3300 and how will it affect the Los Angeles County Superior Court?*

**Judge Byrne:** The Bill AB 3300 or the Court Delay Reduction Act of 1986 was passed last year by the legislature and signed by the Governor. It designates certain counties as demonstration counties and requires each to initiate a three year delay reduction program in at least four courts beginning January 1, 1988. The Judicial Council is required to adopt standards of timely disposition for the processing and resolution of cases, to establish the programs in each demonstration county, to collect and publish statistics and to report to the Legislature no later than July 1, 1991. The statute permits the Judicial Council to hire outside consultants to assist them in carrying out the program. In general, the American Bar Association delay reduction standards for the timely disposition of cases are the model for the program.

*ABTL: The ABA standards are to resolve 90% of civil litigation within one year, aren't they?*

**Judge Byrne:** Yes. The final California standards will ultimately be determined by the Judicial Council at the end of the program. The Judicial Council may also establish interim standards.

*ABTL: As I understand it, the Judicial Council's interim goal is to have all civil litigation resolved within four years by the end of 1988.*

**Judge Byrne:** At its May meeting the Council adopted a recommended time standard which states: "Each Superior Court general civil case disposed of between July 1, 1987 and June 30, 1988 should have a total elapsed processing time of no more than four years from filing to disposition."

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**H.O. (Pat) Boltz**



**Hon. Richard P. Byrne**

## *Interview: The Impact of AB 3300*

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**ABTL:** *Is that goal consistent with what goes on in the Los Angeles County system today?*

**Judge Byrne:** No.

**ABTL:** *Is it achievable?*

**Judge Byrne:** No.

**ABTL:** *That makes it very simple.*

**Judge Byrne:** This is a recommended interim goal. As we understand it from the National Center for State Courts—which is the consulting entity that has been retained by the Judicial Council—these are goals which we hope to meet. At the present time, however, most of the cases that are being tried in the Central District and in many of the other districts in Los Angeles County are close to five years from the time of filing or are priority cases of one kind or another. We've also had a dramatic and continuing increase in criminal filings in the last few years and these additional cases are being handled by courts that would normally hear civil matters.

**ABTL:** *The thrust of what I understand to be AB 3300, the American Bar Association standards and the way they reach those standards was what they call "greater judicial management" of cases.*

**Judge Byrne:** Yes.

**ABTL:** *What types of judicial management of cases do you think will be utilized in the Los Angeles County Superior Court to try to achieve the state and ABA standards?*

**Judge Byrne:** We are in the process of developing that at this time. We have formed committees composed of judges, with staff representatives and attorney representatives, and we hope to publicize our proposed rules by mid-August.

**ABTL:** *Who is chairing that committee?*

**Judge Byrne:** The subcommittee on case management is co-chaired by Judge Walter Croskey and Judge Robert O'Brien.

### **The San Diego Program**

**ABTL:** *So they have not actually formulated particular standards or devices yet?*

**Judge Byrne:** It is in the process of discussion. However, I believe the basic approach will be to adopt rules which set forth times when certain things in the life of a case should be done and monitor whether they in fact happen and take appropriate action if they don't. This is consistent with the ABA standards.

This approach is already in operation in San Diego County. San Diego anticipated AB 3300, developed a program of its own with input from the bar and put it into operation on January 1, 1987.

What they do—and I am not saying that this is the same thing that we will do—is require certain action to be taken at certain points along the way, beginning with the time the complaint is filed.

For example, either a return of service of the summons and complaint or a responsive pleading of some sort must be filed within a specified time after the complaint is filed. If it isn't, the computer will pick it up and set the case for an Order to Show Cause. At that hearing, the judge will determine why the requirement was not met and whether more time is needed and, if so, set the additional time limit. The court may also impose sanctions at that point for not complying with the rules.

**ABTL:** *This seems similar to what the federal court in the Central District does in 60 to 120 days?*

**Judge Byrne:** I am not certain just what the federal court does and how the system varies between the various judges. But one thing that we want to do is to have a program that is as uniform as possible in our demonstration project.

**ABTL:** *Will the demonstration project be, as I understand, just applied in the Central District or will it also affect the branch courts as well?*

**Judge Byrne:** It will be implemented in the Central District only. Ours is a large court. While the legislation calls for a minimum of only four courts to be used in the demonstration project, we felt that if it was going to be a representative test of what can be accomplished in this kind of program, we should have a greater number of judges participating. Four judges in many counties comes out to about 10% of the judicial staff. We have 224 judges plus another 52 commissioners. Our feeling was that 25 judges would be a representative number.

**ABTL:** *This is out of the civil branch and not the criminal courts?*

**Judge Byrne:** Yes. We have designated 25 judges in Central Civil to participate in the program. This is roughly one-half of Central Civil.

**ABTL:** *Will those judges be from the trial courts or will you also be reducing some of the law and motion departments?*

**Judge Byrne:** It will reduce some of the law and motion departments, because under our approach to the AB 3300 the cases will be assigned to individual judges. It will be an individual calendaring system and the individual judges will do their own law and motion and discovery work.

**ABTL:** *How many cases do you think these individual judges will be assigned?*

**Judge Byrne:** I don't know. We haven't computed the numbers on that yet.

**ABTL:** *Will cases assigned to the pilot program judges be just new filings or will there be some existing cases assigned as well?*

**Judge Byrne:** According to the legislation, they are to receive an appropriate number of existing cases. Our feeling is that they will receive their pro rata share.

### **No Continuances**

**ABTL:** *One of the other things emphasized by the ABA standards and in San Diego is that one of the causes of court delay is lawyers asking for continuances. I know in San Diego, for example, no continuances can be given without a court order. Has that proposal been considered here in Los Angeles?*

**Judge Byrne:** Continuances are not granted without court permission now. I believe in San Diego they state that lawyers are not permitted to grant extensions of time to other parties to respond without first obtaining court permission. If that is the type of rule that we adopt, and it most likely is, we will be following the same practice.

**ABTL:** *Would that be by stipulation and order or would one require an ex parte application and order?*

**Judge Byrne:** You are ahead of where we are.

**ABTL:** *In your view, are lawyers and their requests for continuances one of the causes of court congestion?*

**Judge Byrne:** I think that there are a number of different reasons for continuances, but the parties and the lawyers are certainly one of the causes. Court congestion is another cause. Availability of witnesses is another. There are a lot of different

causes. But AB 3300 is a court delay reduction measure. The effort is to reduce delay—to try to resolve the case one way or another and earlier.

It is not really a measure to cure our backlog problem. That is a different kind of problem. We have a backlog here that we will have to deal with in some way. There are a substantial number of untried cases that will have to be tried. Under our AB 3300 program, I would assume that there would be fewer cases to be tried because judges would become familiar with the cases earlier on and take a more active role. If there is an opportunity to settle a case, we will settle it sooner. There might be and probably would be a reduction in trial time because, again, the judge would be familiar with the case and could move right through it without taking as much time as would otherwise be the case. But there will always be a certain number of cases that will have to be tried.

At the present time we have a lot of cases in our court system that have been resolved and we do not know that they are resolved. In the Central District, we've had a purging calendar for many years. On Thursday afternoons in Department 1, we have an OSC Re Dismissal calendar. We set between 200 and 300 cases each week. Those are cases that have been in the system for a long time where there is no at-issue filed or any other action and it appears from looking at the Register that the case has been resolved. The attorney of record is cited on an OSC Re Dismissal and it is considered on that dismissal calendar.

Roughly 15 percent of the cases on that calendar are still alive and 85 percent of those cases are not and are dismissed. We have not purged everything in the court files, but presumably there are a lot of cases that have been settled and not dismissed. That is basically what the purging effort tries to meet. Other cases will settle or drop out of the system at some point along the way. Maybe after one, two, three or four years. Certainly we are not trying to discourage that from happening.

Our feeling, and I believe the intent behind AB 3300, is that if the judges take an active role from the outset, these matters will be resolved much quicker.

*ABTL: One of the criticisms of AB 3300 from lawyers and judges is that it is a form of "voodoo economics"—not adding additional judges but trying to reduce the delay and backlog within the Superior Court. Is that a fair criticism?*

**Judge Byrne:** I do not know if that is really a criticism of AB 3300. I think it is a recognition of the problem more than a criticism. We do have a backlog. There are going to be cases that need to be tried. AB 3300 is not designed to resolve that and AB 3300 is not a substitute for some means by which the backlog may be reduced, except in the ways I just said. The judge, being more familiar with the case, may be able to actively participate at various hearings in the life of the case and help bring about a settlement, or by knowing more about the case may expedite the trial of that case. But that is as far as that part of it goes.

When push comes to shove, the case that has to be tried has to be tried and you have to have the judges available to accomplish that. You need some kind of system to do that and an obvious answer is additional judges and additional facilities where the judges can work. A less obvious answer is the utilization of some kind of backup system which would use retired judges, judges pro-tem, things of that sort.

I think the problem that concerns many people is how to handle the old and new cases when the two systems collide. If we are trying five year cases and somebody else is on the fast track and ready to go to trial, can you then defer to the fast track cases and not the cases that have been in the tube longer? That is the problem that will arise after the system has been in place

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## Enter the Twilight Zone of 'Special Appearance'

The "special appearance" is a twilight zone in most litigators' minds. If you are not careful, you waive your clients' right to object to jurisdiction.

This leads into the following dilemma. Assume that you represent a nonresident who has been sued in California and that you believe the Court has no *in personam* jurisdiction over your client. Clearly, you do not want to enter a general appearance and waive jurisdiction. What, then, are your options?

If the Court has no personal jurisdiction, your client may simply ignore the proceedings. Without jurisdiction, any judgment rendered would be void and your client cannot be adversely affected. However, this response can be expensive. Even a void judgment can be troublesome for your client.



**Linda J. Bernhard**

For example, the plaintiff may seek to enforce the judgment in a court which does have jurisdiction over your client (i.e., where your client has assets). Although you could move to vacate the judgment or order on the grounds that the original Court lacked jurisdiction, this also can pose problems as the determination of jurisdiction may involve questions of fact and law not yet adjudicated. A safer option is to directly challenge the Court's jurisdiction in the first instance. It is important to remember that objections to the Court's jurisdiction over the person, unlike objections to subject matter jurisdiction, are waived if not timely raised.

Traditionally, the special appearance was the sole means in both state and federal courts, to challenge the court's assertion of jurisdiction over a nonresident defendant. The special appearance had to be made solely for the purpose of challenging jurisdiction. Courts deemed an appearance for *any* other purpose consent to the court's jurisdiction over the person *i.e.*, a general appearance. A general appearance has several important consequences. First, it operates as a consent to jurisdiction over the person. Second, and somewhat relatedly, it serves to dispense with the requirement of service of process and acts to cure any defects in such service. Third, it operates to waive any failure to give other kinds of notice in the proceedings, such as an opposing party's failure to serve notice of a motion, failure to file a substitution of attorney or failure to properly join a party.

CCP §418.10 details the procedure for making a special appearance to object to the Court's lack of jurisdiction. That section provides:

"(a) A defendant, on or before the last day of his time to plead or within such further time as the court may for good cause allow, may serve and file a notice of motion either or both:

(1) To quash the service of summons on the ground of lack of jurisdiction of the court over him.

(2) To stay or dismiss the action on the ground of inconvenient forum.

(b) Such notice shall designate, as the time for making the motion, a date not less than 10 nor more than 20 days after filing of the notice. The service and filing

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of the notice shall extend the defendant's time to plead until 15 days after service upon him of a written notice of entry of an order denying his motion, except that for good cause shown the court may extend the defendant's time to plead for an additional period not exceeding 20 days.

(d) No default may be entered against the defendant before expiration of his time to plead, and no . . . application to the court or stipulation of the parties for an extension of the time to plead, shall be deemed a general appearance by the defendant."

Section 418.10 now makes it clear that: (1) you can simultaneously make a motion to quash summons and a motion to stay or dismiss for inconvenient forum; (2) a motion to quash summons must be made in the first instance on or before the last day of a defendant's time to plead; (3) the service and filing of the motion extends the time to plead so that no default can be taken; and (4) an application or stipulation to extend the time to plead does not constitute a general appearance.

### Avoiding the General Appearance

In moving to quash, it is customary to state in the notice that it is a "special appearance." However, the designation of the paper is not controlling. The important point is that the motion must confine itself to the objection to jurisdiction. If the defendant asks the Court for some relief which can only be granted on the hypothesis that the Court has jurisdiction of the claim and of the person, then it acts as a submission to the jurisdiction of the Court. This is the basic test and it governs the various acts which you can and cannot do without making a general appearance.

CCP § 1014 provides that "a defendant appears in an action when he answers, demurs, files a notice of motion to strike, files a notice of motion to transfer pursuant to Section 396b, gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." *Any of these acts will constitute a general appearance.* This should not be surprising as these acts are consistent with the basic test of jurisdiction — appearance on a substantial basis.

Each act requests some relief from the Court which, by the very request, presumes that the Court has jurisdiction over the defendant. For example, an answer clearly seeks relief on the merits of the cause, which can only be granted if the Court has jurisdiction of the person. Similarly, a demurrer raises objections other than the Court's lack of personal jurisdiction. It is interesting to note, however, that an order striking a demurrer eliminates it as an appearance and the demurrer is then deemed never to have been filed. Therefore, after such an order, a defendant can then raise objections to jurisdiction as if they had been raised at the outset.

Making a general appearance is not limited to answers or demurrers. As specified in Section 1014, even merely accepting service on behalf of your client, such as by Notice and Acknowledgment of Receipt, is written notice of a general appearance.

Moreover, any motion which seeks relief on the merits or implies that the court has jurisdiction over the defendant effectuates a general appearance.

For example, a motion to strike a pleading or other paper or to dismiss on some ground other than lack of jurisdiction, *e.g.*, a motion for summary judgment, will be deemed a consent to jurisdiction. Similarly, a motion for continuance of a trial or a hearing, other than a hearing on a motion to quash or to stay or dismiss on inconvenient forum grounds, submits a defendant

to jurisdiction because it invokes the action of the court on his behalf.

Understand, you can submit your client to jurisdiction without actually filing a motion invoking court action. You can waive all rights to object to a lack of jurisdiction by merely appearing or participating in a hearing. For example, appearing in Court to oppose an Order to Show Cause or an application for a temporary restraining order or preliminary injunction may well be deemed to be a general appearance.

Initiating discovery will have the same effect. In *Creed v. Schultz*, 148 Cal.App.3d 733, 196 Cal.Rptr. 252 (1983), an action by a former husband against his former wife to establish and modify in Ohio divorce judgment, the wife's attorney served a notice of taking deposition and for production of documents on the husband. The notice was never filed and no deposition took place. However, the court held that the wife had made a general appearance by virtue of using the court's process to initiate discovery.

In the same way, answering interrogatories can lead your client to submit to jurisdiction. In *Chitwoods v. Los Angeles*, 14 Cal.App.3d 522, 92 Cal.Rptr. 441 (1971), plaintiff sued Los Angeles County and Does for property damage allegedly caused by the construction and maintenance of a pipeline changing the natural rainfall flow. Plaintiff propounded interrogatories which non-party Los Angeles County Flood Control District answered and filed. Two and one-half years later, the County moved for summary judgment on affidavits showing that the Flood Control District was the property owner rather than the County. Plaintiff's motion to amend to correct the mistake by substituting the District for the County was denied and summary judgment in favor of the County was granted. Unless the District had previously appeared, the limitations period had run on the right to bring a new party into the lawsuit. In reversing the trial court's ruling, the Court of Appeals noted that, although answering interrogatories is not a request for relief from the court, the act of filing and serving the answers was necessarily predicated on an assumption that the court had jurisdiction. Without that assumption, there would have been no need to answer the interrogatories.

Under California law, there are numerous exceptions to the general rule that any act other than appearing to quash service will be deemed a general appearance. For example, payment of an appearance fee will not subject a defendant to jurisdiction as it is required by the Clerk as a condition of filing the motion.

### Statute Change

C.C.P. §418.11, enacted earlier this year, now allows a specially appearing defendant to appear at certain ex parte hearings without submitting to general jurisdiction. That Section provides: "An appearance at a hearing at which ex parte relief is sought, or an appearance at a hearing for which an ex parte application for a provisional remedy is made, is not a general appearance and does not constitute a waiver of the right to make a motion under Section 418.10."

It is also possible for a defendant objecting to jurisdiction to seek to disqualify a judge without submitting to jurisdiction. Prior law provided that "any party who has appeared in the action" could move to disqualify a judge. Consequently, a motion by a specially appearing defendant resulted in that defendant's consenting to jurisdiction. The 1984 amendments to the Code of Civil Procedure sections governing disqualification of judges now allow a specially appearing defendant to challenge a judge without submitting to jurisdiction. CCP § 170.3(c) provides that "any party" may file a verified statement setting forth the facts constituting the grounds for disqualification. Similarly, a CCP § 170.6 peremptory challenge may be used by a specially

appearing defendant. The courts have held that each party is entitled to one peremptory challenge as a matter of right and, if that party wishes to use that challenge to disqualify the judge hearing the motion to quash, then he or she should be entitled to do so.

### Jurisdictional Discovery

It is now well established that the court has the power to allow limited discovery for the purpose of establishing whether there is a basis for asserting personal jurisdiction. The language of the discovery statutes, both under the old Act and under the New Discovery Act which goes into operation July 1, 1987, is broad and permits discovery regarding any matters relevant to the pending action, including collateral matters to be decided upon motion.

Under the discovery statutes, written discovery may be served after service of the summons or the "appearance" of the adverse party. The word "appearance" is set forth without qualification

and is thereby not limited to a general appearance. However, this does not mean that a plaintiff can go overboard in seeking discovery prior to a determination of personal jurisdiction over the defendant. A specially appearing defendant cannot be required to answer any written discovery which is not relevant to the subject matter of the motion to quash.

In *1880 Corporation v. Superior Court*, 22 Cal.Rptr. 209 (1962) the Court of Appeal held in a dispute over interrogatories that a specially appearing defendant should not be penalized for seeking the protection afforded by the discovery statutes, which contain provisions authorizing the granting of relief against oppressive interrogatories. Accordingly, a specially appearing defendant can assert overbreadth objections to discovery without submitting to jurisdiction.

As discussed earlier, CCP § 418.10 authorizes a specially appearing defendant to concurrently file a motion to quash service of summons and a motion to stay or dismiss the action on the ground of inconvenient forum. In *Berard Construction Co. v. Municipal Court*, 49 Cal.App.3d 710, 122 Cal.Rptr. 825 (1975) the Court held that a specially appearing defendant's request for attorneys' fees in connection with its motion to dismiss for inconvenient forum does not constitute a general appearance.

A motion to dismiss, although not a challenge to jurisdiction is a request that jurisdiction be declined. By virtue of CCP 418.10, there is a special statutory exemption for such a motion to be made concurrently with a motion to quash. Normally, the granting of a motion to dismiss for inconvenient forum affords costs to the prevailing party and, under CCP § 1717, attorney fees are defined as costs. Consequently, the addition of a request for attorneys' fees is an appropriate incident of the motion to dismiss and will not defeat the statutory exemption.


Similarly, a motion to dismiss for lack of prosecution under CCP § 583.360 will not waive objections to jurisdiction. That section commonly known as the "five-year rule", makes dismissal mandatory if the action has not been brought to trial within five years from the date the complaint was filed. In those instances, the court has the duty to dismiss the action on its own motion and personal jurisdiction over the defendant is not a requirement. A special appearance by the defendant to dismiss for this reason merely aids the court in performing its duties.

Attacks on ancillary proceedings will not submit a specially appearing defendant to jurisdiction. The usual situation occurs where a plaintiff seeks an attachment prior to the defendant's appearance. Courts have consistently held that the dissolution of an attachment is not the type of relief that can only be granted on the hypothesis that the court has jurisdiction over the defendant. Therefore, an appearance for that purpose only is not considered a general appearance.

Another typical situation occurs when a respondent in a family law proceeding makes a special appearance to challenge personal jurisdiction by a motion to quash summons. While the motion is pending, the petitioner may seek *pendente lite* orders for such things as temporary spousal or child support, attorneys' fees and costs or custody and visitation rights. In 1984, the Legislature enacted Civil Code § 4356, which provides that an appearance in opposition to a *pendente lite* order will not be deemed a general appearance by the respondent while a motion to quash is pending.

### Preserving Jurisdiction on Appeal

What if you lose your motion to quash? Can you stop the litigation while you challenge the trial court's decision? An order granting a motion to quash is directly appealable under CCP § 904.1(c) (appeal from Superior Court) and 904.2(d) (appeal from Municipal Court). The issue on appeal is *solely* the lack of jurisdiction.



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Best be careful. The raising of any other issue on appeal by the specially appearing defendant could well subject him or her to general jurisdiction. For example, in *Nelson v. Howath*, 4 Cal.App.3d 1, 84 Cal.Rptr. 101 (1970), the defendant in a Texas action defaulted and a Texas judgment was rendered against him. An action was brought in California to enforce the Texas judgment and service was admittedly proper. Defendant moved to quash summons on the grounds that the Texas judgment was invalid and the trial court granted the motion. The Court of Appeal reversed, finding that the defendant had made a general appearance because the motion to quash was not limited to the question of whether there was personal jurisdiction over the defendant.

If your motion to quash is denied, you have two options. You can file an answer or a demurrer and go to trial on the merits. This course of action waives any jurisdictional objections and those objections cannot then be later asserted on appeal. Your second option is to petition the appropriate reviewing court for a writ of mandamus. CCP § 418.10(c) provides that the defendant may, before pleading, petition the reviewing court within 10 days after service upon him of a written notice of entry of the order denying the motion. Timely service and filing of a notice of the petition for writ of mandate extends the defendant's time to plead until 10 days after service of a notice of the final judgment in the mandate proceeding. The normal rules governing petitions for writs of mandamus then apply.

Unlike California's courts, the Federal Rules of Civil Procedure have eliminated formal special appearances. Rather, a pleading or motion is made under Rule 12 of the F.R.C.P. and the substance of the matters raised determines whether it is a submission to jurisdiction. Rule 12(b) provides, in pertinent part, as follows:

"(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim shall be asserted in a responsive pleading thereto if one is required, except that *the following defenses may at the option of the pleader be made by motion*: (1) lack of jurisdiction over the subject matter, (2) *lack of jurisdiction over the person*, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. *A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.* If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief." (Emphasis added).

Unlike state court practice, Rule 12(b) specifically provides that you do not waive an objection to *in personam* jurisdiction simply by raising another defense or objection in the same pleading or motion. However, Rule 12(b) also requires you to object to *in personam* jurisdiction at the outset and you may waive defective personal jurisdiction if a motion is made without including the objection.

Consequently, in Federal Court you may present every defense or objection in your answer or motion, including some which go to the merits (such as a failure to state a claim upon which relief may be granted). However, you cannot present these defenses by a series of motions. Thus if you lose a motion to dismiss for improper venue, a subsequent motion to dismiss for lack of *in personam* jurisdiction will be denied as untimely. Similarly, if you proceed first on the merits, such as by a motion to dismiss or an answer on the merits, a later challenge to personal jurisdiction would not comply with the procedural requirements of Rule 12 and would fail.

In further contrast to state court practice, taking depositions or engaging in other discovery before answering do not waive the defense of lack of *in personam* jurisdiction. Moreover, removal of an action from a state to a federal court does not constitute a general appearance or a waiver of defects in service of process.

—Linda J. Bernhard

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for a while. Hopefully, we will have more judges available at that time. We are seeking additional judges. We are attempting to obtain additional facilities. Where we stand on that is hard to say.

*ABTL: So you do not know what the result will be once the five-year cases and the fast track or pilot cases come for trial at the same time?*

**Judge Byrne:** Right. One very important thing, though, is that the trial date for the AB 3300 cases should be preserved at all costs. If the system is going to be effective in bringing about any alternative disposition, the system has to have a firm trial date along with a firm no continuance policy. The parties, the lawyers and everyone else involved has to know that the case is going to be tried on the day that it is set for trial or shortly thereafter. Otherwise the integrity of the system is jeopardized. In Los Angeles we have so many cases that this poses a problem of heroic proportion to resolve.

### Current Trial Status

*ABTL: What is the current status of Department 1?*

**Judge Byrne:** We have a lot of problems in Department 1 right now. These have changed over the last six months. Every year for the last two years we have been getting criminal cases from the criminal courts building and from other districts where they are unable to try them. In 1985, we had 161 cases sent over, absorbed in Central Civil and assigned out to trial departments from Department 1. Last year in 1986 we had 223. This year—as of right now at the time of this interview June 29, 1987—we have received 223, exactly the same number that we had last year for the entire year. So we have roughly twice as many.

That has made it more difficult to assign civil cases out because more of our judges are involved in criminal cases than ever before. In addition to that, we are about to begin a 90-day crash program effective July 15 by which one-half of the civil departments in the County will be available to hear criminal matters. The purpose of this is to reduce trailing time in criminal cases which have priority and hopefully to reduce jail overcrowding.

I do not know to what extent this will have an effect upon jail overcrowding, but the Superior Court has agreed to participate in the 90-day crash program with some prompting and encouragement from the Federal Court and the American Civil Liberties Union, which is the plaintiff in the federal case that has been pending before U.S. District Court Judge William Gray for some 10 or 12 years. We are influenced somewhat by the prospect of being named as defendant if we do not take some action. When I say we, I mean basically the Superior Court and maybe some of the judges of the Court as well.

There has been a charge made by a number of different people involved in that case that the reason the jails are overcrowded is that the Superior Court is not processing criminal cases fast enough. So that is what prompts us to become involved in this 90-day crash program. We will see an increase in criminal cases handled in civil departments throughout the County and particularly here in Central Civil beginning July 15.

All of that has an impact upon our ability to implement AB 3300. It may be that we are not going to be able to fully implement what we would like come January 1, 1988. We may have to do it in increments. We are obligated under the statute to staff the AB 3300 pilot program with at least four judges. We would like to go with 25. On September 15, we will look to see

realistically just how many judges we can put into this program. We may have to scale it down at that time and start with fewer come January 1st and then increase it some time later if we are able to.

*ABTL: Outside of going to direct calendaring and perhaps making it more difficult to get continuances, what other procedural changes in judicial management do you see being considered under the AB 3300 Pilot Program?*

**Judge Byrne:** There are changes that come along with individual calendars which are rather dramatic. There are additional procedures that are required when the judge is expecting certain things to happen at certain times.

*ABTL: Do you see more informal discovery and law and motion resolutions? For example, sometimes in the federal court you will literally get on the telephone with the magistrate or the judge during a deposition to resolve a dispute over deposition questions.*

**Judge Byrne:** I would think that would be true. I would feel that the judge would have a better idea of what was necessary discovery in a case and what was unnecessary. There is going to be more personal involvement on the part of the judge from the outset than there is in a master calendar system where the judge virtually knows nothing about the case until it comes in and the parties are ready to begin trial.

*ABTL: Will each judge within the Pilot Program develop their own individual rules?*

**Judge Byrne:** The rules will be uniform and the judges will, to the greatest extent possible, attempt to apply them uniformly. But judges are individuals and there obviously will be some variation. But the time standards will be the same. The mechanism by which the time standards are enforced will be monitored by a computer which will service all of the judges participating in the Program.

*ABTL: Among the other procedural devices being considered, do you see status conferences and pretrial conferences?*

**Judge Byrne:** Yes.

*ABTL: What will be the role of the National Center for State Courts?*

**Judge Byrne:** The National Center has been employed by the Judicial Council to assist the counties in the development and implementation of their programs. The Center will also monitor the programs and provide the Judicial Council with progress reports and a final report. The pilot program is to span three years starting January 1, 1988, and the Judicial Council, I believe, has to make its report for legislature by July 1, 1991 or thereabouts.

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## Correction

In the May, 1987 issue of *ABTL Report*, the announcement of the June 9 meeting on California's New Discovery Act incorrectly identified Los Angeles County Superior Court Judge Norman Epstein as a co-author of the New Discovery Act. The *ABTL Report* regrets the error.

## Letter from the President \_\_\_\_\_

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to have matters deemed admitted is filed after a party fails to respond to requests for admissions.)

7. As before, there is no need to meet and confer when the responding party fails to respond to a discovery request at all. That is the rule of *Leach v. Superior Court* (1980) 111 C.A.3d 902. It is implemented in the new law by provisions which trigger the necessity for counsel to meet and confer only when some discovery response is made.

Finally, Judge Norman Epstein wants the record on the New Discovery Act to be absolutely clear. He is *not* a "co-author" of the legislation. In view of rumors to that effect, encouraged by a program announcement prepared by Dave Pasternack, Judge Epstein has disclaimed all credit regarding the legislation, observing that the title "co-author" of the New Discovery Act might prove to be as unfortunate as Chief Naval Architect of the Titanic.

### Bad Faith

The recent expansion of bad faith concepts has created several anomalies in California law which the legislature is now endeavoring to correct. Since *General Insurance Company vs. Mammoth Vista Owners Association*, 174 Cal.App. 3rd 810 (1985), for example, California sureties have been held to have obligations of good faith and fair dealing with respect to both their principals and their obligees. In other words, if the surety pays promptly and in full, it gets sued for bad faith by its principal. If, on the other hand, the surety does not pay, in deference to its principal, the surety is sued for bad faith by its obligee. Under California law, the surety cannot win. This dilemma has left sureties in an "impossible position," to quote the Chief Counsel for the Department of Insurance, and has helped make California law the laughing stock of the nation. Legislation to rectify this impossible situation (Assembly Bill 1677) has been approved by the Assembly and deserves approval of the Senate.

Members interested in this legislation should contact the Hon. William Lockyer, 2032 State Capitol, Sacramento, Calif. 95814.

### Trial Certification

The legislature is again examining the issue of certification of trial lawyers. Assemblyman Harris has introduced Assembly Bill 2618 that would amend the Business and Professions Code to establish specialization certification for trial lawyers. Standards for certification of "Civil Litigation Law Specialists" are being reviewed by the State Bar of California and include various "tasks and experience requirements" which make little sense from the perspective of the business trial lawyer.

Under the proposed standards, the most experienced and competent lawyers in Los Angeles may find that they do not qualify. Moreover, those trial lawyers who settle cases prior to "submission" may be jeopardizing their ability to meet the new standards. The compromise standards require "Twenty-five qualifying trial days which must have occurred within five qualifying trials" during a ten-year period.

"Qualifying trials" are defined as contested civil proceedings "tried to submission" involving the presentation of live testimony for more than a "full day of hearing which consists primarily of examination of witnesses" in Superior Court or U.S. District Court only. The criteria go on and on with other elaborate and often vague requirements. In the final analysis,

a personal injury lawyer whose experience is limited to slip-and-fall cases may satisfy the standards with ease, while outstanding members of this Association could be judged "unqualified."

Who is served by such a certification program? Not the public. Members are encouraged to send written comments regarding the certification proposal to the California State Bar, Office of Professional Standards, 555 Franklin Street, San Francisco, California 94102, with copies to their representatives on the State Bar Board of Governors.

— H.O. (Pat) Boltz

## Interview: The Impact of AB 3300 \_\_\_\_\_

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*ABTL: So once we embark on this three-year pilot program, the court system is committed to it and cannot discontinue it or terminate it prior to that three year period?*

**Judge Byrne:** The court is required to maintain at least four courts in the program. We do not want to start with a large number and then have to scale down. That is the reason that we are setting this September 15th date as a date to look at the entire program realistically.

*ABTL: Will these pilot projects be reporting to you directly as presiding judge or will they be reporting as literally a separate court system?*

**Judge Byrne:** No, I am the project coordinator and I will be keeping track of what is going on. One of the subcommittees is a monitoring a statistical committee that will comply with the mandate of AB 3300 and provide statistics to the National Center for the Judicial Council. That committee is just getting off the ground. We do want to determine what the effectiveness of the program is and certainly one way of accomplishing that is through the development of meaningful statistical information.

*ABTL: Now when do you anticipate the rules governing this pilot project will be promulgated for comment?*

**Judge Byrne:** I would think that is going to happen within the next 30-45 days at the outside. You have to start with the rules in order to develop the rest of the program. That is already in the works and Judges O'Brien and Croskey have prepared some drafts that have been circulated to the members of the committee. The committee has met several times and discussed the rules at length. The proposed rules should be ready for comment in August.

*ABTL: Anything else in terms of the procedural changes that will be encompassed by the pilot program rules?*

**Judge Byrne:** Let me just say that I feel that AB 3300 presents an opportunity to address a serious problem—the expeditious handling of civil cases. We're going to make a serious effort to move those cases along and resolve them as quickly as we can. We have an excellent team of judges who are interested in the program and anxious to make it work. We've had constructive input and cooperation from the bar in the development of the rules and expect that to continue. We hope to learn some things that can be applied to expedite the resolution of all civil matters. It's an exciting challenge that we are looking forward to with interest and enthusiasm.