ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

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How to Control Your Expert

Controlling an expert is really a classic management problem. The recent cap on reimbursement of expert witness fees to $100 a day in federal actions has only exacerbated the problem. Do you give your expert a lot of freedom and unlimited access to information so as to maximize the expert's creativity or do you tightly control the expert's information and areas to investigate?

The truth is that most lawyers manage their experts somewhere between these two extremes. The former environment is completely uncontrolled and the costs may be enormous. The latter environment may be cost effective but may be too stifling to generate useful output. Drawing the line between stifling creativity and controlling costs depends upon the facts of the individual case.

Michael J. Wagner

The most important factor is to know what you want your expert to do. Ill defined projects and general instructions are a license for the expert to run off and incur substantial fees with little useful output to your case. Be specific. The more you define precisely what the expert's role is to be and the areas that you want investigated, the more focused your expert will be.

Avoid open ended requests like, "I want you to consider the damages issues" or "I want you to analyze the other side's case." Tell the expert exactly what issues you want the expert to deal with. The more discretely you can break up the tasks, the easier it will be to figure out how much it will cost to perform each step.

Although it is usually very difficult for experts, at the time they are originally hired, to give you a meaningful estimate of the cost to complete their assignment, it is not so difficult to estimate the cost of performing discrete tasks such as: assisting in preparation of interrogatory questions or deposition questions, reviewing known quantities of documents or legal filings, or preparing an analysis of the adverse party's damage claim.

Require the expert to obtain your approval before undertaking any discrete task and require an estimate of the cost of the task *beforehand* so that you can decide whether it makes economic sense.

Even when you have a task that has to be done regardless of the cost and your expert gives you an estimate that appears to be too high, the discipline of having forced the expert to think about costs before doing the work will make the expert aware

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Protecting Your Fees Under *Cumis*

Insurers bristle at the mention of the oft-cited *Cumis* decision. They decided to fight back. The Personal Injury Plaintiff's Bar and the Insurance Industry, without legislative hearings and public comment, negotiated a tort reform package of legislation, SB241, which passed the Legislature in the eleventh hour and which was recently signed by the governor. SB241 includes the results of the insurance industry's pleas to the Legislature. Unfortunately, it raises more issues than it resolves.

In *San Diego Navy Federal Credit Union v. Cumis Mutual Society, Inc.*, 162 Cal.App.3d 358 (1984), the Court of Appeal clarified and reiterated the rule that, where an insurer reserves its right to deny coverage, the insured is entitled to select its own counsel at the insurer's expense. The decision was not a new statement of California law and the rule exists in many other jurisdictions across the country. But the *Cumis* decision was met with a nearly hysterical reaction by insurers and insurance defense attorneys in California. Insurers, who had previously controlled litigation from selection of counsel, to strategy, tactics and settlement, were required to relinquish control of their insureds and their insured's selected counsel, who more often than not charged higher hourly rates than the insurer's regularly retained defense counsel.

Bruce Alan Friedman

Insurers found *Cumis* to be problematic. First, insurers believed *Cumis* is overbroad and arguably permitted the selection of independently retained counsel whenever an insurance company reserved its right to deny coverage and upon whatever grounds, regardless of whether the coverage issue was involved in the underlying litigation. Second, and more significant, the insurer's cost of defense was substantially increased due to the addition of the hourly rates of the insured's selected counsel.

Since *Cumis* , if not before, business litigators have obtained for their clients an insurer-paid defense in many types of cases, ranging from unfair competition, anti-trust, trademark and patent infringement, wrongful termination and securities litigation. Insurance companies, for their part, have reserved their rights to deny coverage for these claims, thereby giving the insureds the right to select their own so-called *Cumis* counsel.

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RICO Revisited: A Ninth Circuit Update

After relative silence, the Ninth Circuit Court of Appeals has now woken up to post-*Sedima* Civil RICO. Three decisions in the past year—*Wollersheim, Schreiber,* and *Wilcox*—addressed issues of first impression in our Circuit and created new law at the court's own election. Two other decisions, *California Architectural Building Products* and *Sun Savings,* firmly aligned the Ninth Circuit with the Second, Seventh and Eleventh Circuits in construing the "pattern of racketeering activity" element broadly in a civil RICO claim and in rejecting the "separate episodes" test embodied in decisions of the Eighth and Fourth Circuits. In the sixth and most recent case, *Lou v. Belzberg,* the Ninth Circuit became the first federal appellate court to hold that state and federal courts have concurrent jurisdiction over RICO claims.

Wollersheim: No Private Equitable Relief In Civil RICO

Alan D. Bersin

The remedy for private plaintiffs under § 1964(c) provides expressly for treble damages, attorneys' fees and costs. The RICO roller coaster is still not over. Courts and lawyers alike are still grappling with this broad statute and its application to civil business litigation. Even Congress is considering getting back into the fray by several RICO reform bills. The statute [§ 1964(b)] specifically empowers the Attorney General to seek injunctive and other equitable relief, including orders for divestment and reorganization. Most courts have expressed reservations as to the propriety of private equitable relief under RICO, but a substantial minority have decided to the contrary.

The matter is no longer at issue as a matter of federal law in the Ninth Circuit. In *Religious Technology Center v. Wollersheim,* 796 F.2d 1076 (9th Cir. 1986), the court held *sua sponte* that equitable relief is *not* available in private RICO suits. The panel (Judges Pregerson, Pool and Thompson) based its ruling on statutory interpretation and legislative history grounds, and drew additional support from the Supreme Court's *Sedima* decision and by analogy to Sections 4 and 16 of the Clayton Act. *Cf. Nakash v. Superior Court,* 191 Cal. App. 3d59, 241 Cal. Rptr. 578 (1987) (private equitable relief may be available under RICO or California state law).

Schreiber: No Separate Defendant Requirement

All Circuits but the Eleventh (*see United States v. Hartley,* 678 F.2d 961, 988-89 (11th Cir. 1982)), that have addressed the issue, require that the enterprise alleged in a civil RICO claim be separate from the person named as a defendant under § 1962(c). *See Rae v. Union Bank,* 725 F.2d 478, 481 (9th Cir. 1984). The charging allegation under § 1962(c) is that the defendant conducted or participated in the conduct of the affairs of an enterprise through a pattern of racketeering activity.

In *Haroco, Inc. v. American Nat'l Bank & Trust Co.,* 747 F.2d 384 (7th Cir. 1984), *aff'd on other grounds,* 105 S.Ct. 3291 (1985) (*per curiam*), the Seventh Circuit concluded that the language of § 1962(c) clearly contemplates an enterprise separate and distinct from the person unlawfully conducting its affairs. It also concluded, however, that a corporate enterprise may be liable under § 1962(a) when it benefits from the infusion of funds derived from racketeering activity and is neither the target nor the victim of an unlawful scheme. 747 F.2d at 402.

In *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.,* 806 F.2d 1393 (9th Cir. 1986), the Ninth Circuit adopted the Seventh Circuit's reasoning in *Haroco,* holding that the same corporation may be both the defendant and enterprise under § 1962(a) and extended the holding to encompass allegation under § 1962(b) (prohibiting acquisition or maintenance of an interest in or control of an enterprise through a pattern of racketeering activity) when the corporation is the direct or indirect beneficiary of the racketeering activity.

Wilcox: A Preponderance of Evidence

Pre-*Sedima* courts generally applied a civil standard of proof either specifying "preponderance of evidence" or applying "civil" burdens without specification. Some commentators and courts suggested that a "clear and convincing" standard of proof was more appropriate because of the "quasi-criminal" nature of civil RICO allegations. *See e.g., Haroco, Inc. v. American National Bank and Trust Co.,* 747 F.2d 384, 402 (7th Cir. 1984).

The Supreme Court in *Sedima* squarely rejected the notion that predicate acts must be established beyond a reasonable doubt. 105 S.Ct. at 3282-83. The Court specifically declined to adopt a civil standard but noted that preponderance of the evidence is "the usual standard." The Court also suggested that lower courts might consider some "protections" normally afforded criminal defendants. This last suggestion was thought to have left an opening for lower courts to experiment with a higher standard of proof in civil RICO actions.

The Ninth Circuit has now foreclosed any such experimentation.

In *Wilcox v. The First Interstate Bank of Oregon,* 815 F.2d 522 (9th Cir. 1987), the Ninth Circuit held that the "preponderance of evidence" standard governs the adjudication of Civil RICO claims. The panel (Judges Skopil, Nelson and Boochever) ruled on this issue *sua sponte* in reversing a grant of summary judgment dismissing RICO claims and affirming the entry of JNOV on a Sherman Act claim arising from bank changes in prime lending rates.

California Architectural Building Products and Sun Savings: The Pattern Requirement

In *Sedima,* the U.S. Supreme Court eliminated the special racketeering injury and prior criminal conviction defenses. In footnote 14, however, the Court gave new life to defenses based upon insufficient pleading of a pattern of racketeering activity. The Supreme Court strongly suggested that the lower courts had interpreted the pattern requirement too leniently and that this element could be fashioned to limit the scope of civil RICO.

The pattern defense has been the most frequently litigated matter in civil RICO cases since *Sedima,* leaving the Circuit Courts of Appeals badly divided.

The Eighth and Fourth Circuits have imposed a "multiple scheme" requirement after *Sedima's* footnote 14. *See Superior Oil Co. v. Fulmer,* 785 F.2d 252, 257 (8th Cir. 1986) *and International Data Bank, Ltd. v. Zepkin,* 812 F.2d 149, 154 (4th Cir. 1987).

The Eleventh, Seventh and Second Circuits have in turn rejected this test. These courts conclude that predicate acts, so long as they are related and continuous, need not pertain to more than one fraudulent scheme and still constitute an actionable pattern of racketeering activity. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co.,* 782 F.2d 966, 971 (11th Cir. 1986); *Morgan v. Bank of Waukegan,* 804 F.2d 970, 975-76 (7th

Cir. 1986); and *United States v. Ianniello,* 808 F.2d 184, 192 (2d Cir. 1986).

In *California Architectural Building Products, Inc,. et al. v. Franciscan Ceramics, Inc., et al.* 818 F.2d 1466, 1469 (9th Cir. 1987), the court (Judges Sneed, Farris and Noonan) expressly rejected the "separate episodes" test and held that multiple predicate acts resulting in more than a single fraud perpetrated on a single victim, as presented in *Schreiber,* are sufficient to establish a pattern of racketeering activity. The pattern requirement is to be interpreted "broadly and liberally" for pleading purposes.

Two months later, a different panel (Judges Pregerson, Norris and Burns) reaffirmed this liberal construction of the requirement in *Sun Savings and Loan Association v. Dierdorff,* 825 F.2d 187, 191-194 (9th Cir. 1987). Unless the predicate acts alleged are isolated or sporadic without posing any threat of continuing activity, the pattern requirement is satisfied.

Judge Pregerson, writing for the Court in *Sun,* cautioned that "[a]lthough RICO cases may be pesky, courts should not erect artificial barriers—metaphysical or otherwise—as a means of keeping RICO cases off the federal dockets." 825 F.2d at 194.

Shearson/American Express Co. v. McMahon: RICO Arbitration

After a third Supreme Court opinion in *Dean Witter Reynolds Inc. v. Byrd,* 105 S.Ct. 1238 (1985), district courts held with some frequency that RICO claims were arbitrable along with securities law claims alleged under Section 10(b) and Rule 10b-5.

Before the Supreme Court finally decided in favor of arbitration, this trend was reversed by rulings in most Circuits that Securities Exchange Act of 1934 claims were not arbitrable despite Justice White's footnote to the contrary in *Byrd. See, e.g., Conover v. Dean Witter Reynolds, Inc.,* 794 F.2d 520 (9th Cir. 1986).

On June 8, 1987, the Supreme Court split on a 5-4 vote, held per Justice O'Connor, that contracts requiring arbitration of both RICO claims and claims brought under the Securities Exchange Act of 1934 are enforceable. While Justices Blackmun, Brennan, Marshall and Stevens dissented from the Court's distinction of *Wilko v. Swann,* 346 U.S. 5527 (1953) in finding Exchange Act Claims arbitrable, all Justices agreed unanimously that RICO claims are subject to arbitration under the circumstances of a valid agreement to arbitrate. The Court found no evidence of Congressional intent to exclude RICO claims from the Arbitration Act establishing a federal policy favoring arbitration or any irreconcilable conflict between arbitration and the public interest in the civil enforcement of RICO by private parties.

Mally-Duff: A Uniform Four Year Limitations Period

There is no express RICO provision setting forth the applicable statute of limitation. Before the Supreme Court's *Mally-Duff* decisions issued on June 22, 1987, courts generally "borrowed" the most analogous state statute of limitations.

The Ninth Circuit in *Compton v. Ide,* 732 F.2d 1429 (9th Cir. 1984) found California's three-year time bar for actions founded on a statute (*Code of Civil Procedure* §338) applicable to civil RICO claims. *See State Farm Mutual Automobile Ins. Co., et. al. v. Amman,* 828 F.2d 4 (9th Cir. 1987). The Circuit Courts of Appeal were otherwise badly divided.

In Agency Holding Corporation, et. al. v. Mally-Duff & Duff & Associates, Inc. and *Crown Life Insurance Co., et. al., v. Mally-Duff & Associates, Inc. et. al.,* 107 S.Ct. 2759 (1987) the Supreme Court ruled by a majority of eight Justices that the four-year statute of limitations applicable to Clayton Act civil enforcement actions, 15 U.S.C. § 15b, applies in civil RICO actions.

Writing for the Court, Justice O'Connor declined to apply any

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Letter from the President

For the first time in its history, the Board of Governors of the Association of Business Trial Lawyers has decided to institute an award for the Outstanding Jurist of the Year. The first recipient of this honor is Chief Justice Malcolm M. Lucas of the California Supreme Court. Chief Justice Lucas has distinguished himself within our community by the remarkable intellect, grace, good humor and human concern which has been reflected throughout his career as a Superior Court Judge, United States District Judge and Chief Justice of the California Supreme Court.

H.O. (Pat) Boltz

At our December ABTL dinner meeting, Judge Richard P. Byrne, Judge Robert H. O'Brien and Justice H. Walter Croskey explained the local rules which have been adopted to implement the new calendaring system for the Central District of the Los Angeles Superior Court. Faced with increasing delay in the processing of civil lawsuits, without increase in judges or facilities in recent years, the Los Angeles County Superior Court has adopted new Trial Court Delay Reduction Rules pursuant to the Court Delay Reduction Act of 1986.

Under these Rules, approximately 50 percent of all civil actions filed in the Central District of the Los Angeles County Superior Court will be subject to a Pilot Program. Twenty-five Superior Court Judges have been assigned to the Program and will handle those cases assigned to them from beginning to end. The rules establish early mandatory deadlines which will accelerate the litigation dramatically. The goal of the program is to dispose of 90 percent of the lawsuits assigned to the program within one year of filing, 98 percent of the cases within 18 months and all cases within two years of filing.

To accomplish these objectives, the rules take control of the lawsuit away from the lawyers and place control firmly in the hands of the Court. Accordingly, trial counsel should anticipate early, frequent and vigorous participation in the litigation by their assigned judge.

Under the new rules, mandatory time limits are established. Specifically, the rules require that:

(1) The Complaint must be served within 60 days of filing;

(2) Proof of service of the complaint must be filed within 65 days of filing;

(3) The at-issue memorandum must be filed within 140 days of filing;

(4) Discovery must be completed within 180 days after the filing of the at-issue memorandum.

In addition, the Court will schedule status conferences to create additional time limits. Trial counsel can expect the assigned judge to review in detail the issues, parties, discovery and settlement of the action at these status conferences. The judge will enforce early discovery cut-off dates and encourage bifurcation or summary adjudication motions to shorten the litigation.

The new rules significantly alter prior practice with respect to extensions or continuances. Counsel may not extend the time for responsive pleadings, cross-complaints, motions, discovery

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limitations period based either on state law or the 5-year federal "catchall" statute, 18 U.S.C. § 3282, applicable in criminal RICO cases. Instead the Court concluded that the uniform 4-year limitations period borrowed from the Clayton Act was more appropriate in terms of the federal policies behind RICO and the practicalities of civil RICO litigation.

Lou v. Belzberg: Concurrent RICO Jurisdiction

Subject matter jurisdiction concerning RICO is vested in federal district courts by 18 U.S.C. § 1964(c). In Cianci v. Superior Court of Contra Costa County, 40 Cal. 3d 903 (1985), the California Supreme Court held that state courts have concurrent jurisdiction of claims for treble damages and attorneys' fees based on the federal RICO statute. The Court (per Justice Mosk with Justices Lucas and Grodin dissenting) found no disabling incompatibility between the federal claim and state court adjudication of it. The Ninth Circuit has now concluded similarly in *A. Jacques Lou v. William Belzberg, et al., 834 F2d 730 9th Cir. 1987).* Amplifying on the reasoning of *Cianci*, the panel (Judges Boocheever, Hug and Fletcher) held, as the first federal court of appeals to do so, that state and federal courts share concurrent jurisdiction over RICO claims.

Status of Civil RICO Reform in Congress

The *Sedima* decision in July, 1985 stirred Congressional activity to clarify the scope of Civil RICO. During the 99th Congress, H.R.5445 passed the House on October 7, 1986. The Senate, by a vote of 47-44, declined to adopt a compromised version of the measure. The legislation would have: (a) changed the name of RICO to "Pattern of Illicit Activity Act"; (b) limited awards for most § 1964(c) litigation to actual damages, attorneys' fees and costs; (c) restricted treble damage recoveries to (i) successful civil law suits brought by governmental agencies and (ii) private suits brought against persons convicted of an illicit activity related to the Civil RICO violation; (d) provided in the consumer context for "punitive damages of up to twice the actual damages," where the defendant acted in "wanton disregard" of plaintiff's rights (limited to natural persons) *but* not available in securities actions for which federal or state securities laws provide a remedy' (e) imposed a uniform statute of limitations barring actions three years after the injury-causing conduct ends *or* two years following criminal conviction of the RICO violator, whichever is latest; (f) defined "pattern" to require at least two acts of illicit activity within five years that "are not so closely related in time and place that together the acts constitute a single episode"; (g) amended Rule 9(b) of the Federal Rules of Civil Procedure to apply "pleading with particularity" requirements expressly to Civil RICO actions; (h) provided for retroactive application of limitations governing the scope of treble damage recoveries in pending litigation except where a judgment has been entered or a court determines retroactivity to be unjust in light of the circumstances of the case.

Similar bills to reform civil RICO were introduced in the 100th Congress.

Open Issues in the Ninth Circuit

Whether amended or re-named, civil RICO is likely to remain a permanent feature of the business litigator's landscape. Numerous issues await judicial resolution. Chief among these are:

(1) **Respondeat Superior Liability:** The argument has been made that RICO, by defining concepts such as "enterprise" and "conduct," supplants common law principles of *respondeat superior*. Court decisions split as to whether the *respondeat superior* doctrine can be used to avoid the separate and distinct defendant and enterprise requirement. The First (*Shofield v. First Commodity Corp. of Boston*, 793 F.2d 28 (1st Cir. 1986) and the Eighth Circuits (*Luthi v. Tonka Corp.*, 815 F.2d 1229 (8th Cir. Apr. 10, 1987), declined the application of vicarious liability under the *respondeat superior* doctrine. The Third Circuit in *Petro-Tech, Inc. v. Western Co. of North America*, __F.2d __ (3rd Cir. July 13, 1987), held that vicarious liability for aiding and abetting or under *respondeat superior* exists only if the corporate employer actually benefitted from its employee's predicate acts *and* it is not the "enterprise" in Section 1962(c) action brought against the employees as defendants under § 1962(c).

(2) **The Racketeering Enterprise:** The Circuit decisions are thoroughly divided on whether the enterprise must be separate and distinct from the acts constituting the pattern of racketeering activity underlying a Civil RICO claim. The Third, Fourth, Fifth and Eighth Circuits require pleading and proof of an enterprise with an "independent ascertainable existence" separate from the acts constituting pattern of racketeering activity. The Second, Sixth and Eleventh Circuits have adopted a contrary view and have approved application of RICO to cases where the enterprise in effect is the sum of the predicate racketeering acts. The district courts are divided. See *United Energy Owners Comm., Inc. v. United States Energy Management Systems, Inc.* 88 Daily Journal D.A.R. 270 (Jan. 8, 1988), where the Court raises but does not decide the issue.

(3) **RICO Standing:** The First and Eighth Circuits have adopted a "direct injury" RICO standing requirement derived in part by analogy from antitrust standing principles. The doctrine has been applied in these jurisdictions to prevent employees, taxpayers, and union members from bringing claims where the injury was directly suffered by the corporation or union rather than the plaintiff. The Eighth Circuit has taken a contrary view, *see Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc.*, 772 F.2d 467 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 1461 (1986), and the Ninth Circuit, among others, has yet to address the issue.

—Alan D. Bersin

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of the cost/benefit of the task. Through further discussion, the expert often will be able to redefine what needs to be done or how to approach the problem and get the job done at a much lower cost. Without this discipline, the expert has no incentive to be as efficient as possible.

Another technique that can effectively reduce expert's costs is to insist that discrete tasks be performed for a fixed fee. Since usually the expert can accurately estimate the time and out-of-pocket expenses to perform a limited procedure or analysis, the expert should not be too resistant to working for a fixed fee. If an expert adamantly refuses to work for a fixed fee to perform a limited task, you may want to insist on a very detailed explanation of why the expert refuses and, if a satisfactory answer to your questioning is not made, you should consider retaining a new expert.

In traditional management consulting engagements, consultants often develop work plans to assist in organizing their projects, estimating the costs to complete the engagement and controlling job progress. Because of the potential of discoverability of a formal work plan, it is often not a good idea to have the expert prepare such a document in a litigated matter.

However, where you have retained an expert to act strictly as a consultant and you believe the consultant's role will be protected by the attorney work product privilege, then requiring the consultant to develop a detailed work plan and fee estimate before beginning work makes a lot of sense.

A common mistake by many litigators is to not keep in frequent contact with their experts. If you habitually call your experts weekly to get a status report of what he or she is working on, you can stop unnecessary work.

An expert who has started a task will normally finish it if uninterrupted. However, if in the middle of a task you force the expert to focus on the interim results, that new perspective may lead to a different approach that will reduce the time and cost to complete the task. You and the expert may even decide that the task should not be completed, a major cost savings.

Remember, if you institute a policy of frequent status reports, it is best to do this orally so as to prevent discoverability.

Another problem is failing to insist on frequent billing by your expert. If you have a major litigation to manage, require a bill to be rendered every one or two weeks. This gives you early warning if fees are getting out of hand. Just because you haven't heard from your expert in a long time does not necessarily mean that he or she hasn't generated large fees.

If your litigation is expected to last a long period of time, consider getting an agreement that your expert's hourly rate will not be increased during the duration of the matter. Like lawyers, it is common practice for experts to increase their rates on a periodic basis, either once or twice a year. The increase is intended to reflect the increased experience of the expert and inflation. Many experts are willing to fix their rates if they believe that they have some guarantee of work over a longer time frame.

There may be an adverse impact if the case takes a number of years and the expert is now making considerably less off of your case than other cases that the expert is working on. There is a good chance that your work will not be the expert's first priority.

Always discuss with an expert the continuity of staff on the job. Especially in larger consulting firms, the ability to keep the original project team together is often difficult. Bringing a new person up to speed on the issues of your case can be expensive. Once you have paid this cost, you should have some expectation that these individuals will stay available to complete your case.

The problem is that lawsuits are difficult to manage. Work can stop and start unexpectedly. If the expert's work is put on hold for any length of time, with no guarantee of when it will start again, it is natural for the expert to assign the original project team to other clients who are willing and able to pay for these persons' time.

When suddenly you call your expert and want work to restart immediately, it may be impossible to get the original staff back to complete the work. One way to protect yourself from having to pay the training costs to get new staff up to speed is to agree up front that if this happens, the expert will not charge for this start-up cost. You should be reluctant to enforce this provision if you have acted unreasonably with your expert and are the reason that the original staff are no longer available. Otherwise, your name may be circulated in the expert community as a lawyer whom they would rather not deal with.

Even when the same staff stays on the job, causing your expert to start and stop is costly. Even old members of your expert team

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will have to spend time refreshing their recollections of the issues and the status of their work when they last stopped. At times this situation just cannot be avoided. No lawyer controls the court's schedule, and unavoidable delays are typical. However, there are things that you can do to avoid some of these delay costs.

Allow your experts to stop their work at natural stopping places. Very often, because of rulings on motions or sudden changes in a judge's calendar, a case that is hot suddenly cools down. The natural reaction is to stop work so as to save the client fees. The expert may be in the middle of a task when you call to say, "Turn off the meter." It will be far cheaper to finish the task at hand when the expert's focus is current and all the data are fresh and available. Otherwise, when you call the expert to start work in the future, the expert may have a lot of relearning to return to the right mental frame to complete the task.

You should not only insist on the completion of the task(s) at hand to a logical place, you should also insist that the work be completely documented so that the assumptions and supporting data will be available to refresh the expert's opinion and conclusion when the case revives.

You have many opportunities during an engagement to keep the expert's fees down. One of the easiest is to control the amount of information that the expert will see. Don't pigeonhole an expert. However, it is not necessary for the expert to see everything in the case. One of the most time consuming tasks in a case is reading documents. The expert does not need to see every discovery response, particularly depositions. Screen what depositions, or what portions of depositions, need to be reviewed by the expert. Carefully consider the issues that you want the expert to address and only give the expert information that is relevant to those issues.

Experts like to impress you, their client. Whenever they have a document to deliver to you, whether it is the final report, just an interim schedule or graph of some of their results, they want it to look impressive. Their image of professionalism requires a polished presentation. Unfortunately, making a document look polished takes time and money. Communicate convincingly with your experts that interim presentations need not be polished. There is no need for fancy colors or three dimensional presentations unless it is absolutely necessary for explanation. Tell the experts that you are more interested in substance over form, especially at this stage of their work.

Let's now turn to some popular misconceptions of how to save money when it is necessary to hire experts. The first is that the later you bring an expert in, the cheaper it will be. This is only true sometimes. When an expert must at the last minute do all the work necessary to reach an opinion, he or she will often work inefficiently, throwing all available bodies at the task. People with experience levels and billing rates far too high for the tasks at hand will be assigned to the case. Data that could have been collected efficiently and at a lower cost is collected on an expedited basis at a high cost.

While it is true that waiting will be cheaper if the case settles and no expenditure is made on experts, weigh this savings against the possible benefits that the expert may give to your bargaining position in settlement negotiations. If you manage your experts well, the fact that the expert has more time means you should get a better work product at a cheaper cost because the work can be done more efficiently. The appropriate staff at the appropriate billing rate can be scheduled to perform the work.

A second myth is that money can be saved by bringing the expertise in-house at the law firm. It probably will be no cheaper to the client. The profit margin on the expert's work will now be the law firm's and not the expert's firm, which is not all bad. The problem that you will have with this approach is that it is difficult to attract the best experts to be law firm employees. Law firms are not structured properly to provide a career path for these types of people. You also cannot usually offer your own employees as experts at trial because of their perceived advocacy role, so another expert will have to be retained to testify. This will almost always require much duplication. If the case is large enough to justify both a consulting expert and a testifying expert, this arrangement may work out very well. An advantage of having expertise inside the law firm is that you have much more control over the expert's schedule.

A third myth is that an expert with a lower hourly rate will be cheaper than an expert with a higher hourly rate. If there is a substantive reason for the higher billing rate, then the more expensive expert should be more efficient. Remember, the total fee is a function of the billing rate times hours. The reason why many experienced experts have such high rates is that they have done the work before and can complete a task in a much reduced time frame. You should be paying for the prior experience on previous jobs which will give you a better and quicker solution to the problems that you have the expert addressing.

The last myth is that you are always doing your client a favor by asking for or demanding reduced fees or billing rates from your experts. Remember, as with your own legal fees you get what you pay for. If you insist on compensating your expert at a level below his or her customary level, you may get a less than full commitment and effort. You put your client at risk because the expert will not consider your client to be as important as the expert's other clients. This is not to suggest that you should never seek such concessions. Many times, value is not received for expert's fees. In these cases, taking a hard line on what fees will be paid is appropriate.

It is your responsibility to not only be a lawyer, but also to be a manager when you hire an expert. You can make a significant difference in the price your client will pay for expert assistance and in the results of your expert.

—Michael J. Wagner

Protecting Your Fees

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Insurers have informally fought the battle with respect to attorneys' fees in business litigation. Some negotiated the maximum amount of fees that they will pay with business litigators. Others limited the maximum hourly rate that they will pay. Still others paid the same rates charged by the business litigator to other clients. All insurers have scrutinized bills for services that they felt were unnecessary or excessive.

However, the disparity between the hourly rates of regularly retained defense counsel and those of major law firms is more than the insurance industry could take. They turned to the Legislature for help. But did they succeed?

SB241 added Section 2860 to the Civil Code. Subsection (a) of this statute codifies the right to independent counsel but allows the insurer to seek a written waiver.

The guts of the legislation, however, is found in subsections (b) and (c) which will be the subject of litigation and judicial construction for years to come. Subsection (b) attempts to define when a conflict of interest exists between insurer and insured, giving rise to the right to select independent counsel:

"(b) For purposes of this section, a conflict of interest does not exist as to allegations or facts in the litigation for which the insurer denies coverage; however, when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist. No conflict of interest shall be deemed to exist as to allegations of punitive damages or be deemed to exist solely because an insured is sued for an amount in excess of the insurance policy limits."

The first sentence of subsection (b) is ambiguous and difficult to understand. It attempts to say that the mere denial of coverage does not create a conflict of interest. Rather, a conflict arises only where the resolution of coverage might be adversely affected by the insurer's control of the underlying defense. I do not believe that this is a substantial change in the law. Although *Cumis* was quite broad in its statement that any reservation would give rise to the right to select independent counsel, subsequent and conflicting decisions have more narrowly defined the scope of the insurer's duty in this regard.

For example, in *McGee v. Superior Court,* 176 Cal. App.3d 221 (1985), the Fourth Appellate District construed *Cumis* to apply only where there is a conflict because the insured's interest at trial is having his conduct shown in a light which brings it within the scope of the policy, whereas the insurer's interest is having the insured's conduct shown to be outside the scope of the policy. Civil Code Section 2860 appears to embody the ruling in *McGee.*

Subsection (b) also excludes claims for punitive damages and excess liability from the definition of a conflict. As to punitive damages, this does not appear to be a departure from existing law. In *Zieman Manufacturing Co. v. St. Paul Fire & Marine Insurance Co.*, 724 F.2d 1323 (9th Cir. 1983), the Ninth Circuit held that the mere presence of a punitive damage claim does not create a conflict between the insurer and the insured. The Court held that, under those circumstances, an insurer is not required to pay for the insured's independent counsel or to indemnify the insured for the punitive damage award. Moreover, the punitive damage limitation should not affect or limit the circumstances under which an insured is entitled to independent counsel. It is not usually the punitive damage claim itself that gives rise to the conflict, but the claim that the insured engaged in intentionally tortious conduct (which provides the basis for punitive damages) that may affect coverage and thereby create the conflict.

The statute provides that no conflict exists solely because an insured is sued for an amount in excess of the insurance policy limits. But what if the claim is for damages far in excess of the limits and the exposure is real? Are these facts beyond merely an allegation of damages in excess of limits? Surely, if the insured will be asked to settle or pay damages far in excess of its policy limits, it should have the right to select counsel to defend it.

Subsection (c) addresses selection and payment of the insured's counsel. The statute requires attorneys to have had at least five years of tort litigation experience, including substantial defense experience in the subject area at issue in the litigation. Since the enactment of this legislation, business litigators expressed serious concern about this five year tort litigation requirement. Does this apply to the firm, the trial attorney or to all lawyers who work the case? Is this a reasonable requirement? Do insurers retain lawyers with at least five years experience to handle their insureds cases? As yet, there are no clear answers.

The second qualification for independently selected counsel is that they maintain errors and omissions insurance. The statute does not set forth any minimum coverage requirements for malpractice insurance. Presumably responsible counsel maintains errors and omissions insurance.

However, the crux of the statute is found in the next clause of subsection (c), which provides:

> "The insurer's obligation to pay fees to such independent counsel selected by the insured is limited to the rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended."

The statute does not express the insurer's intent to limit attorneys' fees of independent counsel to that of regularly retained defense counsel hired to defend their insureds. In most cases involving major insurers, the statutory language should have little effect on the hourly rates of business litigators in business litigation. The "rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions" include all of the major Los Angeles law firms in lawsuits in which they are representing *insurance companies* in their own business and significant coverage disputes.

Individual insurance companies may present a problem, but in most cases insurers faced with claims of unfair competition, wrongful termination, securities violations, and other business torts hire premier business litigators to handle these matters at rates which these same lawyers charge their other clients. Unless this practice ends, an unlikely event, business litigators whose clients are faced with similar claims should be able to charge their normal hourly rates.

The statute does not prevent insurance policies themselves from containing provisions pertaining to attorneys' fees or methods of settling fee disputes which may permit insurers to become more restrictive than the statute now provides.

For example, in *New York State Urban Development Corp. v. VSL Corp.*, 738 F.2d 61 (2nd Cir. 1984), the Second Circuit held that a conflict of interest between an insurer and its insured did not prevent the insurer from participating in the selection of counsel for the insured provided the insurer acted in good faith and the attorney chosen was truly independent. The language of the insurance policy, however, obligated the insurer to pay "claims expenses," and defined such expenses as either fees charged by any attorney designated by the insurance company, or fees charged by any attorney designated by the insured with the written consent of the insurance company. The Court found this distinction critical and the policy language to be different than that found in general liability policies. Such language is similar to that found in directors and officers liability policies, though. The fees of attorneys generally retained to handle lawsuits falling within directors and officers liability policies will in all likelihood be similar, if not identical, to the fees charged by law firms who represent the insurance companies' directors or officers in litigation against them.

Finally, subsection (c) requires that any dispute concerning the attorneys' fees not resolved by these methods shall be resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute.

The new statute, does not address the procedural aspects of the required binding arbitration. How will the arbitration be held and under what rules? Will there be discovery permitted during arbitration? Will the arbitration address solely the hourly rate or the entire legal fee charged for the matter? When will the arbitration be held?

As presently worded, without the adoption of any new rules of Court, the final and binding arbitration of the fee issue does not appear to fall within the judicial arbitration statute C.C.P.

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Protecting Your Fees

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§§ 1141.1, *et seq.* and California Rules of Court, Rules 1600, *et seq.* Moreover, it is unclear whether the arbitration would be governed by C.C.P. §§ 1280, *et seq.* (regarding arbitration under agreements which require arbitration of an existing controversy).

Title 9 of the Code of Civil Procedure, which sets forth the procedure for enforcement of arbitration agreements, however, does appear to provide an approach. Section 1281.6 provides that if an arbitration agreement does not provide a method for appointing an arbitrator, the parties to the agreement who seek arbitration and against whom arbitration is sought may agree on a method of appointing an arbitrator and that method shall be followed. In the absence of agreement, the Court may appoint an arbitrator.

In most instances, counsel for the insurer and insured should be able to select an agreeable arbitrator from the list of retired judges and attorneys who perform these services. Code of Civil Procedure §§ 1282, *et seq.* discusses the exercise of powers by arbitrators and § 1282.2 sets forth the conduct of arbitration hearings. Section 1282.2(2) provides for an exchange of list of witnesses, experts and documents where the amount in controversy exceeds $50,000. Such a procedure is advisable in this context.

Section 1283.05 allows for the right to take depositions and to obtain discovery regarding the subject matter of the arbitration, and to use and exercise all the same rights, remedies and procedures and be subject to all of the same duties, liabilities and obligations in the arbitration with respect to the subject matter thereof, as if the subject matter of the arbitration were pending in a civil action before the Superior Court. Depositions for discovery, however, may not be taken unless leave to do so is first granted by the arbitrator.

It will be incumbent upon you as counsel for the insured to obtain from the insurer a list of law firms and lawyers the insurer uses on matters similar to the underlying case. The insurer's general counsel, rather than claims personnel, would be an excellent source for this list since general counsel will be more familiar with matters similar to the one you are handling. If the insurer has not retained counsel in Los Angeles to defend it in a similar action, then you may want to inquire as to retention of counsel in other large metropolitan areas and, ultimately, look to other insurers.

The final subsections of the new statute require that independent counsel timely inform and consult with the insurer on all matters relating to the action other than matters that involve privileged attorney-client communications relevant to coverage disputes. (Subsection (d).) Subsection (e) provides the language necessary for the insured to waive its right to select independent counsel.

Subsection (f) provides that where the insured selects independent counsel, counsel selected by the insurer shall be allowed to participate in all aspects of the litigation. Moreover, counsel are required to fully cooperate in the exchange of information that is consistent with each counsel's ethical and legal obligation to the insured.

This section raises some very interesting problems. First, it is the exception, rather than the rule, that the insurance company appoints separate defense counsel to work alongside of independently selected counsel. According to the statute, does this mean that in this situation both independent counsel and counsel selected by the insurer are entitled to examine all witnesses at depositions and trial? Who is to be lead counsel with respect to the handling of the case and the trial of the lawsuit? Are both counsel entitled to propound written discovery? Obviously, the intent of the statute and reason dictate that counsel selected by the insured should be lead counsel in the case and that counsels' efforts not be duplicative.

Subsection (f) also calls into question the economic motivation for the legislation. Under the statute, an insurer is not obligated to hire separate counsel to participate in the litigation with the insured's counsel. However, doing so effectively doubles the hourly rate insurers must pay.

The new statute, in an effort to address the insurance industry's concern over abuses of *Cumis*, was hastily drafted and not well thought out. The statute raises more questions than it answers and on its face is not likely to have the effect, at least on business litigation, that the insurance industry intends.

—Bruce Alan Friedman

Letter from the President

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cut-off, at-issue memoranda, or other matters specified by the rules or orders without permission of the Court "upon a showing of good cause." Failure to meet time deadlines established by the rules or the Court will result in an Order to Show Cause why the case should not be dismissed or sanctions imposed, requiring counsel to appear before the Court.

The new Rules provide for greatly accelerated dates with respect to any challenge of the Judge pursuant to Code of Civil Procedure Section 170.6. The challenge must be made within 10 days after the moving party receives notice of the assignment of a case to the Judge. In addition, Doe defendants and Doe cross-defendants will be dismissed early in the litigation unless the Court for good cause otherwise orders.

The new rules represent the most significant change in the administration of the Superior Court since the adoption of the master calendar system almost fifty years ago. In 1929, outrage over the backlog of civil cases produced the existing master calendar system designed by former Justice Marshall McComb. After nearly 50 years, the Superior Court has elected to alter Justice McComb's system and has devised solutions which, with some difficulty and pain, may actually work. The Superior Court has committed itself, its judges and its resources to making this program succeed in reducing the backlog of civil cases. Judge Byrne, Judge O'Brien, Justice Croskey, and each of the judges who have worked to develop these procedural innovations deserve our encouragement and support in their implementation of a difficult legislative mandate.

—H.O. (Pat) Boltz

Interesting Real Estate Cases?

The State Bar Real Estate Section is assembling a summary of significant trial court decisions on real property issues in California. If you know of any significant decisions on real property, please send them to:

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