ASSOCIATION OF BUSINESS TRIAL LAWYERS

# abtl REPORT

*Volume XXIV No. 2* *Spring 2002*

## The Meaning of An Insurance Carrier's Reservation of Rights — Part 1

In many complex civil cases an insurance carrier agrees to defend one party or the other. Often such a defense is under a reservation of rights. The letter setting forth that reservation generally uses standardized, legal-sounding language. It may even be a form letter sent by a claims representative who may not entirely understand its meaning or effect. And sometimes all the insured or defense counsel understands (or for the moment cares about) is that an insurance carrier is picking up at least a portion of the legal fees. But what does the carrier's reservation of rights really mean?

**Robert A. Olson**

A reservations of rights letter will often identify the various coverage issues that may be present in the litigation (*e.g.*, identifying that potentially the conduct may be willful, or the injury outside of the policy period, or no coverage may be afforded for equitable relief). These coverage issues will vary depending on the nature of the claims at issue and the coverage afforded by the particular insurance policy. The identified coverage issues explain *why* the carrier is reserving its rights; however, they do not explain *what* rights the carrier is reserving. The letter should also specifically set out the *rights* that the carrier is reserving. These are typically fairly standard, falling into a handful of categories. Two of these typical reservations — the right to deny coverage for any ultimate judgment and the right to seek reimbursements for settlements — are discussed in this issue. Two other sometimes reserved rights — the

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## Defining Internet Jurisdiction

Through the Internet, world-wide instantaneous communications electronically permeate the political boundaries that traditionally have defined and separated state sovereignties. One court has defined the Internet as "...a worldwide network of computers that enables various individuals and organizations to share information. The Internet allows computer users to access millions of web sites and web pages. A web page is a computer data file that can include names, words, messages, pictures, sounds, and links to other information." *Panavision Intern, L.P. v. Toeppen* (9th Cir. 1998) 141 F.3d 1316, 1318.

**Hon. Richard Fruin**

Another court has analyzed the spectrum of Internet usage, from passive review of a website, to fully interactive communications, to determine when personal jurisdiction should be exercised over a foreign originator of Internet communications. *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* (W.D. Penn. 1997) 952 F.Supp. 1119, 1123-24. Four recent California Court of Appeal decisions applying traditional jurisdiction analysis to torts committed over the Internet suggest that careful attention to where the case lands on the Internet usage spectrum and to old-fashioned procedural issues can make a difference to whether California jurisdiction will attach or be rejected.

### Jurisdiction Primer

California's long-arm statute authorizes California courts to exercise jurisdiction on any basis not inconsistent with the Constitution of the United States or the Constitution of California. Code Civ. Proc. § 410.10. Personal jurisdiction may be general or specific. For general jurisdiction, the nonresident defendant's contacts with the forum must be "substantial…continuous and systematic." *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 445.

Absent general jurisdiction, a nonresident defendant may be subject to specific jurisdiction if she (1) "purposefully availed" herself of forum benefits; (2) the dispute is related to the defendant's contacts with the forum; and (3) the exercise of jurisdiction is reasonable, that is, it comports with "fair play and substantial justice." *Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal.4th at 447-48.

In tort cases, the "purposeful availment" requirement can be measured by the effects of the nonresident defendant's conduct

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in the forum. Under the "effects test," personal jurisdiction can be based upon: "(1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered — and which the defendant knows is likely to be suffered — in the forum state." *Panavision Intern, L.P. v. Toeppen* 141 F.3d at 1321 (applying California law), relying on *Calder v. Jones* (1984) 465 U.S. 783.

The third requirement for specific jurisdiction — that the exercise of jurisdiction comport with "fair play and substantial justice" — can be a wild card, as it permits the court to attach jurisdiction when the forum has a special interest in the in-state effects of the nonresident defendant's acts and therefore in adjudicating the dispute. *See Jamshid-Negad v. Kessler* (1993) 15 Cal.App.4th 1704, 1708.

When a nonresident defendant challenges personal jurisdiction the burden shifts to the plaintiff to demonstrate by a preponderance of the evidence that all necessary jurisdictional criteria are met. *Jewish Defense Organization, Inc. v. Superior Court* (1999) 72 Cal.App.4th 1045, 1055. A plaintiff is entitled to conduct discovery on jurisdictional issues before the trial court rules on a motion to quash. *Goehring v. Superior Court* (1998) 62 Cal.App.4th 894, 911.

In *Zippo Manufacturing. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. at 1123-24 (footnote and citations omitted), the court presented the jurisdictional facts at play in Internet cases as a spectrum and proposed a key to deciding jurisdictional challenge motions as follows:

> "At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and…nature of the exchange of information that occurs on the Web site."

How has the *Zippo* jurisdictional rule of thumb fared in California practice?

**Passive Web Site**

*Defamation*. By failing to present declarations establishing effects in California to his reputation based upon the defendants' Web posting, the plaintiff in *Jewish Defense Organization, Inc., supra*, missed his opportunity to litigate the case here. In this case, the court considered whether it should exercise jurisdiction in California over defendants who, from their New York residence, posted defamatory statements about plaintiff on a passive Web site; *i.e.*, one that makes information available to those that choose to access it. The defendants' Web posting accused plaintiff Steve Rambam, a licensed private investigator, of being a government informant (and a "snitch"), a dangerous psychopath and an anti-Semite. The court analogized the facts to a newspaper libel, noting that in libel cases jurisdiction is found where the plaintiff suffered damage to his reputation. (The comparison of a libelous Internet posting to a newspaper libel is not perfect. A newspaper is read wherever it is circulated, and its area of circulation is largely determined by its distribution costs. To view a Web page, on the other hand, a computer user must find and then choose to access the Internet site. An Internet posting also is nearly cost-free and is available (circulated) world-wide.)

Plaintiff's declarations in opposition to defendants' motion challenging jurisdiction were inadequate to establish his injury in California. Although defendants had not attacked the evidentiary sufficiency of plaintiff's declarations in the trial court, the Court of Appeal concluded that plaintiff's declarations lacked foundation, contained conclusory statements and were inadequate to support the legal and factual conclusions for which they were offered. In his declaration, Rambam had testified that he spent "considerable professional time" in California, but he "failed to establish he had any clients in California, or that the alleged defamatory statements herein would impact a business interest or reputation in California." *Id.* at 1059. The court cited with approval the statement in *Ziller Electronics Lab GmbH v. Superior Court* (1988) 206 Cal.App.3d 1222, 1233, that "declarations are insufficient to support the assertions for which they are offered if they consist primarily of vague assertions of ultimate facts rather than specific evidentiary facts permitting a court to form an independent conclusions on the issue." *Id.* at 1055. Because Rambam's declarations were not competent, the Court of Appeal held they provided no contrary evidence to the defendants' motion. "Where there is no conflict in the evidence, the question of personal jurisdiction is one of law; in such a case, the lower court's determination is not binding on the reviewing court." Id. The appellate court issued its writ directing the trial court to grant defendants' motion to quash service.

If plaintiff's counter-declarations had been evidentiarily competent, and the trial court in ruling on the evidentiary conflict had still denied defendants' jurisdictional challenge, the appellate court's review would have been by the more deferential substantial evidence standard, with a result more likely in the plaintiff's favor.

**Passive Web Site**

*Trade Secret Misappropriation*. In *Pavlovich v. Superior Court* (2001) 91 Cal.App.4th 409, also involving a passive Web site, the plaintiff's attorney skillfully used discovery to draw concessions from the nonresident defendant that the information accessible from his Web site would have a differential impact on California-based businesses. Matthew Pavlovich, a Purdue University student, posted on his Web site a de-encryption program that permitted users to pirate movies sold in DVD-format over the Internet. Plaintiff owned an encryption-based copy protection system that was supposed to permit only licensed downloading of DVD movies. The de-encryption program that Pavlovich posted had been reverse engineered from plaintiff's system (whether by Mr. Pavlovich is unclear) to facilitate the copying of DVD movies.

Plaintiff's complaint, served on Pavlovich in Texas, alleged that Pavlovich had repeatedly republished plaintiff's trade secrets and copyrighted material over the Internet. Pavlovich opposed California jurisdiction by arguing that, although he knew the de-encryption program could be used to misappropriate copyrighted materials stored in a DVD format, he did not know when he posted the program on his Web site either plaintiff's identity or its ownership of the copy protection system and therefore did not intend or aim his acts to harm plaintiff or, more generally, California's interests.

In deposition, plaintiff drew Pavlovich's acknowledgment that the motion picture industry is centered in California and that the computer industry, too, is a significant presence in the state. The court held that Pavlovich's admissions were sufficient to establish specific jurisdiction over him because his conduct was aimed at the forum's interests even if he did not know the identity or location of the plaintiff when he posted his de-encryption program. The court also concluded that facilitating the unlicensed copying of DVD movies constituted an issue that this state has a special interest in adjudicating.

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The Supreme Court has granted a hearing in *Pavlovich*, removing it as citable authority. Rule 976(d), Cal. Rules of Court. The Court evidently intends to decide the *Pavlovich* facts as its first Internet jurisdiction opinion. (The *Pavlovich* facts are mirrored in a criminal case. In July 2001, the FBI arrested a Russian computer programmer, Dmitri Sklyarov, as he attended a Las Vegas convention and charged him and his employer with violating the Digital Millennium Copyright Act. Under the Act the promotion in the United States of a device that can be used to violate copyrights is a criminal offense. Sklyarov while working for Moscow-based ElcomSoft had developed a software program that allows users to disable copyright restrictions on electronic book software sold by California-based Adobe Systems. Sklyarov was released in December after agreeing to provide testimony against his employer. ElcomSoft claims its program is legal under Russian law.)

**E-Mail**

*Threat of Violence*. In yet another case brought by Steve Rambam, he again missed an opportunity to sue a foreign defendant in California, this time by failing to focus the limited discovery authorized by the Court on the pertinent jurisdictional issue. In an unpublished appellate decision issued in late 2001, the court refused to exercise jurisdiction over an Ohio teenager named Brad Luhta. *Rambam v. Luhta*, 2001 WL 1528619.

After seeing disparaging comments about Rambam on the JDO Web page, Mr. Luhta, 18-years old, sent a threatening message to an e-mail address published on Rambam's own Web page. The e-mail suggested that Rambam should be killed and thrown in a ditch because he is an anti-Semite snitch. Rambam sued Luhta for making a threat in violation of Civil Code section 51.7 and for intentional infliction of emotional distress, and sued Luhta's parents for negligent supervision of their son's use of the Internet and e-mail. In his complaint, correcting the oversight in the *Jewish* Defense Organization case, Rambam alleged that he was a California licensed private investigator.

Defendants' motion challenging California jurisdiction was supported by a declaration from Luhta's mother, in which she stated that the alleged acts occurred in Ohio, and that her family had never resided or conducted business in California and did not have financial resources to litigate the action in California. The trial court granted Rambam an opportunity to suggest interrogatories for service on the defendants, but Rambam squandered this opportunity. The interrogatories he proffered would have sought "to determine visits to California, transactions with California, communications to California, business dealings with California, and Internet dealings with California hosted web pages, ISPs and web hosts." *Id*. at p.2. The trial court deemed them irrelevant to the proposed basis for jurisdiction and dismissed the complaint. As the specific jurisdiction analysis looks to the nature of the effects *in California* of the nonresident defendants' acts and not their contacts *with California*, the information that was sought was beside the point. The appellate court affirmed, saying "Plaintiff's proposed discovery could not have led to information establishing personal jurisdiction over defendants. Therefore, the trial court did not abuse its discretion in refusing to allow it." *Id*. at p.9.

The intriguing question about this second Rambam case is how the Court would have ultimately ruled had plaintiff's proposed discovery been directed toward supporting his claim under Civil Code section 51.7. Section 51.7 provides that "[a]ll persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of," among other things, religion, ancestry and national origin. Under the "effects test" even when a defendant only minimally intrudes into the

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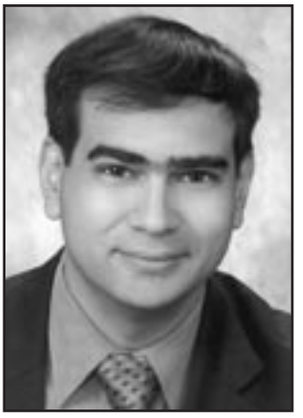
## Judicial Perspectives On Discovery Referees

California Code of Civil Procedure section 639 empowers a court to appoint a discovery referee if the judge "determines that it is necessary." The judges we spoke with expressed very different views about when to use a referee, and even whether it is ever appropriate to use one. As Judge Derek W. Hunt of the Orange County Superior Court put it, "Every judge's view about the use of discovery referees is idiosyncratic."

**The Framework**

Trial courts have "broad discretion to employ private referees without the parties' consent, to assist in resolving discovery disputes." *Taggares v. Superior Court*, 62 Cal. App. 4th 94, 100 (1998). Referees are an attractive option for courts faced with crowded dockets and increasing pressures to move cases quickly to trial. Discovery referees "give the overburdened trial courts the opportunity to utilize the paid expertise of retired judges in the resolution of complicated, time-consuming discovery disputes." *Solorzano v. Superior Court*, 18 Cal. App. 4th 603, 614 (1993).



**Russell I. Glazer**

The use of discovery referees has been subject to criticism from appellate courts and from commentators. *See, e.g.*, J. Evans, *Pay-As-You-Go Justice*, 11 Cal. Law 108 (1991). Discovery referees are expensive and can impose an extraordinary burden on parties who cannot afford them. As one appellate court has said, "The justice system not only must be fair to all litigants it must also appear to be so. The increasingly common practice of referring discovery matters, without regard to the financial burdens imposed upon litigants, threatens to undermine both of these goals." *Solorzano*, 18 Cal. App. 4th at 615. Apart from the expense, discovery referees can be perceived as an abdication of a judge's responsibility. In *Hood v. Superior Court,* 72 Cal. App. 4th 446, 449 (1999) the Court of Appeal held that a trial court may not use a discovery referee "in a routine tort action…to decide run-of-the-mill discovery motions."

Reflecting these concerns, the Legislature rewrote section 639 in 2000. Section 639 now requires that a referee may only be appointed upon the written motion of a party or on the court's own motion. Cal. Civ. Proc. Code § 639(a). The Legislature also added a provision making clear that parties may challenge a referee under Code of Civil Procedure section 170.6. § 639(b). Judges appointing referees must issue a written order, which includes a finding that "exceptional circumstances" require the reference and sets the maximum rate the referee may charge. § 639(d). In addition, section 639 now prohibits the appointment of discovery referees unless the court finds either that "no party has established an economic ability to pay a pro rata share" or that "another party has agreed to pay that additional share of the referee's fees." *Id*. Moreover, in July 2001, California Rule of Court 244.2 was amended to provide additional safeguards of a referee's neutrality. At least five days prior to the deadline for the parties to file a motion to disqualify a referee, the referee must disclose "Any significant personal or professional relationship the referee has or has had with a party, attorney, or law firm" in the

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case, including any services the referee has provided in the past 24 months. Rule 244.2(e).

**Referees Relieve Strain**

The Court of Appeal has held that referees should be reserved for "the unusual case where a majority of factors favoring reference are present, including "(1) there are multiple issues to be resolved; (2) there are multiple motions to be heard simultaneously; (3) the present motion is only one in a continuum of many; (4) the number of documents to be reviewed…make the inquiry inordinately time-consuming." *Taggares*, 62 Cal. App. 4th at 105. In practice, however, these factors frequently apply, leaving the decision whether to appoint a referee in the judge's hands.

Judge Malcolm H. Mackey of the Los Angeles Superior Court believes "there was an overuse" of referees before the Legislature amended the statute, but adds, "The Legislature has done a great job in improving the process." Judge Mackey thinks that courts should ordinarily handle discovery disputes themselves. "I try to do it," he says. But he notes, "We get forty new cases a month. We have a research clerk which is shared between two judges." As a result, in some cases discovery disputes can take an inordinate amount of a judge's time, especially in large cases or cases where lack of civility among lawyers and "scorched earth" litigation tactics foster acrimonious and complex discovery disputes, to which courts simply lack the resources to devote much time. Judge Mackey believes referees may be appropriate in such cases.

Judge S. James Otero of the Los Angeles Superior Court echoes these views. "I prefer handling discovery disputes on my own," he says. He has found that if the parties must present their disagreements to the trial judge, "It helps to reduce or minimize disputes." Judge Otero stresses that referees should be "the exception, not the rule." Nonetheless, Judge Otero believes "there are cases that lend themselves to discovery referees," namely cases which are unusually adversarial or complex. "Some cases are overwhelming" given the demands on a court's docket. In such cases, referees can lead to savings of cost and time.

Judge Hunt has never used a referee to decide discovery motions, and he never intends to. "A judge should know his case," he says. Even if it means reviewing one hundred interrogatories, the judge should "sigh deeply and take an hour to go through them."

Judge Mackey believes that a referee can offer important benefits to the parties. "In a major case, both sides want it. There is a demand for it." If the parties use a referee, "they get somebody who has a lot more time to go over minute matters." Using a referee also help clients because "the judge is not saddled with the hostility of the parties." Moreover, "the referee helps the judge evaluate the case." And, "if the referees are good they can help settle the case."

Judge Hunt disagrees. "It doesn't benefit the parties because they don't get the benefit of learning the judge's views of the case. It doesn't benefit the judge, because he doesn't get to learn the case." He believes that judges can cut short discovery battles by actively reviewing the parties' disputed discovery requests. "Lawyers frequently use boilerplate questions and boilerplate answers in discovery," Judge Hunt says. He believes that by ruling on motions himself, the judge can "cut through the boilerplate" and instruct the parties to provide the discovery that he thinks is appropriate. Judge Hunt edits the requests as he reviews them, supplying his own meanings to supposedly ambiguous terms in the requests.

**Importance Of Confidence In Referees**

Even when a referee is appropriate, "a discovery referee's report is advisory, not determinative." *Marathon National Bank v. Superior Court*, 19 Cal. App. 4th 1256, 1261 (1994). Thus, "the trial court must independently consider the referee's findings before acting upon the referee's recommendations." *Id*. For this reason, Judge Otero believes discovery referees only work when both sides agree to them. "It doesn't help when one side objects" because then it simply leads to "relitigation of discovery motions before the judge. What is important is that the lawyers perceive it to be appropriate." He will not appoint discovery referees without the consent of all the parties.

Judge Otero believes that the quality of the referee is crucial. "There are some discovery referees that are better than others." A good referee is "diligent, and will spend a lot of time with the parties at the outset." The referee must be willing to make "tough decisions" and "stand by a decision and make clear that the decision stands." It is also important that the referee have a reputation which is "appreciated by the lawyers." "The last thing I want to see is having the parties relitigate discovery issues" in the trial court after the discovery referee has resolved them.

The court need not hold a hearing on objections to referee's report and recommendations. *Marathon National Bank*, 19 Cal. App. 4th at 1259. However both Judge Mackey and Judge Otero always conduct hearings on parties' objections. "I have disagreed with a referee's report," Judge Mackey says, but "that doesn't happen that often." He observes, "You're appointing experienced judges, they are usually people on whom the parties have agreed."

**Referees At Depositions**

Judge Mackey believes referees are necessary at depositions if there is a great degree of hostility between the parties or their counsel. He fears "there could be fisticuffs" at some depositions unless a referee is present. "I've even had lawyers argue about who gets to go first." In cases like these, there is no practical alternative to having a referee preside at the deposition. "I can't be there," Judge Mackey says. "Having a referee handle the dispute there gives an orderly proceeding." Judge Otero agrees. "What we cannot do is hold when necessary the types of telephone conferences that can resolve disputes on the spot."

Judge Hunt has used discovery referees for depositions, but only as a last resort. If parties are unable to conduct depositions by themselves, Judge Hunt orders them to be taken in the jury room of his court, with directions to send for him if a problem arises. Judge Hunt will sit in on portions of the deposition, "so that the parties know I am watching." If these steps fail, he will enlist a retired judge to preside over the depositions.

**Discovery Referees In The Complex Courts**

The California Standards of Judicial Administration for Complex Litigation define complex cases as "those cases that require specialized management to avoid placing unnecessary burdens on the court or the litigants." Cal. Stds. Jud. Admin. § 19(c). In *Lu v. Superior Court*, 55 Cal. App. 4th 1264 (1997), the Court of Appeal ruled that it is always permissible to appoint a discovery referee in complex cases, even if there is no discovery dispute pending. The Court of Appeal reasoned, "Complex cases invariably involve complex discovery disputes and, unless managed, a case with many separately represented parties had the potential for burdensome and duplicative discovery. It is therefore appropriate for the case management order to provide for the appointment of a discovery referee under Code of Civil Procedure section 639." 55 Cal. App. 4th at 1269.

Judge Charles McCoy is a judge of the Complex Courts Division of the Los Angeles Superior Court. He views the judge's role in complex case discovery differently: "Complex cases require hands on management" by the court, he says. Judge McCoy says before he joined the complex courts in April 2000, "I used discovery referees in many cases and it was very appropri-

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ate." "I didn't have the time to devote to individual cases." Yet since joining the complex courts, he has never appointed a discovery referee, and "no one has asked for one."

"Complex litigation courts have the luxury of time," Judge McCoy says. "The most important resource we've been given is time to devote to cases." "We carry about the same total number of cases" as the other Los Angeles Superior Courts, but the complex courts carry "only approximately 40 grouped cases" *i.e.*, cases which are grouped together for case management such as product liability claims involving a particular product.

Judge McCoy explains, "In the complex departments, our discovery procedures are individually tailored case-by-case and the judges become very active in the discovery process from the very first meeting." Judge McCoy personally manages all of the written discovery in his cases. He stays all discovery at the outset of the case and then meets with the parties to decide which issues to tackle first. At the conclusion of the hearing, he directs parties to simultaneously draft and exchange discovery requests on that issue.

Judge McCoy orders the parties not to exchange letters about discovery disputes. "Nasty discovery letters are unnecessary." Also, there are no discovery motions in Judge McCoy's courtroom. Instead, he schedules a "discovery day," in which he goes through the parties' requests one by one. He asks the propounding party "why do you need it?" and the responding party "why shouldn't you answer it?" Then Judge McCoy decides to strike or order each discovery request. "In one day, you end up with court ordered discovery," he says. "Nine months of procedural wrangling is resolved in one day." Judge McCoy explains, "Now it's my discovery and I'm going to make sure you get it." The parties must provide a response or assert a privilege, "but they can't complain that its vague or ambiguous" or assert another boilerplate objection. If the parties want new discovery "they schedule a new discovery day."

Judge McCoy finds that, as a result of this process, the parties' discovery requests are "more targeted." "They don't waste time shooting for the moon. But they aren't the least bit hesitant" to ask for the discovery they think they need. He explains "I'm there to help you get what you need." So far it seems to work. No one has ever come back complaining that a discovery response is inadequate.

In Judge McCoy's cases the parties work out deposition scheduling on their own. "I can be called any time" if there is a dispute, but he says he is rarely called. "I solve real problems in real time." If necessary, "I will go to the depositions, if they are in town and I can drive there." He admits the process is exhausting, but says "exhaustion is a wonderful trade for efficiency."

**— Russell I. Glazer**


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## Attorney As Expert — Blurred Boundaries

To be admissible, expert testimony must assist the trier of fact in understanding the evidence or determining an important fact in issue. Whether the expert is an engineer or an attorney, the basic rules of admissibility are no different. Each must have specialized knowledge that will assist the trier of fact.

But when attorneys are the experts, their very presence in the courtroom carries with it certain inherent and inescapable risks, such as confusing the jury about the role of the judge, or even their own role as ultimate decision makers. As one court noted, "[t]here is a significant difference between an attorney who states his belief of what law should govern the case and any other expert witness… The jury may believe the attorney-witness, who is presented to them imbued with all the mystique inherent in the title expert, is more knowledgeable than the judge in a given area of law." *Specht v. Jensen*, 853 F.2nd 805, 808-809 (10th Cir. 1988).

**John W. Cotton**

As a result, courts continually struggle with application of the correct rules governing experts when attorneys are brought into the courtroom. This struggle is becoming more and more evident, as attorneys are now frequently in the courtroom to testify as experts in areas involving government regulation, foreign law, ethics and business conduct in general.

### Expert Opinions on an Attorney's Standard of Care

The one traditional area in which the courts seem to have the most experience and the least difficulty in dealing with attorney experts is in legal malpractice cases. When an attorney's competence is in issue in a jury trial, another attorney's expert testimony is allowed to establish the standard of care applicable to attorneys which is not typically within the understanding of lay people, and whether that standard of care was met. *Starr v. Mooslin*, 14 Cal. App. 3d 988 (1971); *Lysick v. Walcom*, 258 Cal. App. 2nd 136 (1968).

The *Lysick* court explained, "[e]xpert evidence in a malpractice suit is conclusive as to the proof of the prevailing standard of skill and learning in the locality and of the propriety of particular conduct by the practitioner in particular instances because such standard and skill is not a matter of general knowledge and can only be supplied by expert testimony." *Id*. at 156. Thus, attorneys are routinely allowed to render expert views on ineffective assistance of counsel, the reasonableness of fees, and the failure to include claims in a lawsuit. *See In Re Avena*, 12 Cal. 4th 694, 721 (1996); and *Jacobowitz v. Double Seven Corporation*, 378 F. 2d 405 (9th Cir. 1967). Indeed, without such expert testimony it is hard to imagine how a jury could reach a decision at all.

While attorneys may testify concerning the applicable standard of care, they may not testify in a fashion that suggests how the law should be applied to a given set of facts; *e.g.,* they are not permitted to render an opinion concerning which party should prevail in the case. *Downer v. Bramet*, 152 Cal. App. 3d 837, 841-842 (1984). Often this is a fine line in its practical application

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in the courtroom. In *Downer*, a divorced wife was prohibited from allowing an attorney-expert to testify regarding the proper characterization of a transfer of real property from her former husband's employer to her former husband as a gift or deferred compensation. The court reasoned: "[T]he calling of lawyers as expert witnesses to give opinions as to *the application of the law to particular facts* usurps the duty of the trial court to instruct the jury on the law as applicable to the facts, and results in no more that a modern day 'trial by oath' in which the side producing the greater number of lawyers able to opine in their favor wins." *Id*. at 842 (emphasis added). In the federal courts, the view is the same, "[e]ach courtroom comes equipped with a 'legal expert', called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards." *Burkhardt v. Washington Metro. Area Transit Authority*, 112 F. 3d 1207, 1213 (D.C. Cir. 1997).

A recent opinion by California's Fifth District Court of Appeal highlighted the reason for this concern. *Summers v. A. L. Gilbert Co*., 69 Cal. App. 4th 1155 (1999). The plaintiff in *Summers* was the widow of a man killed when a tractor trailer carrying a load of corn overturned, crushing the decedent's pick-up truck. During the wrongful death trial, the plaintiff called as an expert, "a lawyer specializing in the field of transportation… who had practiced primarily before the PUC." *Id*. at 1160. In what the appellate court suggested was a "tragedy" equal to the one that took the decedent's life, the lawyer was allowed to testify as to his opinions, among others, that the primary defendant had a nondelegable duty to ensure that this contractor operated a safe vehicle and was liable for the negligent hiring of an incompetent contractor. These opinions were inadmissible legal conclusions and consequently the $1.7 million judgment was reversed.

**Expert Opinions on Ultimate Fact Issues**

It is evident when reading the reported cases on attorney expert opinions, that discerning what is proper testimony presents frequent and difficult challenges to the bench. Creating some of the confusion surrounding the use of attorney experts is the often repeated admonition that while they cannot testify to ultimate legal issues, attorneys are not precluded from testifying about ultimate fact issues, which sometimes look quite like legal issues.

A good example of this confusion can be found in *Neal v. Farmers Ins. Exchange*, 21 Cal. 3d 910, 921-24 (1978). In *Neal*, the California Supreme Court concluded that two attorneys could render opinions on whether an insurer had failed to exercise the appropriate standard of care in settling an insurance claim. As was later explained in *Devin v. United Services Automobile Association*, 6 Cal. App. 4th, 1149, 1158, n.5 (1992), these opinions were admissible because they "involved opinions on questions concerning such factual issues as the promptness of the insurer's responses to settlement overtures."

Yet at the same time, the *Devin* court held that it was error to allow an expert to express an opinion at trial that a particular claim was covered by an insurance policy. In that case, the expert opined on whether a complaint alleged facts that constituted an "occurrence" or "accident" and whether the alleged damages constituted "property damage" or "bodily injury" within the meaning of the policy at issue. The court determined that such an opinion "which interpreted the terms of a written instrument - [was] purely a legal conclusion." *Id*. at 1157. To some practitioners, this seems a very inartfully drawn distinction when, as most trial counsel know, lawyers on the witness stand can sometimes turn an otherwise deadlocked case into a verdict.

Federal courts as well are not immune from the tendency to permit testimony on ultimate legal issues that masquerade as testimony on ultimate facts. Federal courts have allowed an attorney-expert to testify about another attorney's ethical responsibilities and the manner in which they influenced his or her conduct. In *In re Carlin*, 39 F. 3rd 1299 (5th Cir. 1994), the court partially overturned the conviction of an attorney who was accused of participating in the fraudulent capitalization of an insurance company. The defendant attorney sought to introduce the opinions of a commercial lawyer expert on the attorney's ethical obligations as they related to the disclosure of client confidences to a regulatory agency which impacted the issue of required regulatory capital. The *Carlin* court found the testimony not only admissible, but essential to a good defense for the attorney.

As seen above, the prohibition on expert testimony on ultimate legal issues often seems to be an elevation of form over substance. One quickly concludes that if the experts' mixed fact and law testimony is framed carefully, it usually can be admitted. Thus, while a court would rule as clearly inadmissible a bald assertion from the expert that the law in question could only be interpreted a certain way, the same testimony might come in if it

*(Continued on next page)*

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is buried in a series of mixed fact and law questions and answers on an ultimate issue. A discussion of this reality can be found in *Strong v. E.I DuPont de Nemours Co*., 667 F. 2d 682, 685-686 (8th Cir 1981), where the court refused to permit an expert's opinion that the product was "unreasonably dangerous," but only because the form, and not the content, of the proffered testimony was improper.

The *Strong* court gave a very focused example of the apparent conundrum with legal expert testimony: while the question " Did T have the mental capacity to make a will?" would be excluded, the question " Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would not be. *Id*. at 686. As with non-legal experts, the testimony of attorney experts can be framed in a way as to admit the very testimony thought to be excludable by strict application of the rule against opinions on the law.

**Jury versus Bench Trials**

Although not without exception, it seems that bench trials are more apt to allow testimony on ultimate issues of law, or mixed fact and law, into the record. In a number of jurisdictions, it seems to be the belief that outside the presence of a jury, legal expert testimony cannot be prejudicial, as the court will not be confused by the attorney expert's role. While lip service can be paid to this notion, in reality, a well-credentialed legal expert coming before the right court on the right case can easily influence a decision that might, absent that legal expert's testimony, never occur.

It is for this reason that many of the reported decisions where legal testimony seems routinely admitted involve non-jury trials concerning regulatory standards, or statutory analysis. Cases involving tax regulations and securities regulations are two areas where experts are seen more and more, rendering views that are as close to opinions on the law in the case as one could imagine. Such expert testimony can involve the tax consequences of a tender offer, what constitutes controlling shareholder status, the net capital required to run a brokerage firm and the disclosure requirements for a mutual fund brochure. *See Whittaker Corp. v. Edgar*, 535 F. Supp. 933 (N.D. Ill. 1982); *Sharp v. Coopers & Lybrand*, 457 F. Supp. 879 (E.D. Pa. 1978), aff'd in part, 649 F.2d 175 (3rd Cir. 1981); and *In the Matter of IMS/CPA's*, SEC Release No. 33-8031, Nov. 5, 2001.

But expert legal opinion testimony is not limited to just those involving tax and securities cases. Other areas where lawyers have attempted to give what amounts to expert legal testimony include mortgage law, gambling, and patents. *See U.S. v. Habel*, 613 F.2d 1321, 1328 (5th Cir. 1980); *U.S. v. Milton*, 555 F.2d 1198, 1203-04 (5th Cir. 1977); and *Black , Sivalls & Bryson, Inc. v. National Tank Co*., 445 F.2d 922, 926 (10th Cir. 1971). In some of these cases, the testimony was permitted, in others it was not.

**Conclusion**

For practitioners seeking to use lawyers as experts the practical goal seems clear: frame the questions and answers in such a fashion as to avoid the appearance of an opinion regarding which party should prevail. Instead, focus on the areas where the opinion can be argued as one concerning ultimate fact, not law. Areas such as the state of mind of the defendant, the history and meaning of a statute and the application of regulatory standards, among others, are susceptible of testimony that can be defended as merely ultimate issues of fact, yet carry with them subtle pronouncements of the law. While there is presently no bright line test or special rule regarding the use of legal experts, their increased appearance in court may in the future result in more strict rules to aid the courts in deciding what is permissible.

**— John W. Cotton and Aaron Gundzik**

## Close the Deal with Enforceable Offers and Settlements — Part 2

*(The first part of this article dealt with Statutory Offers to Compromise (ABTL Report, October 2001). Below is a discussion of procedures for enforcing settlement agreements.)*

California *Code of Civil Procedure* § 664.6 is California's settlement and judgment statute. It states as follows: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." § 664.6 provides two ways for a court to enter judgment pursuant to a stipulated agreement to settle: (1) in a writing signed by the parties, or (2) by oral agreement made before the court. *See Murphy v. Padilla* (1996) 42 Cal. App. 4th 707, 712. The California Legislature enacted § 664.6 in 1981 in order to create a summary, expedited procedure for enforcing settlement agreements. *See Levy v. Superior Court* (1995) 10 Cal. 4th 578, 585. The intent was to set certain requirements that would decrease the likelihood of misunderstandings.

**Craig A. Roeb**

**'Parties' Requirement**

In *Levy*, the parties' respective counsel signed a written settlement agreement, but the plaintiff himself refused to sign the agreement. *Id*. at 580. The Supreme Court held that the trial court properly denied the defendant's motion to enforce the settlement agreement, since the plaintiff refused to sign it. *Id*. at 586. The California Supreme Court noted that the reference in the statute to "parties" means the litigants themselves. It does not include their attorneys of record, nor does the signature of an authorized spouse satisfy the requirements of § 664.6. *See Williams v. Saunders* (1997) 55 Cal. App. 4th 1158, 1163.

Similarly, in *Cortez v. Kenneally* (1996) 44 Cal. App. 4th 523, the court noted the following: "Appellant was not present in court for the announcement of the settlement agreement, and so obviously did not personally agree to it as required by Levy. Appellant *did not personally sign* the written settlement agreement." *Id*. at 530 (emphases added). As a result, the court found that the settlement agreement did not satisfy the "party" requirement of § 664.6. *Id*.

In addition, neither signing a collateral document nor ratification through conduct passes muster under the "party" requirement. *See Account Management Associates v. Sanglimsuwan* (2001) 91 Cal. App. 4th 773. In *Account Management*, a settlement reached in court was reduced to writing in the form of a stipulation for judgment, under which the defendant was required to make monthly payments until the judgment was satisfied. *Id*. at 775. To secure the monthly payments, the stipulated judgment obligated the defendant to execute a deed of trust on his residence. *Id*. at 776. Although the defendant's attorney signed the stipulation for judgment, the defendant did not. However, the defendant did execute a deed of trust in favor of the plaintiff, and made 13 monthly payments to the plaintiff before defaulting, at which time the plaintiff filed an action to foreclose on the trust deed. On the day of trial, the defendant

*(Continued on page 8)*

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moved for a nonsuit on the ground that the stipulated judgment was not enforceable under § 664.6, because he never signed it.

The appellate court agreed, holding that a settlement lacking a party's signature is unenforceable. *Id*. at 777, 779. Significantly, the court rejected the plaintiff's ratification argument (predicated on the defendant's having made several monthly payments), by reasoning that such an exception would swallow the rule. *Id*. at 781. The court also found that the defendant's signature on the deed of trust did not satisfy the "parties" requirement under § 664.6. *Id*. at 778-79. The court emphasized that *Levy* created a "bright-line rule," explaining that, "In our view, if the litigant does not sign the document containing the terms of the settlement but instead signs a collateral document that does not refer to, or incorporate, the terms of the principal document, section 664.6 does not apply." *Id*. at 780 (emphasis added). Consequently, the settlement was unenforceable because the defendant did not sign the settlement agreement, nor was he present in court when counsel agreed to settle the case. *Id*. at 779, 781.

**James C. Chow**

Note, though, that an exception to the "parties" requirement occurs in construction defect cases. California *Code of Civil Procedure* § 664.7(a) permits enforceability of a settlement in a construction defect case that is memorialized in writing by the parties' counsel or made orally before the court provided the party's contribution is funded by insurance proceeds. The California legislature specifically designed § 664.7 to modify the holding of *Levy*. *See* § 664.7(b).

Another exception to the "parties" requirement may be settlements reached by authorized insurance defense counsel or an adjuster. In dicta, the court in *Robertson v. Chen* (1996) 44 Cal. App. 4th 1290 stated that *Levy* did not preclude enforcement pursuant to § 664.6 of an insurance-funded settlement reached by authorized insurance defense counsel or an adjuster, when the carrier has the contractual right to settle. The court found that when a defense is being provided without reservation by an insurance carrier, a settlement by the carrier within policy limits does not prejudice the substantial rights of the insured. In addition, the insured normally cannot either bind the insurer by the insured's own consent nor prevent settlement by withholding consent. For this reason, it is common practice for insurance counsel and an adjuster to handle the negotiation of insurance-funded settlements without the superfluous involvement of a fully protected insured. Consequently, the court suggested that § 664.6 would allow for an authorized insurance defense counsel or adjuster to sign a settlement agreement. However, this conclusion was not essential to the holding, and thus, remains dictum.

**Application Of Contract Rules**

A settlement agreement is a contract, and the legal principles that apply to contracts generally apply to settlement contracts. *See Weddington Prods., Inc. v. Flick* (1998) 60 Cal. App. 4th 793, 810. As with any contract, the settlement requires mutual consent. *See Weddington*, 60 Cal. App. 4th at 811; Hon. Robert I. Weil & Hon. Ira A. Brown, Jr., *California Practice Guide: Civil Procedure Before Trial* ¶ 12:955.5 (1999). The existence of mutual consent is determined by objective rather than subjective criteria, the test being "'what the outward manifestations of consent would lead a reasonable person to believe.'" *Weddington*, 60 Cal. App. 4th at 811 (quoting *Meyer v. Benko* (1976) 55 Cal. App. 3d 937, 942-43).

Moreover, in order to be binding, the agreement must be sufficiently definite to enable courts to give it an exact meaning. *Id*. at 811; Weil & Brown, *supra*, ¶ 12:955.5. A settlement agreement that incorporates other documents can be enforced pursuant to § 664.6 , but only if there was a meeting of the minds regarding the terms of the incorporated documents. *See Weddington*, 60 Cal. App. 4th at 814.

**Oral Settlements — 'Before the Court' Requirement**

As discussed above, an oral stipulation for settlement "before the court" is also enforceable under § 664.6. See § 664.6; Weil & Brown, *supra*, ¶ 12:691. In conformity with this mandate for personal litigant participation and assent, the Court of Appeal in *Johnson v. Department of Corrections* (1995) 38 Cal. App. 4th 1700, held that oral settlements also required personal approval by each affected litigant, and that approval or assent by attorneys is ineffective to bind the litigant. *Id*. at 1707-08. Further, consultation between a party and her attorney during the course of negotiations does not constitute the type of direct participation contemplated by *Levy. Id*. at 1709. The party must personally acknowledge the settlement to the court. *Id*.

Additionally, § 664.6 provides that the oral agreement must be recited "before the court." § 664.6. An oral agreement recited to a judge in the course of a settlement conference supervised by that judge satisfies the "before the court" requirement. *See Murphy*, 42 Cal. App. 4th at 712. By contrast, an oral settlement agreement reached at a mediation session cannot be enforced pursuant to § 664.6.

However, the phrase "before the court" under § 664.6 is not limited to formal court proceedings. *See Marriage of Assemi* (1994) 7 Cal. 4th 896, 909. It is sufficient that the settlement was reached in "judicially supervised" proceedings. (Emphasis omitted). For example, oral stipulations before a subordinate court officer meet the "before the court" requirement if (1) the court officer was empowered to act with an adjudicatory function; and (2) the court officer did in fact act in that capacity.

If a settlement is reached, the judge will usually cause the parties' agreement to be "put on the record." For example, *Los Angeles County Superior Court Rules* Rule 8.21 states: "If a settlement is reached, ordinarily, the terms thereof and consent thereto by the parties, as well as counsel, should be stated on the record."

Placing the settlement on the record means that the terms will be stated in open court, and taken down by a court reporter, or entered in the court minutes, or both. Note, though, that the settlement is enforceable by the court regardless of whether it was placed on the record. If either party fails to perform a settlement agreed to personally by the parties at the Mandatory Settlement Conference, the court may order judgment pursuant to the terms of the settlement. Weil & Brown, *supra*, ¶ 12:570.

Section 664.6 is not the exclusive means of enforcing a settlement agreement. *See Robertson v. Chen* (1996) 44 Cal. App. 4th 1290. Rather, it is a summary procedure available when certain prerequisites are satisfied. The procedure provides a more efficient alternative to resolution of disputes arising over settlement agreements. *See* Weil &. Brown, *supra*, ¶ 12:591. However, even when the summary procedures of § 664.6 are not available, a settlement agreement might be enforceable by summary judgment, a suit for breach of contract (perhaps prosecuted by means of a supplemental pleading), or a suit in equity.

Creating enforceable offers and settlements is attainable by understanding both the terms and the nuances of the applicable statutes and case law. This is critical for the successful litigator, as efficient resolution of cases permits more time for the 5% of cases that do not settle, and ultimately proceed to trial.

**— Craig A. Roeb and James C. Chow**

## *Insurance Carrier's Reservation of Rights*

*Continued from page 1*

right to seek reimbursement of defense costs and the right to withdraw from the defense — are discussed in the next issue.

*The Right To Deny Coverage For Any Ultimate Judgment*. First, carriers generally reserve the right to deny indemnity coverage to the extent a judgment is rendered on a basis that is not covered. This is fairly straightforward if the insured is found liable on a ground that clearly is not covered, *e.g.*, for willful misconduct or intentional fraud (*see* Ins. Code, § 533 [barring coverage in such circumstances].) The carrier, having reserved its right to do so, will not pay that portion of the judgment that on its face is not covered.

But what if the judgment is ambiguous as to whether it is premised on a covered ground (for example, what if there is a general verdict after presentation of claims that might be either covered or not covered)? To address that scenario, a properly drafted reservation of rights letter will also reserve the carrier's right not to be bound by any judgment against the insured. This means that if the judgment is ambiguous, the carrier will be free to litigate with its insured whether the basis for liability, in fact, was a covered or noncovered ground. "'[I]f the insurer adequately reserves its right to assert the noncoverage defense later, it will not be bound by the judgment. If the injured party prevails, that party or the insured will assert his claim against the insurer. [Fn. omitted.] At this time the insurer can raise the noncoverage defense previously reserved.'" (*J. C. Penney Casualty Ins. Co. v. M. K.* (1991) 52 Cal.3d 1009, 1017, quoting *Gray v. Zurich Insurance Co*. (1966) 65 Cal.2d 263, 279.)

Indeed, the carrier's reservation of the right not to be bound by the judgment will allow it to litigate the coverage question in its dispute with the insured even if the judgment against the insured is on an unambiguously covered ground. For example, if the sole claim the plaintiff presents and argues to the jury is one for unintentional negligence, the carrier, having reserved its right to do so, remains free to contend and to litigate with the insured (or with the plaintiff if the insured has assigned any rights against the carrier) whether the insured's conduct, in fact, was willful and not covered. (*J. C. Penney Casualty Ins. Co. v. M. K., supra*, 52 Cal.3d 1009 [even though plaintiff obtained judgment solely for negligence, carrier was free to prove uncovered willful sexual molestation].)

*The Right To Seek Reimbursement For Settlements*. These rules apply equally to settlements. The carrier generally will reserve the right not only not to be bound by any judgment but also not to be bound by any settlement. But how then is the case to get settled? Most plaintiffs are not willing to wait until the insured defendant and its carrier settle their coverage dispute before being paid.

The scenario often runs something as follows. The carrier is defending, having reserved its rights not to be bound by any judgment or settlement. The plaintiff makes a settlement demand. The insured defendant demands that the carrier settle the case by agreeing to pay the full amount of the settlement demand. At the same time, the insured defendant asserts that the full settlement amount is the carrier's sole responsibility and it will not agree to the settlement if it ultimately is going to be liable for any portion of that settlement.

The California Supreme Court recently addressed just this scenario in *Blue Ridge Ins. Co. v. Jacobsen* (2001) 25 Cal.4th 489. There, a carrier was defending its insureds having reserved its rights to contest coverage. The case involved a dog owned by the insureds that had mauled a young girl. The plaintiff presented a settlement demand within policy limits. It was not disputed that the amount of the settlement demand was reasonable. Unlike some insurance policies (*e.g.*, professional malpractice

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## Electronic Briefs: A Peek at the Future?

Like so many things in life, technology is both a blessing and a curse.

The Xerox machine, word processors, e-mail, real time reporting — and the like — while they have made many aspects of life and the practice of law so much easier, they are also burying lawyers and courts alike in ever growing and increasingly unmanageable mountains of paper. Case law, legislation, learned commentary, documentary discovery, depositions and the other tools of the litigator's trade are spontaneously multiplying like the Sorcerer's apprentice's brooms. And if that is not enough, depositions are now not only being reported in "real time" but are also frequently being videotaped. Add to this the ever-increasing complexity of many of the factual and legal issues now being litigated and the serious pressures imposed on an already overworked judiciary by our increasingly litigious society, and the challenge these factors pose to trial lawyers in efficiently and effectively communicating with both trial and appellate judges is monumental.

**Robert K. Wrede**

How can a lawyer faced with a war-room full of documents; bookshelves chock full of deposition or trial transcripts; volumes and volumes of case law, legislative history, law review articles and learned treatises; frequently numerous conflicting expert reports; discovery responses, myriad motions and other pleadings; trial transcripts and the trial "record;" and all the other accumulated detritus which complex litigation generates effectively and persuasively communicate his or her arguments to an already overburdened court?

One answer, which is rapidly gaining strong support among seasoned lawyers and numerous members of the judiciary, alike, is the electronic brief. An electronic brief is no more nor less than a digitized version of a traditional printed brief and accompanying appendices, PLUS pertinent case law and other legal authority cited in the printed brief AND any audio/video materials which are included in the "record" all of which have been digitally recorded on a CD, which can be loaded in the CD drive of any Windows-based PC or laptop equipped with a CD drive.

Whenever any bit of testimony, case law or other legal authority, documentary evidence, material to be judicially noticed, or any other pertinent material extrinsic to the brief itself is cited, the citation is "hyperlinked" to the item referred to so that, by simply "clicking" on the citation, the cited material is immediately (techies would say "seamlessly") displayed on the reader's computer screen, thus totally dispensing with the need to dig through the voluminous trial records, appendices or other "hard copy" material which generally accompanies printed briefs, motions or other argumentative pleadings. Moreover, audio/video materials are immediately available, also at the click of a mouse. In simple fact, navigating an electronic brief is as simple as surfing the Internet! For those needing a little help in navigating around an electronic brief, an on-screen user's guide is available. However, since the electronic brief screen looks like

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## *Electronic Briefs: A Peek at the Future?*

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popular web browsers (only simpler), most users require no training at all.

From the lawyers' standpoint, electronic briefs are powerful tools of communication and persuasion because they allow the reader to immediately refer to testimony, exhibits, authorities, and anything else which makes up the "record" without the need to sift through mountainous hard copies or to trot to the library to paw through (or have clerks trot and paw through) dust law books. All documents, transcripts and even audio/visual materials are IIMMEDIATELY accessible to the reader at a click of the mouse, thus eliminating the numerous interruptions that accompany the use of traditional printed briefs and allowing the reader to effectively maintain his or her train of thought and analysis.

From the courts' standpoint the benefits are numerous. Because every citation is hyperlinked, accessing data is instantaneous — no digging through hard to handle appendices, rummaging through boxes full of exhibits, trips to the library, or fumbling to load a tape or video player. Moreover, the entire "case" is totally portable — laptop and CD are easily carried and conveniently used just about anywhere. Perhaps most importantly, the "seamless", instantaneous switch from brief to cited material and back again allows the reader to maintain important trains of thought. Another extremely powerful tool is the ability to search the entire "record" for critical terms or passages, which can then be "cut and pasted" in the reader's word processing program, thus allowing easy preparation of notes and written analysis which the brief is being read. (In fact, full Boolean and proximity searches can be made of all text documents on the CD with results displayed in a hyperlinked list in a separate window.

Not surprisingly, lawyers and courts alike are coming to realize the value of electronic briefs as powerful and highly efficient tools of accurate communication, persuasion, and analysis. The United States Supreme Court, various United States Courts of Appeal and District Courts, and state trial and appellate courts, have entertained and even requested the use of electronic briefs. Not surprisingly, the entire set of filings in the United States Court of Appeals for the District of Columbia in *Microsoft v. United States* utilized CD-ROMs.

Any trepidation about judicial acceptance of this new technology should evaporate upon reading the following expression of judicial approval by Justice Talmadge, of the Supreme Court of Washington about their use in *Alcoa v. Aetna Casualty & Surety*:

> "[The electronic brief] greatly enhanced our ability to handle this case. The savings to the Court in time-motion efforts alone enabled us to retrieve and examine relevant parts of the record with ease, and made the record far more accessible than it would have otherwise been…We note that there is no reason why parties in more routine appeals to this Court should not seriously consider submitting the record and briefs to us in a similar format."

Given the undeniable trend toward using e-technology for document and case management, real-time reporting, OCRing, and the like, much of the work in transforming hard copies into electronic copies is already being done anyway. The move to filing important motions, trial briefs, post-trial briefs, and appellate documents will not take much.

Those interested in further investigating this exciting new technology should contact: RealLegal, the providers of "E-Brief," at www.reallegal.com, or (888) 584-9988, or TrialGraphix, the providers of "iBrief," at www.trialgraphix.com, or (888) 269-9211.

**— Robert K. Wrede**

## *Insurance Carrier's Reservation of Rights*

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policies), the policy afforded the carrier the right to settle without the insureds' consent. (*See generally Western Polymer Technology, Inc. v. Reliance Ins. Co.* (1995) 32 Cal.App.4th 14, 23-28 [without consent provision, carrier has right to settle even if insured claims business reputation will be harmed]; *New Hampshire Ins. Co. v. Ridout Roofing Co.* (1998) 68 Cal.App.4th 495 [without consent provision, carrier has right to settle even if doing so adversely affects insured's interest in limiting deductible expenditures].)

The insureds threatened the carrier with a bad faith claim and liability for any judgment in excess of the policy limits if it did not accept the settlement demand. At the same time, the insureds asserted that they refused to consent to the carrier settling unless it waived its reserved right to seek reimbursement from them for any settlement amount. The carrier, after offering the insureds the opportunity to assume the defense at their own expense, accepted the settlement demand anyway and sought reimbursement from the insureds.

The California Supreme Court held that the carrier had neither acted in bad faith nor waived its reserved right to reimbursement in settling over the insureds' objection where (1) it timely and expressly reserved its rights to dispute coverage and seek reimbursement; (2) it expressly notified the insureds of its intent to accept the proposed settlement; and (3) it expressly offered to the insureds that they could assume their own defense if they disagreed with the insurer's intention to accept the proposed settlement. Where a carrier meets these three conditions, it can settle a claim on which it has reserved its right to deny coverage and then seek some or even all of the settlement amount from the insured.

*Blue Ridge* expressly rejected arguments that the carrier acts as a volunteer and that the carrier has to write the reimbursement right into its policy language. The right to seek reimbursement for moneys advanced to pay uncovered liabilities is inherent in the policy and is preserved simply by expressly reserving it once a claim is tendered.

*Blue Ridge* also parted company with decisions in some other jurisdictions where the carrier arguably has to waive its reserved rights in order to settle a claim against its insured. (*E.g., Texas Assn. of Counties County Govt. Risk Management Pool v. Matagorda County* (Tex. 2000) 52 S.W.3d 128 [premised on carrier's right, not present in California, to obtain early determination of coverage issue while underlying claim against the insured is still pending]; *Mt. Airy Ins. Co. v. Doe Law Firm* (Ala. 1995) 668 So.2d 534 [contra to *Blue Ridge* as to whether carrier acted as a volunteer, but insured also not offered opportunity to assume defense]; *Medical Malpractice Joint Underwriting Assn. v. Goldberg* (1997) 425 Mass. 46 [680 N.E.2d 1121] [insured not notified of settlement or offered chance to assume the defense].)

There is one other caveat: The insured is free to contest the reasonableness of the settlement that the carrier reached. In the classic bad faith claim, the insured asserts that the carrier should have settled the claim within policy limits or coverage but did not, with the result that the insured is facing a judgment in excess of policy limits or coverage. In that circumstance the insured will claim that liability was reasonably certain and that the settlement amount demanded by the plaintiff was modest in comparison to the damages exposure. By contrast, where the carrier settles and seeks reimbursement from the insured, the insured will be in the position of asserting that liability was unlikely and that the amount the carrier paid was too much.

*Blue Ridge* greatly affects the dynamics among the insured, the carrier, and defense counsel in cases where the carrier is defending but has reserved its rights. It is now clear that an insured cannot demand that a carrier waive its reserved reimbursement right in order to effect a settlement or claim that the

carrier acts in bad faith by refusing to do so. Insureds — at least financially solvent ones — must walk a fine line.

On the one hand, to get the carrier to contribute to settle the case and to put the carrier at risk to cover any excess-of-limits judgment should a settlement not be effected, the insured will want to argue its potential liability and substantial damages exposure.

On the other hand, to keep the carrier from settling for a large amount that the carrier may then seek to recover from the insured under its reserved rights, the insured will want to downplay its liability and damages exposure. The result is that insureds and the counsel representing them are going to have to attempt to realistically evaluate and represent to the carrier the liability and damages exposure.

Both insureds and carriers are likely to want to settle coverage issues when settling the underlying case. Global settlements are generally more economical than ones that lead to further, follow-on litigation. Thus, it will be in both the insured's and the carrier's interests to resolve coverage issues at the same time the underlying case is settled.

Typically, this will mean that the carrier will waive its reserved reimbursement right in return for a contribution by the insured to the settlement. The result of this is that the evaluation of the ultimate coverage exposure and issues cannot be put off to the end of the case. *Blue Ridge* ensures that it is an integral part of the evaluating a case's settlement potential and posture.

*Blue Ridge* provides lessons for carriers as well. It provides leverage to carriers in settling cases where a substantial portion of the exposure is for uncovered wrongs or damages. It also, however, provides a checklist of what the carrier should do to preserve its reserved reimbursement rights when the insured refuses to consent to a settlement or conditions such consent on the carrier's waiver of its reserved rights. Assuming that it has timely and clearly reserved its reimbursement right, the carrier should make sure that it (1) informs the insured of the intended settlement, and (2) offers the insured the opportunity to assume the defense at the insured's expense. (*Cf. Novak v. Low, Ball & Lynch* (1999) 77 Cal.App.4th 278 [carrier's appointed counsel violates Civ. Code, § 2860 in assisting carrier in partially settling case without informing insured].)

**— Robert A. Olson**

## *Defining Internet Jurisdiction*

*Continued from page 3*

state and thereby minimally invokes its benefits, he may nonetheless be subject to California jurisdiction if the effects are of a kind that the state treats as exceptional and therefore subjects to special regulation. *Jamshid-Negad v. Kessler*, *supra*, 15 Cal.App. 4th at 1708. With a more skilled discovery plan, one focused on Luhta's ability to carry out his threat against Rambam, the trial court likely would have been required to permit Rambam to proceed with the proposed discovery. The trial court then would have had to evaluate the Luhtas' jurisdiction motion in light of the information the defendants provided in answer to plaintiff's interrogatories.

### Internet Message Boards

*Trade Disparagement*. In *Nam Tai Electronics v. Titzer* (2001) 93 Cal.App.4th 1301, an unidentified person, using various aliases, posted 246 messages on Yahoo!-maintained Internet message boards (sometimes called "chat rooms"), a few of which plaintiff claimed disparaged its reputation and thus reduced the value of its stock. Plaintiff was a consumer electronics products company based in Hong Kong, with its stock traded on NASDAQ National Market System.

Yahoo!, a California corporation, permits only those Internet users who register an alias known as a Yahoo! ID and electronically agree to Yahoo!'s terms of service to post to its message boards. The terms of service include a promise not to post any content that is unlawful, defamatory, libelous or otherwise objectionable. The terms of service further state that the relationship between the registered user and Yahoo! is governed by California law and that in the event of a dispute both parties agree to the exclusive jurisdiction of California courts.

After having filed a complaint for libel, trade libel and violation of Business & Professions Code section 17200 against a Doe defendant, plaintiff served a subpoena duces tecum on Yahoo! to learn the identity of the unknown author, and discovered the author was an AOL subscriber using a fictitious name. Plaintiff then obtained a commission for an out-of-state deposition of the Virginia custodian of records of AOL, and identified the author as Joe Titzer, whom plaintiff served at his residence in Colorado.

On Titzer's motion to quash service, the trial court determined that while California could exercise specific jurisdiction over nonresident Titzer, it would not serve California's interests to do so. To exercise California jurisdiction over Titzer under the circumstances was not "fair play and substantial justice." *Id*. at 1303. "The determinative question," the Court of Appeal said in affirming, "is whether the Web sites themselves [although hosted by a server computer physically located in California] are of particular significance to California or Californians such that the user has reason to know the posting of a message will have significant impact in this state." *Id*. at 1312. The plaintiff failed in asserting jurisdiction because it presented no evidence (1) that Titzer's messages "were directed at Californians or disproportionately likely to be read by residents of this state" or (2) that plaintiff's "relationships with residents of California were of particular importance to its business and likely to be impacted negatively" by the messages Titzer posted. *Id*. at 1312. Although the Yahoo! terms of service were enforceable to require that litigation between Yahoo! and its registered user be conducted in California, they did not govern disputes between registered users and third parties; in the absence of other significant contacts, they did not subject the Yahoo! user to California jurisdiction.

(Titzer's jurisdiction motion was inadvertently put in jeopardy by the trial court's scheduling of a status conference before the hearing date of the jurisdiction challenge. Nam Tai argued that defense counsel's appearance at the status conference, submission of a status conference questionnaire and acceptance of a trial date consented to the court's jurisdiction. The court of appeal held that it did not, noting that Titzer's counsel did not initiate any powers afforded a litigant in a California court. When the trial judge inquired what discovery the defendant contemplated, Titzer's counsel coolly responded: "If in fact we are obligated to defend in California, then I imagine that we are going to be doing some extensive discovery." While holding that "we do not believe appearance at a hearing whose purpose is to inform the court of the status of the case should be deemed a general appearance," the court of appeal nonetheless advised "it would have been better practice to postpone the status conference" when a motion challenging jurisdiction is pending. *Id*. at 308-9.)

Applying the *Zippo* rule of thumb to these four decisions, it appears that passive Internet posting is not enough for California jurisdiction unless the posted message invites conduct in which California has a significant concern; and that occasional interactive Internet communication also is not enough for California jurisdiction *at least* where the use does not differentially impact California or its residents. The cases also show how critical it is for the party asserting jurisdiction to tailor its allegations, discovery and declarations to the particular jurisdictional issues presented by its case.

**— Hon. Richard Fruin**

**Civil Procedure**

In *Gemini Aluminum Corp. v. California Custom Shapes, Inc.*, 2002 WL 172661, 2002 DJDAR 1443 (February 5, 2002), the Fourth Appellate District clarified the standard under which a prevailing defendant may be awarded attorney's fees in a misappropriation of trade secrets case. The Court of Appeal held that "bad faith" under Civil Code section 3426.4, the attorney's fees provision of the Uniform Trade Secrets Act, required "objective speciousness" of the plaintiff's claim, as opposed to "frivolousness," and plaintiff's subjective bad faith in bringing or maintaining the claim. The Court of Appeal, quoting from Webster's Dictionary, defined objective speciousness as "apparently right or proper: superficially fair, just, or correct, but not so in reality…" By contrast, frivolousness consisted of a standard by which "any reasonable attorney would agree it is totally and completely without merit."

**Raymond B. Kim**

**Employment**

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 122 S.Ct. 681 (2002), the United States Supreme Court addressed the issue of what an employee must show to demonstrate that he/she is disabled under the Americans with Disabilities Act, thereby obligated his/her employer to make reasonable accommodations for the disabled employee. In a unanimous decision, the Supreme Court held that an employee is substantially limited in performing manual tasks when the employee has an impairment that "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." In so holding, the Supreme Court made it clear that to qualify for protection under the ADA, an employee must demonstrate that his/her disability affects repetitive activities relating to his/her daily life, not just his/her job duties.

**Arbitration**

In *Blake v. Ecker*, 93 Cal.App.4th 728 (2001), the Second Appellate District held that the trial court erred in ruling on a defendant's motion to dismiss plaintiff's complaint for lack of prosecution after the trial court had previously granted defendant's motion to compel arbitration. The Court of Appeal stated that defendant's sole avenue for redress of plaintiff's failure to prosecute the arbitration was in the arbitration proceeding. Therefore, the trial court had no jurisdiction to grant the motion to dismiss.

**Appeal**

In *Cuenllas v. VRL International, Inc.*, 92 Cal.App.4th 1050 (2001), the Second Appellate District held that service of a minute order which notes the date of entry in the order but is not entitled "notice of entry" does not trigger the 60-day time period for filing a notice of appeal under California Rule of Court 2(a). Under California Rule of Court 2(a), a notice of appeal must be filed on or before the earliest of (1) 60 days after the date of mailing by the clerk of the court of a document entitled "notice of entry" of judgment, (2) 60 days after the date of service of a document entitled "notice of entry" of judgment by any party upon the party filing the notice of appeal, or (3) 180 days after the date of entry of judgment. In *Cuenllas*, the trial court served appellant with a minute order indicating the date of entry of an order denying appellant's motion to quash service of summons for lack of personal jurisdiction but that was not entitled "notice of entry." The Court of Appeal held that the minute order did not trigger the 60-day time period for filing a notice of appeal, and that appellant therefore filed a timely notice of appeal 92 days after entry of the order.

**— Raymond B. Kim**

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