

THE NINTH CIRCUIT ON TRIAL

Is There Any Valid Reason to Split the Ninth Circuit?

No members of the legal profession should understand more fully than your members the folly of recent efforts to split the Ninth Circuit. The Federal Bar Association, its chapters in Orange County and Los Angeles, and elsewhere in California, have all expressed opposition, as has the American Bar Association.



Hon. Mary M. Schroeder

A major problem with any restructuring proposal is that there is no sensible way to divide the Circuit because of the size of California. Currently pending are bills containing no fewer than five different configurations of new Circuits that would split the existing Circuit into either two or three parts, at great cost to lawyers, clients and taxpayers.

There can be no equitable division of the case load of the Circuit without division of California into different Circuits, because California has more than 70% of the current case load. There has never been a regional Circuit with fewer than three states (and 6 Senators). None of the other eight states wants to be left in a divided Circuit with California, and California certainly does not want to be left alone. We owe a debt of thanks to California's member of the Senate Judiciary Committee, Senator Feinstein, for spearheading the opposition and providing thoughtful analysis raising

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What Lawyers Must Do to Block the Split

I have it on good authority that Susan Sarandon does not care if the Ninth Circuit is or is not split. George Clooney obviously doesn't care, or we would have heard from him. Ditto, Barbra Streisand. (Not to mention the Dixie Chicks.) Where are the experts when we need them?



Thomas J. McDermott, Jr.

Who should care? The judges, of course, but also you and me and our clients. You've just read Chief Judge Schroeder's article, so you know that the judges of the Circuit care strongly and do not desire a split. Some politicians, very few of whom know hearsay from heresy, want the split.

So what about you, the trial lawyer? You are in the Ninth Circuit as often as you can get there, or as seldom as you can arrange, depending on your point of view and your clients' level of appreciation for the social contract. There are thousands of trial lawyers in the Ninth Circuit and we and our clients are the users of the court. The court is actually there for our clients and for us as the clients' surrogate, not the judges or the politicians. What do we have to say, keeping in mind that we should be speaking for our clients? What can we do to stop the split? I'll tell you later on.

**Lawyers and the Split**

The lawyers of the Ninth Circuit Advisory Board unanimously oppose the split. The lawyers attending the Ninth Circuit Judicial Conference overwhelmingly voted against the split at least twice. We lawyers, of course, are only spokespersons for the real users of the court — the American Public. The courts were established for the benefit of the American Public and the American Public pays for them. Why should the American Public care? Because any attempt by one branch of the government to muzzle the constitutional powers of another branch is not in their ultimate interests. Even though a person may believe the Circuit is too liberal — or may believe that California should be isolated as the split will do — remember that one successful interference with the justice system will lead to another, and another, and another. Judge Schroeder mentions the White Commission Report, a carefully balanced analysis of the charges against the Circuit (primarily, that it's too big). The White Commission Report said, in no

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these important points.

Thoughtful consideration of the issue, however, is sometimes lacking. Last fall a bill was pushed through the House, as part of a budget reconciliation package that would have left Hawaii and California in a Circuit by themselves. The budget reconciliation bill was in essence an attempt by the then House Leadership and Chairman Sensenbrenner of the House Judiciary Committee to bypass the Senate Judiciary Committee. The provision was taken out in Conference, but only after both the Chairman and the Ranking Member of the Senate Judiciary Committee jointly protested.

### **Imagine Different Circuit Law in S.F., L.A. and Orange County**

None of the proposals to divide the Circuit has seriously considered dividing California since the Hruska Commission Report did so in the 1970's. It is not difficult to foresee the costs, stresses and potential delays that would result from having different Circuit law in San Francisco, Los Angeles or Orange County. Forum shopping and confusion in the interpretation of California state law are the dismal probabilities that I need not elaborate on here.

Our judges don't want a division either. Only three of our 24 active judges have advocated any split, and recently 34 of our total of 47 active and senior judges, including all of our past, present and future chief judges, authored an article explaining why. Entitled "Federalism and Separation of Powers — a Court United," (published in Vol. 7, Issue 1 of *Engage*, at p. 63) it responded to the arguments of split proponents, including the contentions that division is inevitable. Our Judges said that argument ignores "the ability of people and institutions to adapt to inevitable changes in a complex world. *Id.*

The Ninth Circuit has indeed led the way in innovation and change. We pioneered the Bankruptcy Appellate Panel, now used in many Circuits. We began a system of issue identification and key word searches before computers were widely available. We have the capacity to handle large numbers of cases by spotting key issues early, getting them decided with precedential decisions, and then quickly and efficiently handling all of the cases raising the same issue.

The most recent comprehensive study of Circuit alignment was the Commission on Structural Alternatives, commonly known as the White Commission, after its Chairman, the late Justice Byron White. Its 1998 report recommended against dividing the Ninth Circuit although it did propose dividing the Court of Appeals into a series of rotating divisions so complex that no one seriously wanted to adopt them (which I suspect was the aim all along).

So why, if there is no feasible, equitable way to divide it, and if the bar and the judges don't want a division, and the experts have recommended against it, do efforts to divide the Circuit persist? I suggest there are three principal reasons, none of which is valid, and at least one of which is a threat to the essential Constitutional underpinning of an independent judiciary.

### **Ninth Opponents Led by Congressmen Outside the Circuit**

First and foremost, efforts to split the Circuit have been driven by particular decisions of the Court of Appeals that were unpopular in some quarters. The nature of those controversial decisions has changed over the years, but there is a common thread — all have involved cutting-edge issues that came first to the Ninth Circuit. In the 1960's and 70's these related to Native American rights and more specifically to fishing in the Pacific Northwest. In the 80's and 90's the unpopular cases related to the environment and the Endangered Species Act and, more specifically, the spotted owl. Most recently, religion in the schools, most notably the *Newdow* Pledge of Allegiance case, as well as several immigra-

tion decisions issued by our Court of Appeals, have been the newest areas of controversy. There can be little doubt that the current efforts to split the Ninth Circuit, led by a number of Congressmen outside the Circuit, is fueled by these particular decisions.

We don't make up these issues, but we do have to decide them. Every civil litigant who loses a case in the District Court has a right to appeal to the Ninth Circuit. In the more than five years that I have been Chief Judge, the Court of Appeals has decided more than 28,000 cases. Of these, approximately six have fueled the efforts for division. As an Article III judge who has sworn an oath to support and uphold the Constitution, to me the threat of division as punishment for such unpopular decisions carries an even deeper concern.

It is ironic that the attacks on the decisions are all attacks on the Court of Appeals, yet the actual proposals for division would dismantle the entire Circuit structure, leaving at least one or possibly two orphan Circuits with no staff or headquarters. It would leave the "California Circuit" with our super staff, perhaps, but without the available assistance we have now from dozens of District and Circuit judges outside of California, familiar with the same Circuit law, who can assist with the case load. As Chief Judge of the Circuit responsible for the administration, this possibility presents an administrative nightmare.

One of my heroes is the late, great Circuit Judge John Minor Wisdom of the Fifth Circuit. He opposed division of the Fifth Circuit. It eventually happened in the late 70's but it had its roots in Congressional opposition to the Fifth Circuit's desegregation decisions in the 50's and 60's, in which Judge Wisdom was a leading voice. He believed that Circuits should be large, so that the Circuit Court of Appeals could reflect diverse interests. He decried efforts to divide Circuits in order to create smaller courts that reflected only local interests. In an article after division of the Fifth Circuit, entitled "*Requiem for a Great Court*," 26 *Loyola Law Review* 788 (1980), Judge Wisdom said: "The federal courts rose to bring local policy in line with the Constitution and national policy. The federalizing role of circuit courts should not be diluted by the creation of a circuit court so narrowly based that it will be difficult for such a court to overcome the influence of local prides and prejudices."

Those who have wanted to divide the Ninth Circuit in order to create a Pacific Northwest Circuit that would be more friendly, for illustration, to timber or fishing interests, would deny the Ninth Circuit this federalizing role. That is a salient reason why the Circuit should not be divided.

There are some secondary reasons given for dividing the Circuit, but they also serve to highlight important reasons why the Circuit should remain intact. There is, for example, the misguided notion that the Circuits should all look alike; that the map of federal Circuits west of the Mississippi should look like the map of Circuits on the East Coast.

### **"You Can't Legislate Geography" – Judge Shirley Hufstедler**

But the western states don't look like the eastern states. The Circuits in the East were formed from the original 13 colonies, while the West has its roots in the Louisiana Purchase. This pro-split argument is most frequently phrased as "it's too big." But the truth is that any Circuit with Alaska is going to be larger than any other Circuit geographically, and any Circuit containing California is going to be larger than any other Circuit in case load and population. As Judge Shirley Hufstедler once said, "you can't legislate geography." And in the U.S.A. you can't legislate demographics either.

An argument related to size relates to our *en banc* process. For many years we operated quite happily with an *en banc* court of eleven, and recently began an experiment with fifteen judges on an *en banc* court. Congress by statute has authorized any court with more than 15 judges to use a limited *en banc* court,

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and we like it. We could adopt a rule that all of our active judges sit on each *en banc* court, but we haven't done so because we think the limited *en banc* is a better use of resources. We encourage other Circuits to try it. If there were to be a Circuit division additional judgeships would have to be created for California, and the California Circuit would use the limited *en banc* process. Nothing would be gained by splitting the Circuit except cost and confusion.

### Division Would Make Practicing Law More Complicated and Expensive

Finally, there is a lack of understanding of the real costs for lawyers and their clients inherent in Circuit division. The fact is that while the ire of a few in Congress is focused on a handful of the decisions from our Court of Appeals, all of the proposals are to dismantle the entire Circuit, including its staff, all of its District courts and the bankruptcy courts. The Circuit law for California would be different from that of its neighbors. Yet California does a lot of business with its neighbors. Lawyers should not be forced to track new and different Circuit law in bankruptcy or commercial litigation. The Ninth Circuit has become the home of intellectual property and technology, with Microsoft, Intel and the Silicon Valley. Division makes the practice of law and litigation more complicated and more expensive, with no commensurate gain in administrative efficiency. As the United States looks toward the Pacific for increasing foreign trade, and our major law firms are opening offices in Asia daily, the nation can benefit from the Ninth Circuit as an unfragmented source of federal law. Sure, the East Coast has been fragmented from the 18th century, but why, in the 21st century should we set out to create a similar system?

Technology and communication have made the business of court administration easier, not more difficult. In fact, Senior Circuit Judge J. Clifford Wallace of San Diego, who served with distinction as our Chief Judge a few years back, has outspokenly opposed division and has repeatedly suggested that the smaller Circuits ought to think about merging. As our judges said resoundingly in the recent *Engage* article: "yes, we are big and our territory is wide, but we have shown that we can function effectively and efficiently despite — indeed because of — our size...we have made size our friend rather than our enemy."

Thus, while there are numerous announced reasons for splitting the Ninth Circuit, none of them appears to be valid, widely supported, or empirically accurate.

— Hon. Mary M. Schroeder

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## Is Anything Left of Abuse of Process After *Rusheen v. Cohen*?

In February 2006, the California Supreme Court dealt a major blow to the tort of abuse of process. In *Rusheen v. Cohen*, 37 Cal. 4th 1048 (2006), the Court held that where a cause of action for abuse of process was based on the alleged filing of false declarations, post-judgment enforcement efforts were protected by the absolute litigation privilege. Specifically, the Court found that because the claim for abuse of process was based on the communicative act of filing allegedly false declarations of service to obtain a default judgment, the post-judgment application for a writ of execution and act of levying on property were protected by California Civil Code Section 47(b).

The Court's decision in *Rusheen* arose out of a series of litigation disputes that ultimately found their way to the California Supreme Court in the form of a review of the trial court's granting of an anti-SLAPP motion, and the lower court's reversal of that ruling. In *Rusheen*, the appellant, Terry Rusheen, had filed a cross-complaint against the respondent, attorney Barry Cohen, for abuse of process. Rusheen's abuse of process claim was based upon Cohen's representation of his clients in the pending lawsuit and in three earlier lawsuits against Rusheen. Among other things, Rusheen alleged that Cohen had made an illegal vexatious litigant motion against Rusheen, failed to serve a complaint properly, took an improper default judgment against him without proper notice, permitted his client to execute on the judgment in Nevada, and filed false declarations on the issue of service of process.



Eve M. Coddon

### Motion to Strike the Complaint

In response to Rusheen's claim for abuse of process, Cohen brought a motion to strike the complaint under the anti-SLAPP statute (Cal. Civ. Proc. Code § 425.16) on the ground that there was no reasonable probability that Rusheen would prevail because Cohen's conduct was privileged under Civil Code Section 47(b). The trial court granted the motion and entered judgment in favor of Cohen. The Court of Appeal reversed the judgment and found that the attorney's filing of allegedly perjured documents fell within the litigation privilege, but that the attorney's participation in an alleged conspiracy to execute on the resulting improper default judgment was unprivileged, noncommunicative conduct.

The California Supreme Court granted review to determine two issues: (1) whether actions taken to collect a judgment are protected by the litigation privilege as communications in the course of a judicial proceeding; and (2) whether a claim for abuse of process based on the filing of an allegedly false declaration of service is barred by the litigation privilege on the ground that the claim is necessarily founded on a communicative act. The Court answered both of these questions in the affirmative.

### Supreme Court Addresses anti-SLAPP Statute

The Court's analysis began with a discussion of the anti-SLAPP

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statute, which provides “a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights.” 37 Cal. 4th at 1055-1056. The Court reaffirmed that a cause of action “‘arising from’ defendant’s litigation activity may appropriately be the subject of a section 425.16 motion to strike.” 37 Cal. 4th at 1056, citing *Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 648 (1996), disapproved on other ground in *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 68 (2002). Further, under Section 425.16, a special motion to strike applies to “[a] cause of action against a person arising from any act of that person in furtherance of the person’s right of petition of free speech...” “‘Any act’ includes communicative conduct such as the filing, funding, and prosecution of a civil action.” 37 Cal. 4th at 1056.

### **Supreme Court Discusses Litigation Privilege**

The Court next considered the tort of abuse of process, which “arises when one uses the court’s process for a purpose other than that for which the process was designed.” *Id.* Abuse of process requires that the plaintiff establish that the defendant contemplated an ulterior motive in using the process, and committed a willful act in the use of process not proper in the regular conduct of proceedings. 37 Cal. 4th at 1057.

The Court next discussed the litigation privilege, which provides that “[a] privileged communication or broadcast is one made...[i]n any...judicial proceeding...” Cal. Civ. Code § 47 (b). The Court noted that the privilege applies to all torts except malicious prosecution, and is applied to any communication (1) made in a judicial or quasi-judicial proceeding; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that has some connection or logical relation to the action. 37 Cal. 4th at 1057, citing *Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990). Further, because the privilege protects only publications or communications, the “threshold issue” in determining the applicability of the privilege is whether the defendant’s conduct was communicative or noncommunicative. Thus, “the key in determining whether the privilege applies is whether the injury allegedly resulted from an act that was communicative in its essential nature.” *Id.* at 1058.

The Supreme Court found that the Court of Appeal had correctly concluded that the filing of an allegedly false declaration of service of process fell within the litigation privilege. However, the Court of Appeal had also determined that the gravamen of the action was not the submission of perjured evidence, but a “conspiracy” to enforce a judgment which “culminated in the noncommunicative conduct of enforcing the judgment.” The Supreme Court held that the lower court’s finding of noncommunicative — and therefore nonprivileged — acts was erroneous.

### **Litigation Privilege Applies to Postjudgment Collection Activities**

In holding that the litigation privilege applies to postjudgment collection activities, the California Supreme Court resolved the conflict in case law that existed between *Brown v. Kennard*, 94 Cal. App. 4th 40 (2001) (holding that the privilege protects both the process of applying for a writ of execution and the levy on the judgment), on the one hand, and *Drum v. Bleau, Fox & Associates*, 107 Cal. App. 4th 1009 (2003) (holding that the privilege applies to the writ of execution but does not extend to the subsequent, noncommunicative acts in levying on the property). The Court not only declined to adopt the analysis of the lower court in *Drum*, but strongly criticized its reasoning. “*Drum* assumed without analysis that the gravamen of the judgment debtor’s cause of action for abuse of process was based on the

physical act of levying on property, rather than on the communicative process of applying for the writ of execution. But it is arguable that the gravamen of the action there was the judgment creditor’s application for writ of execution in violation of the court-ordered stay, and that the subsequent levy on property during the stay merely resulted from the writ of execution.” *Rusheen*, 37 Cal. 4th at 1061.

### **Further Clarification of Litigation Privilege**

Turning to its analysis of the facts at issue in *Rusheen*, the Supreme Court found that the Court of Appeal failed to identify any allegedly wrongful conduct by Cohen *other than* filing the perjured declarations. Thus, “[o]n close analysis, the gravamen of the action was not the levying act, but the procurement of the judgment based on the use of allegedly perjured declarations of service.” Because the declarations were communications made in a judicial proceeding by litigants to achieve the object of the litigation and have some connection to the action, the litigation privilege applies. “[S]ince a party may not be liable for submitting false testimony or evidence in the course of judicial proceedings, which are used to obtain a judgment, the party should likewise be immune from abuse of process claims for subsequent acts necessary to enforce it.” *Id.* at 1062. The privilege therefore extends to necessarily related noncommunicative acts where the gravamen of the action is a privileged communication (namely, a false declaration).

Finally, the Court found that its holding was consistent with public policy established by Civil Code Section 47(b). The purpose of Section 47(b) is to afford litigants and witnesses free access to courts without fear of subsequent harassment; to encourage open channels of communication and zealous advocacy; to promote complete and truthful testimony; to give finality to judgments; and to avoid unending litigation. *Id.* at 1063. Thus, “modern public policy seeks to encourage free access to the courts and finality to judgments by limiting derivative tort claims arising out of litigation-related misconduct and by favoring sanctions within the original lawsuit.” *Id.*

### **Conclusion**

In summary, the Court’s holding in *Rusheen* affirms the Court’s desire to achieve finality of litigation and to limit derivative claims. The Court’s rationale, however, further clarifies that the other avenues for rectifying improper litigation tactics — such as sanctions, judicial oversight and even criminal prosecution — adequately address the concerns of aggrieved parties.

— Eve M. Coddon

uncertain terms, that the Circuit should *never* be split for political reasons:

“There is one principle that we regard as undebatable: It is wrong to realign circuits (or not to realign them) and to restructure courts (or to leave them alone) because of particular judicial decisions or particular judges. This rule must be faithfully honored, for the independence of the judiciary is of constitutional dimension and requires no less.”

### **No Congressional Polling on Split**

Congress is supposed to represent the American Public. But Congress has paid little attention to the lawyers who actually do represent the American Public that uses the courts. Congress has

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not reached beyond its own Beltway to poll its constituents. How many telephone calls and letters that you receive from Senators and Representatives — the ones that ask your opinion on taxes, gays, immigration, environment — have ever asked you about the courts? (Except, of course, if you believe they are too liberal.)

Congress is not soliciting your opinion or the opinion of the American Public because Congress is interested in splitting the Ninth Circuit for its own political reasons. Congress is mad at the federal courts in general and at the Ninth Circuit in particular because too often, in their opinion, the courts strike down their laws, or misinterpret their laws, or engage in some tenuous reading of either their laws or the Constitution. This opinion is understandable. Both the lawyers and the courts arguably have become co-conspirators in manipulating the law and the Constitution to arrive at “just results,” “just,” incidentally, in the opinion of one of the parties to the case, not both parties. “Hard cases make bad law.” This old law school maxim might be reconsidered. But even though here Congress’ position is understandable, it is not permissible. Members of Congress have myriad ways in which they can promulgate law to fit their point of view. Attacking the courts, a separate branch of the American government, is not the way to proceed.

Keeping in mind the old axiom that all politics is local, Congress’s second reason for attacking the courts is local. Certain interests in the Pacific Northwest want to be de-annexed from California where, they argue, the judges do not understand their local issues, such as fish, wildlife, water, timber and other areas. Although the concept that local judges are more in touch with local issues makes sense, all of these issues are first decided by the federal district trial judges who are local. A very small number of these cases are ever reviewed by the Ninth Circuit.

I wasn’t being facetious in my opening. Sarandan, Clooney, Streisand, they are all a part of the public. It’s the public that uses the courts. Any member of the public should be concerned about legislatures meddling in the justice system, particularly meddling aimed at a political end rather than some acceptable improvement.

You know the old joke: “In our family, I decide all the big issues. Shall we recognize Red China? Should the income tax be raised or lowered? My wife decides the smaller issues, such as where we should live and where the kids should go to school.”

### **Mobilize Your Clients**

Well, this is a big issue that is decidedly personal as well. The Ninth Circuit should not be split, absent a valid reason, and none has been put forth. If it is split, it will greatly affect you, me, and all of our clients. Mobilize your clients against the split. They vote.

Politicians will listen to the public. They will particularly listen to the public you most often represent, the corporations that use the federal courts. These corporations and their employees are extremely important to politicians because they often contribute to political campaigns, they exert great influence in their community, and they vote. As Judge Schroeder points out, it is this business community that will be significantly affected if the split should occur. The western United States needs a rigorous integrity of common law. I suggest you review Judge Schroeder’s article carefully and use some of her arguments to present to your clients as to why they should oppose the split. Ask them to become active and to approach their representatives in the Senate and the House by letter, telephone, or otherwise. The strongest possible way to block the split is to have the American Public oppose the split and to let Congress know that they oppose the split.

— Thomas J. McDermott, Jr.

## “Settlement Is an Exercise in Doubt”: Strategic Settlement Advocacy

**S**ettlement advocacy is a bit like chess and a bit like poker. Like those games, “winning” in settlement advocacy results from the “accumulation of small advantages.” You can have a losing case, but if you accumulate enough small advantages, you can “win” your settlement.

Risk is the currency of settlement. Parties discount their positions based on their sense of risk. Settlement advocacy seeks to create disparity in the parties’ relative sense of risk. This approach differs from a pure litigation strategy, where the sole object is winning at trial. Because risk translates directly into settlement concessions, each party tries to increase the other party’s sense of risk while hiding its own. Trial may be an exercise in proof, but settlement is an exercise in doubt.

### **Creation of an Integrated Litigation/Settlement Strategy**

You want to develop an integrated litigation and settlement plan. An integrated plan prepares you for trial and settlement simultaneously. You develop your integrated plan by asking yourself three types of questions — involving Time, Money and Information:

#### **Time**

- *How long might the litigation last (including appeals, if necessary)?* This factor ties directly into the Money factor (see below). Defendants often base their strategy on the plaintiff’s “staying power.” This factor sometimes depends on the chosen forum.

- *How much time away from more productive pursuits can the parties endure?* What goes on in a party’s business or personal life can have major impact on the litigation’s disposition. In settlement, parties routinely value the time they must devote to the litigation instead of family or work time. The out-of-pocket compensation costs are substantial enough, but lost opportunities can be even more costly.

An accounting malpractice case alleged defendant gave bad tax advice to the sellers of a business. Sellers had legitimate potential damages of \$20,000,000. Yet defendant obtained a settlement in the low millions. Defendant calculated — correctly — that the sellers, who still managed the business, needed to maintain the business’s profitability for the new owners. An ongoing lawsuit would have distracted sellers from that effort.

- *When is the best time to broach settlement?* Parties typically talk settlement at the beginning of the case, before they have spent much money, or after the completion of discovery, when they have developed the information they feel they will need for trial. But parties should consider settlement talks any time during the litigation when the risks magnify. Examples include before major motions (summary judgment, preliminary injunction), before other major expenditures (depositions), and, in one common situation, immediately before (or during) trial, on the “courthouse steps.”

- *How to broach settlement without appearing weak?* By including a “meet and confer” and/or mediation clause in their contracts, parties can avoid the appearance of weakness they sometimes feel when they suggest settlement to the other side. Instead, they can simply cite the contractual compulsion of the clause. In other cases, parties can cite the judicial compulsion of

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court-ordered mediation to avoid any personal weakness stigma. Regardless, the information you can obtain from the other side about its case, its witnesses, its negotiating style and strategy, and similar factors more than compensates for the apparent weakness; you are always free to reject any proposals and maintain your negotiating position.

• *Are there are other timing issues to consider?* Does the lawsuit affect a party's current reporting obligations under any regulatory system, such as the securities, antitrust, nonprofit, healthcare or tax laws? Is there a major transaction pending, such as a merger or a public offering, that the lawsuit may impede? What is the real estate or stock market's trend, and might the lawsuit's pendency adversely affect the market value of real property or securities?

In a case involving license rights under spinal surgery patents held by a Los Angeles physician, Medtronic Corporation settled a \$550 million adverse judgment for \$1.35 billion. Among the reasons for this non-intuitive result was that Medtronic wanted to report the transaction for financial accounting purposes in its current fiscal year, which was about to conclude. (*See, e.g.*, “Medtronic's Record Patent Settlement — Lemonade from Lemons,” *Mediation Perspectives*, April 2005, [www.bobsteinberg.com/publications/articles/medtronic.case.html](http://www.bobsteinberg.com/publications/articles/medtronic.case.html).)

Similarly, Research in Motion Ltd., the makers of the Blackberry remote email device, settled a patent suit brought by a patent-holding firm for \$612.5 million as its 2006 fiscal year was ending. (*See, e.g.*, “The Blackberry Settlement — Lessons in Settlement Advocacy,” *Mediation Perspectives*, March 2006, [www.bobsteinberg.com/publications/articles/Blackberry.html](http://www.bobsteinberg.com/publications/articles/Blackberry.html).)

### Money

• *How much money will the parties spend through each stage of the litigation?* Either party can unilaterally control the intensity of the litigation. The financially stronger party will often burden the less strong party with weighty discovery and motions.

• *How much money can the parties afford to spend on litigation?* The well-known “BATNA” — Best Alternative to a Negotiated Agreement — is a variant of this factor. How many chips a poker player — or litigant — has often determines the result of the game — or negotiation.

• *How much money outside the litigation is either party losing?* The pendency of a lawsuit can hurt a party's interests in ways that a favorable judgment may not fully compensate. Examples include business-sensitive cases (such as theft of trade secret or unfair competition cases) where the court refuses to grant preliminary injunctive relief; cases where property is tied up during favorable market conditions; and cases that affect merger or other acquisition talks.

• *How much money outside the litigation is either party gaining?* Some defendants can obtain a higher rate of return through their business or investments than the legal rate of interest. Since the time-value of money thus works in their favor, they may deliberately delay proceedings to minimize the ultimate cost of the litigation.

Exxon Mobil lost the jury trial of the Exxon Valdez oil spill case. Yet Exxon Mobil did not settle because the Alaska legal interest rate is far less than what Exxon Mobil earns on the judgment amount.

### Information

• *When and how will the parties acquire sufficient infor-*

*mation to justify their own position?*

• *When and how will the parties release information to maximize the persuasive impact of such information on the other party?*

• *Especially important, what non-litigation settlement information can you discover?* Such information might include the other party's personal predilections, its risk profile, its negotiating style, the negotiating style and litigation approach of its advocates and similar information. A party can factor this information into its integrated litigation/settlement strategy to determine when certain events should occur — the filing of motions, the taking of depositions, and the raising of settlement — that hold the greatest promise of pushing the other party into a favorable resolution.

One of the benefits of early settlement negotiations generally, and mediation specifically, is to discover this kind of information. Normal civil discovery will not tell you how a person negotiates or how sensitive he or she is to risk.

### Implementing Your Integrated Plan

Now you're ready to implement your plan. Each case is different, but here are some ideas:

• After your initial client interview, evaluate your case based on the known evidence. Because so much is yet unknown, and because your client has not yet sunk significant money into the litigation, you should substantially discount your first evaluation. This first evaluation will enable you to settle your case on a “rough justice” basis, should the opportunity arise.

• To obtain critical settlement information, conduct an early mediation (perhaps through a court program). Your object is not necessarily to settle (though if you can get your “rough justice” amount, your client should take it). Rather, your object is to:

- Find out as much as you can about your opponent's evidentiary case.
- Learn about your opponent's negotiating strategy, tactics and other behavior.
- Learn about the opposing party and what kind of witness he or she will make.
- Obtain an early objective read on the case from the mediator.
- Get some number from the other side that will become your target and understand your opponent's evidentiary basis for that number, so you can attack the evidentiary basis in the future.

• Create risk-magnifying events:

- Early “ponderous” discovery or discovery motions.
- Important motions involving jurisdiction, pre-judgment remedies, temporary injunctive relief, protective orders, evidence, demurrers (if you can dispose of material parts of the complaint), motions to dismiss or summary judgment.

• Time future settlement discussions (whether mediated or not) when your opponent's risks are greatest. Such moments might include:

- Before the hearing but after the filing of a major motion.
- Before a party must respond to a major discovery request.
- If a key witness becomes unavailable.

In one UCC Article 3 case, an elderly plaintiff claimed that the bank cashed his check for his life savings when it should have known that the man's caregiver was unduly influencing his cash-out decision. The key factor in the case evaluation was the likely sympathy for the plaintiff. When the plaintiff

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## Keep It Simple

*How Really Smart Litigators Get Boggled Down and Off Message in the Courtroom and What To Do About It*

**O**n July 11, 2006, at the Biltmore Hotel, the Los Angeles Chapter of the ABTL presented a lunch program titled “*KISS: Keep it Simple: How Really Smart Litigators Get Boggled Down And Off Message In A Courtroom, and What To Do About It.*” The panel of speakers included the Honorable Anthony J. Mohr of the Los Angeles Superior Court; trial attorney Brian O’Neill of Jones Day; Professor Doug Levinson, Business for Lawyers; and Katherine James, trial consultant for ACT of Communication.



**Natalie N. Adams**

### **There’s A Stranger Among Us**

Judge Mohr reminded us that when we, as litigators, reach the courtroom, the judge is a stranger to our case. We may have been working on the case for months, or even years, but the judge is entirely new to the story. Judge Mohr memorably likened it to his being a fifth grader and changing schools. He remembered sitting on the lunch bench and hearing his new peers discuss “Bobby’s home run,” and remembering feeling like an utter stranger.

Attorneys should present their case, plain and simple, whether they are explaining the case to a judge or a jury. Judge Mohr has observed that lawyers trying cases before juries do a far better job putting forth the facts and law of their case than with bench trials. He stated that he once denied summary judgment simply because the attorneys failed to clearly put forth the facts, and he could not make sense of the case. Only later in the proceedings was Judge Mohr able to realize that summary judgment was likely proper.

Finally, Judge Mohr also pointed out that attorneys should not forget the obvious things. For example, when arguing whether or not a specific document should be admitted, it is probably a good idea to attach the document to your motion, even if the document is already part of the record (no, he doesn’t lug the record home with him each night).

### **Know Your Audience and Help Them Do the Right Thing**

Brian O’Neill followed Judge Mohr, and stressed the importance of paring down a complex set of facts into a workable story, which both familiarizes the judge and jury to the case, and helps them reach a just decision. O’Neill stressed that the single most important element of rhetoric is knowing your audience. Juries are made up of smart, curious people who want to do the right thing. Your job as an attorney is to give the jury a grasp of even the most complex facts. At the end of trial, if the jury lacks a working knowledge of the minutia of your patent infringement claim, for example, it is not because the jury is stupid, it is because you failed to adequately explain it to them. The same rule applies to judges.

Even the most complex facts can — and should — be boiled down to ten simple bullet points. O’Neill recommended that when faced with a new case with complex facts, the attorneys should take time to digest the facts, and then sit down in a conference room for no more than one hour and boil those facts

down to ten bullet points. These are your facts. Once you cut out a fact, leave it out.

O’Neill described a case on which he worked, in which the relevant facts spanned a period greater than 20 years. Over the years, the client had sought advice from a handful of the nation’s most prestigious law firms and conducted a vast amount of business in worldwide financial markets. The client was indicted under an obscure provision in the California penal code that no one — neither the prosecution nor the defense — understood. Because of the complex players, transactions, and law, O’Neill recognized that the only way the client could prevail was to identify a simple theme, and then work only the relevant facts into that theme. There is no need to give every fact over the last 20 years, just those relevant to the story, something like this:

### **Statement of Facts**

This is a case about a young entrepreneur (hereafter, “Executive”) with great vision but less clear judgment. While still in his late 20’s, the Executive recognized a terrific business opportunity when the savings and loan industry began to fail. He was able to raise a significant amount of Wall Street and pension fund money for the purpose of buying bundled loans, improving the credit worthiness of the loans and then either keeping the loans or reselling them to banks and other financial institutions. Ten percent of the pension fund money he raised had to be retained in a reserve account and could be released only by the manager of the fund (“Pension Fund Manager”). The Pension Fund Manager separately entered into a personal financial transaction with the Executive according to which the Executive loaned the Pension Fund Manager several million dollars secured by personal property.



**Heather R. Barber**

Problems arose when there was a worldwide tightening of the financial markets and the Executive’s positions became highly leveraged. He was forced to liquidate most of the loan pools at a great loss. During this debt crisis, the Executive needed access to the pension fund reserve money in order to keep his company afloat. The Pension Fund Manager agreed to release the reserve money on the condition that the Executive extinguish the personal loan obligation. In the end, the Executive’s company was saved but the pension fund lost hundreds of millions of dollars. All of the above transactions were documented by the finest law firms in the Western United States and several major accounting firms including Arthur Anderson.

New counsel for the pension fund brought a series of civil lawsuits against the lawyers and accountants on all sides of the transactions, as well as our friends the Executive and Pension Fund Manager. These latter two were also indicted for a variety of offenses including mail fraud and criminal ERISA violations.

### **Hold the Jargon...**

Professor Doug Levinson’s presentation brought home the point that no matter how complicated an issue, it can be simplified for non-lawyers. Levinson is in a unique position in that he has taught both business concepts to lawyers, and legal concepts to business students. The first and most important step in keeping it simple is regaining your naivete — that is, remembering what it’s like to not talk like a lawyer. Levinson went on to give various examples of how to explain complex legal and business concepts, such as the dreaded topic of macroeconomics, without using jargon.

Katherine James emphasized the advantages of using storytelling in presenting cases to a jury, using the “Ten Word Telegram” to reduce the theory of a case to 10 simple words that focus on the parties, the wrong, and the solution. James then applied the “Ten Word Telegram” technique to the case O’Neill described: • Kids • Trust • Lawyers • Accountants • For • Good • Advise • Crime? • Free • Them.

— Natalie N. Adams and Heather R. Barber

## Employers Beware of the Squeaky Wheel

**M**ost Californians are well aware of the enormous jury verdicts against and settlement payments made by various employer-defendants in wage and hour class action lawsuits. But what many California employers do not understand, or want to admit, is that it is not just large companies like Farmers Insurance (\$90 Million jury verdict), PacBell (\$35 Million and \$27 Million settlements), Payless Shoes (\$4 Million settlement), Taco Bell (\$9 Million settlement) or Starbucks (\$18 Million) that are defendants in these cases. Indeed, virtually every employer in California is at risk of being embroiled in a wage and hour class action lawsuit.



**Michelle Lee Flores**

### **Employee Complaints Can Create Class Actions**

Employers should realize that an employee can single-handedly turn his or her personal complaint into a class action lawsuit that will question the employer's pay practices for a certain group or groups of its employees. For example, an employee that has the title of "manager" can question the pay practices for every manager employed during the last three years and often four years, depending on how the claims are styled. Most often a manager claims he or she was misclassified as exempt from overtime pay and as a result, is owed back pay based on a variety of wage claims and penalties. It does not, however, stop there. The plaintiff-manager also asserts that since he or she was misclassified, every other manager that has worked for the company during the last four years was also misclassified as exempt from overtime and is also owed back pay and penalties.

### **Common Claims for Class Actions**

Employers should know that a run-of-the-mill misclassification class action brought in California could seek damages based on claims that the employer failed to: (1) pay for all hours worked; (2) pay overtime; (3) pay minimum wage; (4) provide required meal breaks and rest periods; (5) provide itemized wage statements; and (6) pay former employees all wages owed upon termination or resignation. Another very common claim is that based on these purported failures, the employer engaged in unfair business practices in violation of California's Business & Professions Code §17200. This allows a plaintiff to demand back pay for four years instead of three. Claims for damages may include daily and weekly overtime, payment for all hours worked, minimum wage based on all hours worked and payment for working lunches. Plaintiffs can also assert that employers should pay one hour of compensation for the failure to provide meal breaks and rest periods, waiting time penalties of a maximum 30 days of pay for each employee in the purported class that was not paid according to these regulations when they resigned or were terminated. In addition, plaintiffs claim that employers should be penalized for failing to provide itemized wage statements reflecting all hours worked including those that should have been paid at a premium, plus punitive damages. Unfortunately, employers have a difficult time accepting that one disgruntled employee can create a claim in which he or she represents all the similarly situ-

ated employees that have worked at the company during the last four years and asserts that the employer is liable for millions of dollars in wage and hour violations.

### **The "one hour of compensation" Clause**

It is important to note that one of the more costly aspects of the potential damages in a California wage and hour class action is the alleged "one hour of compensation" for failure to provide a rest or meal break. Specifically, California Labor Code section 226.7 provides that employers must pay an additional one hour of compensation for failure to provide a meal period or a rest break. Whether or not this "hour of compensation" is a "penalty" or a "wage" is presently before the California Supreme Court in *Murphy v. Kenneth Cole*, review granted, previously published at 134 Cal. App. 4th 728 (2005). The significance of such distinction lies in the statute of limitations that applies to penalties, which is one year, or wages, which is three years and in some cases four years. Furthermore, a claim for attorneys' fees is not available if based on a "penalty" pursuant to Labor Code section 226.7 as compared to "wages" pursuant to this same code section. The difference in the monetary calculations of potential damages can be enormous in class action lawsuits.

We all know that the best defense is a great offense. As such, employers should have an understanding of their own policies and practices concerning payment for hours worked and apply the same scrutiny to these practices that a plaintiff's attorney may eventually place on them. Just because an employee is paid a "salary" does not mean that the individual qualifies as exempt from overtime pay and meal break and rest period requirements. In California, the most common exemptions are for administrative, executive (including managerial) and professional employees. Problems arise when the "salaried" employee claims that he/she does not, in fact, qualify under one of the recognized exemptions and further claims he/she has worked more than eight hours a day, more than 40 hours a week and did not take at least a one-half hour lunch break upon working five hours, or did not take a 10-minute rest period for each four hours worked.

### **The "improper classification" Threat**

It is often said that improper classification is the most common and most costly threat made against employers. Employers must recognize the reality of exposure for attorneys' fees in defending such actions, let alone if damages are proved. Clearly, employers are not without defenses to liability and arguments to reduce the claims for damages; however, the typical practice of paying your hard working employees a bonus at the end of the year to "make up for it" will not eliminate liability or reduce damages. Employers can vigorously defend these actions by proving that they indeed maintained proper paperwork and have always made sure people are working consistent with their job descriptions. Another good defense is to show that managers were trained in time keeping and pay practices and supervised employees consistent with these policies. Employers can also defend these actions by showing that indeed that the plaintiff and the putative class members were authorized and permitted to take rest breaks, and if they chose not to, it was voluntary on their part. Finally, employers can defend an action by showing that in fact the representative plaintiff/employee was not performing as required and, as such, is the only employee that was not performing the requisite amount of exempt duties. Indeed, and is often the case, is that the plaintiff's claims as alleged are not typical (*i.e.*, relatively the same) as the alleged putative class members and as such the plaintiff is not an adequate representative of the putative class. Accordingly, it is best to conduct periodic self-audits of pay policies and practices, especially with regard to "salaried" employees who are not paid overtime, and record keeping practices.

— Michelle Lee Flores



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## The Iron Curtain: Protection from Personal Liability?

If you are anything like me, sitting through a semester in law school learning the benefits of establishing an S-Corp as opposed to an LLC was less than exciting and required quite a bit of caffeine. That was, until our professor began discussing the proverbial protection provided to officers, directors and shareholders of a corporation by way of the corporate veil. It was described as an iron clad curtain possessing some magical power which shielded corporate officers, directors and shareholders from personal liability in connection with the wrongdoing of the corporation. Needless to say, the first time the professor mentioned the ability to “pierce the corporate veil” the entire room erupted in laughter. Once things settled down, we learned that in actuality, the protection offered by the corporate veil is quite powerful until it is pierced. The myth carried away from law school was as follows: Once the corporate veil is pierced, *everyone* behind the curtain is exposed to personal liability.

### Piercing a Corporate Veil

As practitioners, we know the insurmountable evidence required to actually pierce a corporate veil. Alleging that an individual is the *alter ego* of a corporation by setting forth the standard boilerplate allegations that the separateness between the individual defendant and the corporate defendant has ceased and that the individual defendant is actually the *alter ego* of the corporation may be enough to circumvent the standard demurrer, but not nearly enough to win a case at summary judgment or trial.

The landmark California case of *Associated Vendors, Inc. v. Oakland Meat Co.*, 210 Cal. App. 2d 825, 837-40 (1962), set forth numerous factors which courts have considered in determining whether to disregard the corporate entity and impose personal liability under the *alter ego* theory.

### Factors Considered in Imposing Personal Liability

The factors reviewed by the Court were as follows:

Commingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses; the treatment by an individual of the assets of the corporation as his own; the failure to obtain authority to issue stock or to subscribe to or issue the same; the holding out by an individual that he is personally liable for the debts of the corporation; the failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities; the identical equitable ownership in the two entities; the identification of the equitable owners thereof with the domination and control of the two entities; identification of the directors and officers of the two entities in the responsible supervision and management; sole ownership of all of the stock in a corporation by one individual or the members of a family; the use of the same office or business location; the employment of the same employees and/or attorney; the failure to adequately capitalize a corporation; the total absence of corporate assets and undercapitalization; the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation; the

concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities; the disregard of legal formalities and the failure to maintain arm's length relationships among related entities; the use of the corporate entity to procure labor, services or merchandise for another person or entity; the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another; the contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions; and the formation and use of a corporation to transfer to it the existing liability of another person or entity... (Citations omitted)

Needless to say, when I was asked to explore the potential liability of a shareholder (the “Client”) of a pierced corporation, I stated with absolute certainty that if the curtain has fallen, the Client is exposed. Nevertheless, I began extensive research on the issue. The facts I had to work with were as follows: The corporation at issue had ten (10) shareholders; Client was a minority shareholder; Client paid for shares of stock which were never issued; Client was never an officer, director or employee of the corporation; Client was never involved in the day to day operations of the corporation; Client was never consulted with in connection with making any decisions for the corporation; Client never maintained an office at the corporation; and Client never received any benefit from the corporation.



Elsa Horowitz

### Some Courts Unwilling to Hold Nonculpable Shareholders Liable

The more I considered these facts, the less equitable it seemed holding the Client personally liable for the liability of the pierced corporation. In fact, Enron-type scandals are becoming more predominant in the news. Can you imagine if all of Enron's shareholders were held culpable for Enron's actions? Clearly, there had to be case law to support this proposition, and I was determined to find it. In fact, much to my surprise, even where it is appropriate to pierce the corporate veil, some courts have been unwilling to hold a nonculpable shareholder liable for other shareholders' actions even if that party has benefitted from the wrongdoing. For instance, in *Firstmark Capital Corp v. Hempel Financial Corp.*, 859 F.2d 92, 94 (1988), the court held that “[t]he fraud or inequity sought to be eliminated must be that of the party against whom the alter ego doctrine is invoked, and ‘such party must have been an actor in the course of conduct constituting the “abuse of the corporate privilege”....” (citations omitted). (Emphasis added.) In Firstmark, the facts were as follows: Nancy and Bruce Hempel were married. Mr. Hempel owned 95% of the stock in Hempel Financial Corporation (“HFC”), Mrs. Hempel had a community property interest in her husband's shares. Mr. Hempel was president and CEO of the corporation. Mrs. Hempel held no corporate office at anytime.

HFC entered into several agreements with Firstmark whereby HFC was to remit monthly lease payments from doctors to

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## Protection from Personal Liability?

Continued from page 9

Firstmark. HFC and Mr. Hempel failed to make the required payments. Ultimately, the court found that HFC and Mr. Hempel defrauded Firstmark and converted funds owed to Firstmark to their own use. An *alter ego* relationship between Mr. Hempel and HFC was stipulated to be based upon the fact that HFC was undercapitalized; corporate formalities were disregarded; Mr. Hempel used corporate funds for his own and Mrs. Hempel's personal uses; and equity ownership and corporate control was in Mr. Hempel's hands.

The district court found that Mrs. Hempel benefitted from Mr. Hempel's actions, as her interest in HFC was based solely on her community property interest in Mr. Hempel's shares. Despite the fact that the district court found that Mrs. Hempel did not participate in any decision making ability, it imposed on Mrs. Hempel *alter ego* liability equal to that of Mr. Hempel, excluding liability for fraud. The Ninth Circuit had to determine whether Mrs. Hempel could be held liable as an *alter ego* for her mere passive receipt of the benefits arising out of Mr. Hempel's conduct. In its ruling, the Court ultimately stated that despite proving Mrs. Hempel's ownership interest in the corporation, more was required to hold her as the *alter ego* of the corporation. Specifically, relying in part on the holding in *Riddle v. Leuschner*, 51 Cal. 2d 574, 580 (1959), the Court found that Mrs. Hempel's ownership interest in the corporation that was the *alter ego* of her husband was insufficient to make her personally liable, as the *alter ego* of HFC. See also *Am. Home Ins. Co. v. Travelers Indem. Co.*, 122 Cal. App. 3d 951 (1981) [the court refused to apply the *alter ego* doctrine against Travelers Indemnity Company because it was not a party to any inequitable conduct].

I am still unsure how the court will ultimately rule with regard to the Client, but here is some food for thought...The next time you are retained to represent a shareholder, officer and/or director of a corporation where allegations of *alter ego* have been set forth, verify whether your client actually was an active participant in abusing corporate privileges, not just caught behind the curtain once it fell.

— Elsa Horowitz

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## "Settlement Is an Exercise in Doubt"

Continued from page 6

died two weeks before the mediated settlement discussions, the defendant bank slashed its case evaluation.

- Before some extra-judicial event (for example, a merger, property sale, or financial reporting obligation).
- When a party becomes short on money (sometimes evidenced by a change of counsel or reduced litigation efforts).
- Under the threat of adverse publicity (although in practice, this factor is often overblown).
- When other business needs become paramount.

### The Importance of Periodically Re-Evaluating Your Case

To track the monetary results of your efforts, you should conduct periodic re-evaluations that reflect the changing risk assessments. Many of you are familiar with a probabilistic approach to case evaluation. (See, e.g., "What's My Case Worth in Settlement?", *Mediation Perspectives*, April 2005, [www.bobsteinberg.com/publications/articles/case.evaluation.html](http://www.bobsteinberg.com/publications/articles/case.evaluation.html).) This approach results in an "Expected Value" to the litigation — the weighted average of all possible trial results assuming you tried the case infinite times.

Periodic re-evaluations are useful for the following reasons:

- The initial evaluation helps you determine whether to pursue a case at all, given the costs involved.
- Subsequent evaluations help you determine whether to pursue a particular motion, analysis, or discovery — in other words, whether the cost of any such action is justified by the gain in Expected Value.
- Periodic re-evaluation helps you determine at what Expected Value settlement becomes preferable to trial.

Re-evaluating over time enables you to track the effect on Expected Value of the various decisions you and your opponent make during the litigation. By this means, you can choose your best times to talk settlement.

- Evaluations help you budget the costs of litigation.
- Business clients understand and prefer this analytic approach.

### How to Assess Probabilities of Success

The difficult question for counsel is how to assess the likelihood of plaintiff winning at trial and the likelihood of plaintiff obtaining any given damage award.

You start by identifying each critical issue necessary for you to win at trial. Under each, you should separately list each reason why the plaintiff would win on that issue and each reason why the defendant would win on that issue. You should drop your advocate's role and think like the judge or jury will think. That means you should consider other reasons than the mere logical weight of the evidence:

- How credible is each side's testimony or documentation on that issue?
- How sympathetic is one side's case, regardless of the law?
- How likely is it that the judge will permit the introduction of certain evidence?
- How does the judicial forum or jury pool affect the possible outcome?
- How good a trial lawyer is the opposing counsel?
- How complex is the evidence, and how likely is it that the judge or jury will follow your case?

While statistical theory instructs you to multiply the probability of winning on each issue by the probability of winning on each other issue, in practice that results in an unrealistically low collective probability of winning the entire case. (For example, if you have three critical issues, and you have assessed each at a 75% chance of winning, then, statistically, your collective probability of success is only 42% (75% x 75% x 75%).)

Experience suggests that judges and juries make a holistic assessment of who should win and will do what is necessary, within reason, to achieve the desired result. Thus, the more practical approach is to conclude that the issue with the lowest probability of success will control the entire case. In our example, that would be 75%. But because the possibility you could lose one of the other issues remains, you should discount that figure — perhaps by an additional 15% — giving you an overall probability of success of 60%.

### Conclusion

A pure litigation strategy focuses only on winning at trial. An integrated litigation/settlement strategy focuses also on increasing the other side's sense of its risk. You can gain a favorable settlement, even with a poor hand, by finding ways to litigate that specifically enhance your settlement prospects.

— Robert A. Steinberg



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## Letter from the President

With this edition of *abtl Report*, my term as President of the Los Angeles chapter comes to a close. I write to thank you for a wonderful and gratifying experience that will always be a highlight of my professional career. The opportunity over the past eight years to work closely with so many leaders of the Los Angeles business trial bar, and the wonderful judges with whom the ABTL has worked both as members of the Board of Governors and simply as those legions of judges who are our friends and supporters, has been truly a remarkable experience. I am particularly grateful to the officers and committee chairs on the ABTL board who have helped to make our annual seminars and lunch and dinner programs a success. I especially want to thank those who have refined initiatives started by previous boards and presidents, and those who are currently helping to develop new programs that will offer our attorney members opportunities to refine professional skills while serving our courts and providing services to our communities.

One of these initiatives includes the development of a speakers' bureau. We know that many organizations throughout the Los Angeles community welcome, and indeed seek, speakers to speak about all manner of topics. Our speakers' bureau would provide a resource for organizations to learn about possible speakers, and about general topics relating to litigation, the courts, business law issues, and other pertinent subjects that could be addressed. The program would then provide an opportunity for younger lawyers to speak to large groups, developing their presence, communication skills, and even thinking on their feet in question and answer sessions should they choose to entertain questions.

We have discussed with many of our judges, including former Chief Judge Consuelo Marshall of the U.S. District Court, Judge Ray Fisher of the Ninth Circuit, and Judges McLaughlin and Czuleger, respectively Presiding Judge and Assistant Presiding Judge of the Los Angeles Superior Court, to catalogue the opportunities for *pro-bono* efforts that will assist the courts in administering justice. We hope to be able to post a list of such opportunities and contacts on the ABTL website for the use of members who want to take advantage of these programs. One example: The U.S. District Court provides *pro-bono* representation by attorneys to indigent incarcerated plaintiffs with civil claims *that have survived summary judgment*. They need representation at trial. Civil attorneys can help these individuals, help the courts to provide representation, and at the same time gain valuable civil trial experience. This opportunity is a truly exciting prospect for business litigators who have a great deal of litigation skills but have not advanced in terms of their experience in "first chairing" a trial. Another example: The Ninth Circuit has a program in which *pro-bono* advocates can argue cases on appeal. For senior associates, or experienced attorneys seeking appellate argument experience, this opportunity is one of incalculable value to both the attorneys involved and the circuit in providing justice.

Finally, I want to say a word about the perennial efforts to split the Ninth Circuit. As I did in my letter in the previous *abtl Report*, I shamelessly use the vehicle of this "president's letter" to raise the issue, and do not speak on behalf of the ABTL. I hope to remind all of us that the issue will not go away. We need to be diligent in our understanding of the issues facing our "home" circuit, and the responsibility we share to stand up and be counted *on whichever side you stand*.

From my personal standpoint, and not that of the ABTL, I commend the arguments made in this Report in the article by Judge Schroeder, "*Is There Any Valid Reason to Split the Ninth Circuit?*" Judge Schroeder makes the following important points, among others. First, the Ninth Circuit cannot be split equitably. Second, certain congressional representatives seem determined to attempt to bypass the Senate Judiciary Committee, as with Congressman Sensenbrenner's effort to attach a provision splitting the Circuit to a budget reconciliation package. Third, the efforts to split the Ninth Circuit ignore the economic realities that would result in far greater cost to taxpayers. Fourth, the arguments "against" the Ninth Circuit ignore the advances pioneered by our Circuit, including the creation of the Bankruptcy Appellate Panel (now used in many Circuits), computerization methods for increasing efficiency and access to court information, cases and research, and greater efficiency in handling the caseload.

But, most important, we should, as officers of the court and to the extent we are intellectually honest on the subject, avoid using any discourse on whether to split the Ninth Circuit as a ruse to disguise efforts to mold the decisions of the court. I sense that the proponents of the split, in their unabashed attempt to fashion decisional and doctrinal results, are willing to ignore the economic detriment that would result, the benefits of a single Ninth Circuit, and the political difficulties of splitting a Circuit where one state has 70% of the cases. These ideologues erroneously believe that carving out states and creating another circuit will change the "bent" of decisions. That myopic approach would, and should, be anathema to any litigator who favors the rule of law. More importantly, it ignores the reality that the "bent" of judges, to the extent there is one beyond the process issues one would expect (*e.g.*, the "original intent" of Justices Scalia, Thomas and others *v.* "active liberty" of Justice Breyer and others), will evolve as vacancies are filled by candidates reflecting the ideology of the presidents who nominate them and the senators who confirm them. To destroy an effective, efficient institution for, at most, a short term gain that cannot be substantiated in any analysis of the Ninth's present jurisprudence, would be to put a blot on our federal judicial system.

Let me close this letter by returning to the opening comments. I have enjoyed serving on the Board of Governors in a truly exciting period in the ABTL's development. I wish the new President, Michael Sherman, and the new Officers — Steve Sletten (Vice President), Trav Wood (Treasurer), and Scott Carr (Secretary), and the Board of Governors for 2006-2007, best wishes for continued success.

This fall, our Annual Seminar, "When Things Go Wrong", October 18-22, at the Grand Wailea Resort Hotel, on Maui, Hawaii, will be one of the best seminars we have ever held. (Go to our web site for more information at: <http://www.abtl.org/annualseminar.htm>) Our keynote speaker will be Hon. Carol A. Corrigan, newly appointed California Supreme Court, Associate Justice. Those of you who attended our April 6 dinner program know that we can look forward to a great opportunity to get to know her better, and the program itself promises to be extremely informative and especially entertaining. I will see you all there!



**Patrick Cathcart**

— Patrick Cathcart



## ABTL Starts Young Leadership Division; Roland Tellis Will Chair the YLD

**H**ere's the challenge — we members of ABTL are all aging and getting gray, if we still have hair (but we still look marvelous). Over thirty years ago, a group of *young* lawyers started ABTL in Los Angeles. While the idea caught on wonderfully, much has changed in the legal community in the intervening years. Law became a big business and billable hours interfered with a young lawyer's ability to participate in extracurricular activities. Before you knew it the majority of attendees at our programs were, well, "older." This phenomenon is not unique to our organization; it is chronic in many professional organizations, as well as in the other ABTL Chapters throughout California.

The Northern California ABTL Chapter was inspired to develop a division of its chapter to meet this issue head on, with a focus on programming geared towards attorneys in their first years of practice. The LA Chapter plans to replicate the Northern California program, along with its success.

To this end, a *young* partner at Alschuler Grossman Stein & Kahan, Roland Tellis, will be chairing the YLD. The expectation is that the YLD activities will focus on programming, holding Brown Bag lunches with judges, and in conducting judicial profiles to populate both the ABTL website and *abtl Report*. It is our hope that many of our future board members will spring from the YLD. YLD is very much a work in progress, and we would welcome your thoughts, suggestions and nominations for participation. For further information, please contact Roland Tellis at (310) 255-9143, or [rtellis@agask.com](mailto:rtellis@agask.com).

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