ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

Volume XXX No. 2 *Spring 2008*

Mediating the Litigated Case

Hailed as *sine qua non* of dispute resolution, mediation has generated books, articles and guides identifying the process of successfully bringing adverse parties together and achieving closure to their dispute. Formulae are proposed, skills identified and the art of dispute resolution studied and analyzed. But we know from experience that the ability to resolve disputes is directly related to the context of the disagreement. Outside the contours of a legal system, *i.e.*, extra-judicial mediation, a mediator must resolve disputes unaccompanied by critical factors present in mediating a litigated case. The role of pleading, discovery, motions, evidence, jury instructions, and a pending trial combine to dramatically change the mediation landscape. Mediation, in the context of litigation, does not necessarily mirror techniques invoked to resolve extra-judicial disputes. In a [two] word[s], mediation of the litigated case is *sui generis*.

Hon. Lawrence Waddington

Paradoxically, litigation facilitates mediation. Trials, verdicts and enforceable judgments compel "closure" of the dispute. Parties in extra-judicial conflict who do not confront "closure" lack the incentive of litigation to settle their differences, and, in the absence of an enforceable provision for resolution, continue their dispute unabated. Accordingly, adverse parties can exchange diatribes, hurl insults, and engage in violent conduct with impunity, fearing no consequence-unless the "consequence" is force. In the United States, the judicial system exists to provide a neutral, albeit compulsory, forum for resolution of disputes.

(Continued on page 7)

INSIDE

Mastering the Art of Cross-Examination

Every trial lawyer in America fantasizes about emulating Perry Mason and "breaking down" an opposing party on the witness stand during withering cross-examination resulting in a crucial admission of wrongdoing in front of the empaneled jury. Does this really happen? Is there a formula for effective cross-examination? Is there a way to become adept at cross-examination without going through the agonizing experience of trial and error? The answer to all of these questions is "Yes."

Allan Browne

Nonetheless, cross-examination is a risky business. A lawyer who recklessly cross-examines every unfriendly witness is more likely to strike out rather than hit a home run.

Fortunately, cross-examination is not a mystical art incapable of definition. A few simple questions can help you decide whether it is wise to cross-examine a particular witness. Then, if you go ahead, there are guidelines you can follow to become a more effective cross-examiner.

There are a number of "do's" and "don'ts" that can be mastered and implemented in a short period of time. Following these rules during cross-examination can provide big dividends once these techniques are put into play.

Deciding Whether To Cross Examine

Many lawyers believe that every witness should be cross-examined. This is definitely not advisable. Most cases are rarely won during cross-examination, and if you cannot hammer home your case through your own witnesses' direct testimony, it's doubtful that cross-examination of an adverse witness can bring home a victory. Far from helping your case, an ill considered cross-examination can actually drive the proverbial nail into your client's coffin. Ask yourself the following questions before you decide to undertake a cross-examination:

• *Has the witness hurt my case?* If the witness has testified only on peripheral matters or in a manner adverse to your client on an immaterial point, you should consider saying "no questions, your Honor," when it is your turn to cross-examine.

• *Can I use a friendly witness to rebut?* If the witness has testified adversely to your case in a material way, but you have a friendly witness who can refute the testimony, consider using only the friendly witness to rebut the adversary's point. The ulti-

(Continued on page 2)

Mastering the Art of Cross-Examination

Continued from page 1

mate game plan in any trial is to control the evidentiary proceedings; each time you venture into unfriendly waters by cross-examining an adverse witness, you run the risk of relinquishing control. Building your case with the testimony of a friendly witness is far easier and less risky, and often more effective than cross-examining an unfriendly one.

• *Did the witness impress the judge or jury?* If the witness's manner was not particularly effective — if, for example, he appeared unsure, evasive, or fumbling — the witness may have been his own worst enemy. In such a case you don't need to make the witness appear less credible. In fact, a strenuous, hard hitting examination of a weak witness can backfire by evoking sympathy from the judge and jury.

• *Will cross-examination emphasize damaging testimony to your client?* Many savvy and articulate witnesses are able to subtly volunteer non-responsive information during cross-examination that may cause the judge or jury to reconsider previous testimony in a positive light. If there is a substantial likelihood that a witness will be able to re-emphasize damaging evidence, do not cross-examine.

• *Will cross-examination create sympathy for the witness?* You may invite disaster by rigorously cross-examining a child, widow, or person of less than average intelligence. For example, making a person of below-average intelligence look foolish when he is perceived to be basically honest is a monumental blunder.

• *Will cross-examination open new areas for re-direct?* A danger in any cross-examination is that the witness may recall new information he did not disclose during direct examination. On re-direct, your opponent may be able to use this information to his advantage.

Your answers to these questions will rarely point all in the same direction. Some of your responses will suggest to you that cross-examination would be a mistake; others may encourage you to proceed. Ultimately, during the heat of trial, you don't have that much time to reflect on the matter. It is never a good idea to blindly follow a general rule, but keep in mind that if you have reasonable doubts about the outcome you are probably better off foregoing cross-examination.

Do You "Know" The Witness's Answer In Advance

Presumably you have deposed the party being cross-examined. Thus, you know the witness's response to all the fundamental factual issues. You also know the vulnerabilities and the strengths of the witness. You know what buttons to push to make the witness uncomfortable, feel anxious, or become angry. You are now in control at trial!

Trial is not the time to explore new areas with an adverse witness. Trial is the time to stick to the subjects you know which are revealed in the answers to interrogatories, the exhibits, and deposition transcripts. If your witness varies from the "script," you must have a document, deposition, or interrogatory answer to impeach him. Play it safe. Venture only where you can "control" the witness's response.

Don't Ask One Question Too Many

Some lawyers can't help themselves from asking too many questions — or at least one too many. The "why" question; *i.e.*, "why did you do or say that," can boomerang into disaster. Avoid that dangerous temptation.

The point to be made is found in this simple example of a dispute which arose at the turn of the century. An accident occurred in the early 1900's between two parties who were driving their horse carriages at rapid rates of speed into the Town Center. The carriages collided, both turning over. The carriages were badly damaged and there were injuries to the horses. A lawsuit ensued. At trial, the plaintiff, claiming damages, was being cross-examined by the defendant's (Sir Winston's) attorney. The defendant's attorney asked:

Q: "Do you claim damages?"

A: "Yes."

Q: "What damages do you claim?"

A: "I received injuries to my back, neck, both arms, and both legs."

Q: "Isn't it true that you never complained at the time of the accident of any injuries?"

A: "Yes, that is correct."

Q: "Isn't it true that you told my client, Sir Winston, after the accident that you were feeling fine?"

A: "That is correct."

Q: "Sir Winston specifically asked you how do you feel — isn't that true?"

A: "That is true."

Q: "And in response to Sir Winston's question you said you were feeling just fine — isn't that true?"

A: "Yes."

At that point the attorney for Sir Winston should have said no further questions. But did he do so? Absolutely not. He escorted danger and temptation, asking the following question:

Q: "Can you explain how you received all of these injuries you are now claiming at trial when in fact you told Sir Winston that you were feeling fine right after the accident occurred?

A: "Yes I can explain. When Sir Winston emerged from his damaged carriage after the accident. He said "my horse has a broken leg" and he took a revolver from his pocket, put it to the horse's head, pulled the trigger, and killed the horse instantly. Sir Winston then turned to me with the pistol pointed at my head and said 'and how do you feel?' And, fearing for my life I said "I feel fine."

The above example of faulty cross-examination is an apocryphal story but nevertheless makes the point. Open ended questions like "can you explain.…" or "why did you engage in that conduct.…" are formulas for disaster in cross-examining a witness.

Control The Witness With Leading Questions

As discussed above, an open-ended question on cross-examination can be a recipe for disaster. Do not allow a witness on cross to give you a narrative answer. Most often, unless you've asked that question previously at deposition and know the answer, your case will be undermined. In general you want the witness to answer with a "yes" or "no," A skillful cross-examiner can be identified by the length of the witness's answer. If the responses are along the lines of "yes," or "no," or "I don't remember," the cross-examiner has framed his question effectively. The rule is "never be surprised by the response."

On the other hand, during discovery, the "why" question is totally appropriate. You want to uncover all the factual issues to avoid surprises at trial. Hopefully during the course of the deposition you will obtain "sound bites" that are beneficial for use at trial.

At trial, proper leading questions include: "Isn't it a fact that.…" or "Would you agree with me that.…" or "Is it a fair statement that.…" The point is to keep the witness "on a short leash" and keep your tools of impeachment close to your side.

In deposition, once you have committed the opposing party to a specific answer that's helpful to your case don't re-plow the same ground. The deponent may realize the blunder he has made and try to change testimony during the course of the deposition. One good admission (or sound bite) is sufficient — go on to another point.

Daily Transcripts At Trial

Some transcripts are a necessity during trial. If you have cor-

(Continued on Page 3)

Master the Art of Cross-Examination

Continued from page 2

nered the opposing party (or an important witness) on cross-examination, you want to use it effectively during closing argument. Often, crucial testimony is given weeks before final argument, and by that time you and opposing counsel may differ in good faith about what the witness actually said. You can be sure of the testimony if you have the transcript. Request a daily transcript well in advance, then alert the reporter the day before the witness testifies, so that arrangements can be made to have someone else transcribe the testimony if the regular reporter is too busy.

Remember, whenever possible visually display the cross-examination (and read it) during final argument. Use the technique of "show and tell" during final argument. Summarizing important evidence suffers substantially if you do not have the requisite tools — a specific quote from an official court transcript.

Remind the jury that if you disbelieve a part of a witness' testimony, the jury may mistrust all of the remainder of his testimony.

Go For The Jugular

Don't look for capillaries, seek out arteries during cross-examination. It's the damaging testimony that really matters. The jury (or judge) will never be persuaded by minor issues and tiny contradictions which you are able to point out. For example, a lapse in memory as to a date or the place where a conversation occurred or the precise time of day when an event occurred (particularly when the trial occurs years later) is generally insignificant. Stay with the bigger factual issues and the more remarkable contradictions.

Whenever possible, in closing argument, refresh the jury's memory by noting a witness's body language. Some witnesses under cross-examination have facial expressions that are notable, fidgeting around in the witness box, not looking at the examiner questioning the witness, covering one's face with hands, avoiding eye contact, and being evasive. Tell the jury that "body language is often more significant than what a witness may actually say." For example, a witness may say "no" but his uncomfortable look is saying "yes." Any or all of these patterns of conduct will be helpful in destroying a witness' credibility along with your effective cross-examination.

Don't Dilute Effective Cross-Examination

Decide what the "big factual issues" are with each witness. Once you have scored on all your major points, resist the temptation of going on to lesser matters of importance. It's better to make three substantial points on cross-examination rather than three substantial points and 10 minor contradictions. The minor points distract from your overall score with the jury. You must always be aware of the dilution effect — allowing the witness an opportunity to rehabilitate damaging testimony by turning to remote or boring subjects.

Make Use Of Sea Changes To Deposition Transcripts During Cross-Examination At Trial

A golden opportunity to score points on cross-examination always arises if the deponent modifies deposition answers on meaningful issues after giving sworn testimony.

Consider the following cross-examination:

Q: "Recall I told you during your deposition that you were sworn under penalty of perjury to tell the truth?"

A: "Yes."

Q: "Recall that I told you to take your time during the answering of questions during your deposition to make sure the answer was correct?"

A: "Yes."

(Continued on page 6)

The Audit Interference Doctrine — An Exception Without A Rule

Under the audit interference doctrine, an auditor may assert the client's negligence as an affirmative defense to a claim for professional malpractice only where the client's negligence interfered with the performance of the audit itself. Originally adopted as an exception to ameliorate the all-or-nothing nature of the common law defense of contributory negligence, the audit interference doctrine should have no place in a jurisdiction that, like California, has discarded contributory negligence in favor of comparative fault. However, California courts have not yet ruled on the issue and there is a split among the states that no longer have a contributory negligence rule about whether to continue to apply the audit interference doctrine. The better approach is not to apply an exception without a rule.

Dale E. Barnes, Jr.

The Contributory Negligence Rule Created Potential Inequities

The common law contributory negligence rule foreclosed recovery by any plaintiff who was the slightest bit negligent. The rule thus could potentially bar a slightly negligent plaintiff from recovery against a greatly negligent defendant. To address such inequities, courts fashioned exceptions to the rule, such as the audit interference doctrine.

One of the first cases to address an auditor's ability to assert contributory negligence was *National Surety v. Lybrand*, 256 A.D. 226 (1939). National Surety paid a claim relating to embezzlement by an employee of the client. As subrogee of the audit client, National Surety brought professional malpractice and breach of contract claims against the auditor who had not detected the embezzlement in the course of its audits. Had the auditor discovered and reported the embezzlement, National Surety contended that the audit client would have fired the employee and would not have sustained the subsequent loss. The auditor asserted as an affirmative defense that the audit client had conducted its business so as to make the embezzlement possible and was therefore contributorily negligent. The appellate court disallowed the defense on the theory that audit clients rely on their auditors to detect such wrongdoing:

> We are, therefore, not prepared to admit that accountants are immune from the consequences of their negligence because those who employ them have conducted their own business negligently. The situation in this respect is not unlike that of a workman injured by a dangerous condition which he has been employed to rectify. [Citations omitted.] Accountants, as we know, are commonly employed for the very purpose of detecting defalcations which the employer's negligence has made possible.… Negligence of the employer is a defense only when it has contributed to the accountant's failure to perform his contract and to report the truth.

Id. at 235-36 (emphasis added). The courts of other states have demonstrated similar reluctance to permit an otherwise negligent auditor to escape liability under the contributory negligence rule.

(Continued on page 4)

Continued from page 3

See, e.g., Lincoln Grain, Inc. v. Coopers & Lybrand, 216 Neb. 433, 442 (1984) (auditor's contributory negligence defense would "render illusory the notion that an accountant is liable for the negligent performance of his duties" and would be allowed only where it "contributes to the accountant's failure to perform the contract and to report the truth"); *Cereal Byproducts Co. v. Hall*, 132 N.E. 2d 27, 29-30 (1956) *aff'd*, 155 N.E.2d 14 (Ill. 1958) (auditor not permitted to assert defense of contributory negligence where "[n]o fact or circumstance is cited contributing in the slightest degree to the negligence of defendants in making the audit"); *Shapiro v. Glekel*, 380 F. Supp. 1053, 1056 (S.D.N.Y. 1974) ("contributory negligence must be accepted as a theoretical defense, but it applies only if the plaintiff's conduct goes beyond passive reliance and actually affects defendant's ability to do his job with reasonable care").

F. Warren Rissier

The Audit Interference Doctrine Created New Inequities

The audit interference doctrine was at best a clumsy response to the draconian all-or-nothing regime of contributory negligence. Except where the client's negligence interfered with the audit, the doctrine simply shifted the entire responsibility for the loss from the client to the auditor.

Under the audit interference doctrine, then, even a grossly negligent audit client might obtain full recovery from a slightly negligent auditor. Obviously inequitable, such results also failed to recognize that the "fundamental and primary responsibility for the accuracy [of financial statements] rests upon management." *Bily v. Arthur Young & Co.*, 3 Cal. 4th 370, 399 (1992). By shifting responsibility for the loss entirely to the auditor, the audit interference doctrine allowed a free pass to the audit client that failed to fulfill these significant responsibilities. This was a fundamental flaw of the doctrine.

The California Supreme Court recognized thirty years ago that the better way to address the inequities of the contributory negligence rule was simply to replace it with a comparative fault system under which each party would bear responsibility for loss according to its relative negligence or fault. *See Li v. Yellow Cab Co. of California*, 13 Cal. 3d 804, 828-29 (1975). The Court considered at the time the continuing vitality of the "last clear chance" exception to the contributory negligence rule and stated that "the better reasoned position seems to be that when true comparative negligence is adopted, the need for last clear chance as a palliative of the hardships of the 'all-or-nothing' rule disappears and its retention results only in a windfall to the plaintiff in direct contravention of the principle of liability in proportion to fault." *Id.* at 825.

Comparative Fault Largely Eliminated The Inequities

No reported California decision has yet addressed whether the audit interference doctrine remains viable in the wake of comparative fault. In *Sagadin v. Ripper*, 175 Cal. App. 3d 1141 (1985), however, the Third District Court of Appeal abolished an analogous exception to the contributory negligence rule relating to a defendant's violation of a statute intended to protect plaintiff from his own negligence. If plaintiff sued defendant for negligence based on the statutory violation, contributory negligence was not available as a defense "because barring the plaintiff's action would thwart the purpose of the statute." *Id.* at 1165-1166. Noting that the purpose of comparative fault was to assign liability for damage in direct proportion to the amount of negligence of each of the parties and finding "no rational reason why the plaintiff's failure to exercise care for his own safety should not…diminish his own recovery," the court held that the exception did not survive the demise of the contributory negligence rule. *Id.* at 1167-1168.

The same logic applies to the audit interference doctrine. Even if an audit may be intended to protect the client from its own negligence and errors, recovery by a client that has failed to exercise due care in the course of its business and in the preparation of its financial statements should diminish its recovery in proportion to its own fault. As with the last clear chance and *Sagadin* statutory exceptions, the audit interference doctrine is no longer required to mitigate the harsh effects of the now-defunct contributory negligence rule and would result only in windfalls to negligent audit clients. "[W]hen the rule falls, so should its exceptions." *Id.* at 1168.

Adrienne L. Taclas

Most jurisdictions that have considered the issue are in accord. For example, in *Scioto Mem'l Hosp. Ass'n v. Price Waterhouse*, 659 N.E.2d 1268 (1996), the Supreme Court of Ohio recognized that the adoption of comparative negligence obviated the need for the audit interference doctrine. Scioto alleged that Price Waterhouse failed adequately to assess and disclose the risks associated with an unsuccessful project and accurately to report the financial forecast of the underwriter. The trial court excluded Price Waterhouse's defense of comparative negligence. The Supreme Court of Ohio reversed, noting that the audit interference doctrine was created to soften the harshness of contributory negligence and was no longer necessary or appropriate in light of Ohio's comparative negligence statute. *Id.* "[A]ny negligence by a client, whether or not it interferes with the accountant's performance of its duties, can reduce the client's recovery." *Id.* (citations omitted).

The Supreme Court of Minnesota concluded similarly, in *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905 (Minn. 1990), that the audit interference doctrine was neither necessary nor desirable after adoption of comparative fault. *Id.* at 909. As that Court recognized, audit clients should be held accountable for their own conduct:

> Accountants, like other professionals, are held to a standard of care which requires that they exercise the average ability and skill of those who engage in that profession. Failure to exercise ordinary care in conducting accounting activities may expose an accountant to allegations of negligence. By the same token, the persons who hire accountants, usually businesspersons, should also be required to conduct their activities in a reasonable and prudent manner.

At least nine states have expressly considered and rejected continued application of the audit interference doctrine as inconsistent with a system of comparative negligence. *See Paul Harris Stores, Inc. v. PricewaterhouseCoopers, LLP*, 2006 WL 2859425 (S.D. Ind. Oct. 4, 2006) (after adoption of comparative fault, rationale for audit interference doctrine did not apply) (Indiana); *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 41-42, 945 P.2d 317, 352-53 (Ct. App. Ariz. 1996) (audit interference doctrine incompatible with Arizona law of comparative fault) (Arizona); *FDIC v. Deloitte & Touche*, 834 F. Supp. 1129, 1146-47 (E.D. Ark. 1992) (comparative fault approach, unrestricted by audit interference doctrine, capable of even-handed apportion-

(Continued on Page 5)

Continued from page 4

ment of liability) (Arkansas); *Resolution Trust Corp. v. Deloitte & Touche*, 818 F. Supp. 1406, 1408 (D. Colo. 1993) (audit interference doctrine would abrogate statement by legislature that liability should be apportioned by fault) (Colorado); *Devco Premium Fin. Co. v. N. River Ins. Co*., 450 So. 2d 1216, 1220 (Fla. App. 1984) (where state had repudiated contributory negligence, better rule is that plaintiffs should not be allowed to recover for losses which they could have avoided by the exercise of reasonable care) (Florida); *Nat'l Credit Union Admin. Bd. v. Aho, Henshue & Hall*, 1991 WL 174671, *5 (E.D. La. 1991) (comparative fault scheme dictates that each party's fault be assessed and that plaintiff be allowed to recover only damages caused by defendant's negligence.) (Louisiana); *Capital Mortgage Corp. v. Coopers & Lybrand*, 142 Mich. App. 531, 537, 369 N.W.2d 922, 925 (1985) (under comparative negligence neither party is absolved of fault due to the other's negligence.) (Michigan).

There Remain A Few Pockets Of Inequity Where States Have Continued to Apply The Doctrine

Courts in a few states continue to apply the audit interference doctrine, notwithstanding their respective states' shifts to comparative fault. The reasoning of these cases is flawed as they apply an exception to a rule (contributory negligence) that no longer exists.

In *Board of Trustees v. Coopers & Lybrand*, 775 N.E.2d 55 (Ill. App. Ct. 2002), for example, the court reasoned that, as a product of common law, the audit interference doctrine remained in full force absent its express abrogation by the Illinois comparative negligence statute. The rationale assumed incorrectly that the audit interference doctrine had an existence separate and apart from the contributory negligence rule to which it was an exception.

Other courts have been reluctant to abolish the audit interference doctrine on the theory that auditors would otherwise be rendered immune from the consequences of their own negligence. *See e.g. Fullmer v. Wohlfeiler & Beck*, 905 F.2d 1394 (10th Cir. 1990) (Utah); *Lincoln Grain, Inc. v. Coopers & Lybrand*, 345 N.W.2d 300 (Neb. 1984). The premise is incorrect because comparative fault requires that liability for damage be assigned in proportion to the amount of negligence of each of the parties. *See Li, supra*. 13 Cal. 3d at 829. Abolition of the audit interference doctrine under a comparative fault system therefore does not render auditors immune from the consequences of their negligence. Conversely, failure to abolish the doctrine under comparative fault would allow audit clients to escape all responsibility for their negligence.

Under the contributory negligence rule, the courts faced the prospect that a client that was even slightly negligent might be denied recovery against a greatly negligent auditor. The audit interference doctrine did not eliminate inequity — it simply shifted the inequity to allow greatly negligent clients to recover from even slightly negligent auditors.

With the demise of contributory negligence, courts are no longer faced with such all-or-nothing choices. Under comparative fault, responsibility can be allocated more equitably in proportion to relative fault. Continued application of the audit interference doctrine is at best unnecessary. At worst, the continued application of the doctrine is an impediment to the equitable allocation of responsibilities intended under comparative fault. There should therefore be no room for the audit interference doctrine under a system of comparative fault.

— Dale E. Barnes Jr., F. Warren Rissier and Adrienne L. Taclas

Professor Erwin Chemerinsky and Dean Kenneth W. Starr Discuss Roberts Supreme Court

On Wednesday, November 14, 2007, the members of the Los Angeles chapter of the ABTL had the great fortune of attending a dinner program presented by Professor Erwin Chemerinsky and Dean Kenneth W. Starr discussing the first full term of the Roberts Supreme Court. Over 200 attendees, including close to 30 judicial officers enjoyed the lively dialogue of these two great legal minds. This event was just one of the many ABTL sponsored dinner programs that provides attendees with the opportunity to obtain knowledge, while enjoying engaging discourse on of-the-moment legal issues.

Mollie Burks-Thomas

Professor Chemerinsky and Dean Starr concurred that the term was fascinating in many respects, given the departure of Justice Sandra Day O'Connor, who had been a so-called swing vote for many years. With her departure, and replacement with Justice Samuel Alito, Jr., and the presence of Justice John Roberts Jr., the expectation was that the Court would take a more unified approach.

However, the 2007 term actually represented the most divisive term in recent history. In a term where the court docket was the smallest it has ever been, nearly one-third of its docket divided 5-4, where a single vote made all the difference. In the 25 5-4 decisions, the single vote that made all the difference was that of Justice Kennedy, who joined the majority each time.

Professor Chemerinsky and Dean Starr discussed several important business decisions, limiting punitive damages and the class action vehicle. In *Phillip Morris v. Williams*, the Court held that a jury cannot award punitive damages for conduct against third parties. The Court also appeared to express skepticism of large class actions, holding that a consumer class failed to plead facts sufficient to state a claim in *Bell Atlantic v. Twombly*, and finding that securities laws precluded the application of antitrust law to plaintiffs' claims against securities underwriters in *Credit Suisse v. Billings*.

In closing, the panel discussed the Court's opinion in the free speech case of *Morse v. Frederick* — the "Bong Hits 4 Jesus" case. Professor Chemerinsky likened his summary of the facts in the presence of Dean Starr, who argued the case on behalf of the petitioning school board before the Supreme Court, to the "I am *the* Brown" story of the civil rights plaintiff's experience as a student at Harvard Law School listening to the facts of a published decision in which he was a litigant. In *Morse*, the Supreme Court reversed the Ninth Circuit's ruling protecting the speech of the student's "Bong Hits 4 Jesus" banner, and held that the banner constituted less protected "school speech" which also advocated illegal drug use.

It was an informative and thoroughly enjoyable evening, and we all came away with a richer understanding of the current Supreme Court makeup.

— Mollie Burks-Thomas

Mastering the Art of Cross-Examination

Continued from page 3

Q: "Recall that I told you that if you did not understand any of my questions to let me know so that I could rephrase the questions?"

A: "Yes."

Q: "Do you recall that I told you during deposition if you make any changes in the transcript after it is delivered to you for signature, I may comment upon those changes at trial so the jury can decide whether you are being truthful?"

A: "Yes."

Q: "You did make an important change in your deposition transcript after it was delivered to you — isn't that true?"

A: "Yes."

Q: *"Did you discuss this change with anyone before making it?"*

A: "Yes."

Q: "Did you talk to your attorney?"

A: "Yes." (Do not ask about the substance of the communication since it is privileged.)

During closing argument you can remind the jury that the attorney and the client discussed the changes in the deposition transcript thereby allowing the jury to infer that the attorney played a role in shaping the witness's story.

Make Good Use Of No Changes To A Deposition Transcript On Cross-Examination

If during trial an adverse witness on cross-examination changes his testimony, you have the perfect opportunity to damage his credibility far beyond the problematic deposition testimony the witness has now attempted to neutralize. Consider the following cross:

Q: "Recall that I told you that you were sworn to tell the truth under penalty of perjury at the time your deposition was taken?"

A: "Yes."

Q: "Do you recall I told you to take your time to answer to make sure during the deposition that you were answering correctly?"

A: "Correct."

Q: "Do you recall me telling you that if you didn't understand a question to let me know and I would rephrase it during the deposition?"

A: "Correct."

Q: "Do you recall that I told you that after the transcript was delivered to you at the conclusion of the deposition you could read it and make changes?"

A: "Correct."

Q: "Did you read the transcript after the deposition was completed?"

A: "Yes."

Q: "Did you take your time in reading the transcript?"

A: "Yes."

Q: "Did you make sure that all the testimony was correct when you read it?"

A: "Yes."

Q: "And only after you made sure that the transcript was correct did you sign it under penalty of perjury?"

A: "True."

Q: "Now at trial for the first time you've changed your testimony given under oath which you later confirmed by signing the transcript under penalty of perjury. Isn't that true?"

A: "That's true."

Q: "Is it true the testimony that you are now changing you believe was correct when you testified to it under penalty of perjury and later signed the transcript under penalty of perjury?"

A: "Yes."

Q: "Is it true that the testimony you're now changing was testimony you thought was correct when you read and signed the transcript under penalty of perjury?"

A: "Yes."

The witness has now been set up for closing argument when you can read this testimony verbatim to the jury making the point that the witness affirmed his testimony twice prior to trial, in the oral deposition and by signing the transcript under penalty of perjury. The rhetorical question can be asked of the jury on closing argument "What caused him on the third occasion to change his sworn testimony?" The act of changing testimony after twice swearing to the truth of it calls into question the truthfulness of everything the witness has said.

Use Plain Words And Short Questions

Do not speak legalese and do not ask questions that are lengthy, complicated or convoluted. Your aim is to communicate with the witness and to convince the judge and jury, not to impress listeners with your vocabulary.

Be Selective

It is not necessary to cover every point counsel touched on during direct examination. Suppose, for example, the witness testified on 12 different subjects, 10 of which are devastating to your case. It would be foolhardy to deal with each of those 10 matters. Instead, select a few topics on which the witness is vulnerable and attack those areas mercilessly. If you can discredit a witness's testimony on 2 or 3 major points, it is relatively easy during closing argument to convince the jury that the remainder of the witness's testimony is unworthy of belief.

Avoid Repetition of Direct Testimony

Frame your questions carefully so the witness has no opportunity to reaffirm the vulnerable aspects of your case. Under no circumstances should you allow the witness to repeat damaging direct testimony.

Listen Carefully

Trial lawyers are often so busy thinking about their next question that they don't listen carefully to the witness's testimony. As a result they miss clues that suggest important follow-up questions. Don't worry if you must pause after the witness's answer to frame the next question in your mind; it is important to pay attention to each response. The pause might even work to your advantage since the Judge and Jury will have longer to consider the witness's answer.

Don't Quarrel With The Witness

In every trial there is at least one exasperating witness. Your best advice is to adopt an even milder attitude and more courteous approach than usual with such a person. Above all, avoid the temptation to get angry or caustic; it can only hurt the case and your credibility as a lawyer. Stay calm, cool, and collected. Remember, if you are right you can afford not to be angry; and if you are wrong, you can't afford to be angry.

Save Something for Closing Argument

Ideally your case should reach a climax at the close; therefore, leave the ultimate argument for the closing summation. It can be very dramatic to reveal in final argument the crucial importance of a fact that appeared to play only a minor role during your cross-examination. If you dwell on a startling bit of evidence during cross-examination, you may steal your own thunder.

Cross Examine Sparingly

The final rule is perhaps the most important: Too little cross-

(Continued on Page 7)

Mastering the Art of Cross-Examination

Continued from page 6

examination is often better than too much. If you have any doubts about asking a certain question or following a line of questions, you probably should not. If testimony on direct examination has been ambiguous or equivocal, leave it alone during cross-examination. You can then point out in your closing argument that such inconclusive testimony does not hold up in light of your own witness's clear and crisp contradictory testimony.

These tips on whether and how to cross-examine are meant only to guide your thinking. They should not be slavishly followed. The greatest trial lawyers, after all, are those who possess the intuition and judgment to know when the rules for examining a witness should not be followed. Mark Twain wisely said "no generalization is worth a damn, including this one!"

— Allan Browne

Mediating the Litigated Case

Continued from page 1

Despite public criticism of frivolous lawsuits and a proclivity of American people to involve courts in tenuous claims, litigation compels all parties to resolve their dispute voluntarily or a jury/judge will impose resolution. The prospect of "closure" in a trial forces the parties to confront the reality of proving the merits of their respective claims to a group of strangers (jurors) as distinct from convincing friends or partisans who have already rendered their personal verdict.

For counsel, the key to successful mediation of the litigated case is selection of the optimum time to discuss potential for resolution of a dispute. Litigation does not stand still, its contours ebb and flow. Pleadings are amended, new parties served, bankruptcies occur, case law or legislation changes, one or more parties settle, motions denied or granted. Other factors are often beyond control of the parties but compel counsel to constantly reappraise a case. For counsel, whether the reasons are external to the case or internal to it, factoring in factual or legal risk is an art practiced during the maturity of litigation. If mediation is arbitrarily compelled, the timing ignores the delicate balance that triggers the decision to attempt resolution.

Unless sophisticated in the litigation process, the vast majority of parties themselves are indifferent to procedural or substantive law, trial strategy or the legal process in general. But lawyers cannot ignore the risks posed by applicable statutory and decisional law. During mediation, identifying relevant law can convert irresolution into resolution. Increased use of mediation requires lawyers not only to master the negotiation process *per se*, but to incorporate their legal acumen and transfer that skill to their clients by explaining legal vulnerability. Coming to the mediation table to parrot previous demands and resist any negotiation wastes client and counsel time. Explanation does not require capitulation.

The Rhetorical Clash

Mediation and litigation are worlds apart conceptually. The adversarial nature of litigation is accentuated by its rhetoric, procedural framework and substantive rules. The caption of a case which inserts "v." as a grammatical surrogate for "versus" confirms and intensifies the clash of interests between parties. And despite liberalized pleading to discourage extensive allegations of misconduct, Complaints are frequently couched in accusatory language, Answers deny responsibility and invoke "defenses," or a Cross-Complaint levels accusations of wrongdoing committed by the complaining party. Discovery proceeds in deposition by questioning parties or witnesses, frequently duplicating "cross examination," a process freighted with implications of confrontation. Interrogatories demand answers, documents are compelled for examination, and requests for admissions seek concessions. Trials are conducted in formal public courts before a jury who must render a "decision" and presided over by a judge who serves, in part, as a "referee." Verdicts are translated by the media into "wins" and "losses" and characterized by the litigating parties respectively as "victory" or "injustice" depending on the outcome.

In contrast, mediation dispenses with the adversarial model, modifies the structure of litigation, and invites parties to participate in a "resolution" mode achieved by a process of negotiation. Informality of the proceedings, a conversational tone, a narrative uninterrupted history of the dispute by the parties and an opportunity for counsel and client to re-evaluate the facts (or law) are the hallmarks of mediation. Mediators attempt to minimize the combative language of litigation and its contentious tone in order to reshape the process of resolving a dispute. Privacy, confidentiality and the absence of public exposure in mediation contribute to facilitating communication and defusing hostility.

Counsel and clients who elect mediation in litigated cases engage in participation of a process markedly different from the language of pleading or the compulsion of pre-trial discovery. Although mediation employs fluidity sharply contrasting with rules of pleading, discovery and trial, the mediator and counsel cannot ignore relevant procedural, substantive and evidential strictures of litigation impacting the negotiating process. Counsel remain in the adversarial role of litigation but engage in the conciliatory dimension of mediation.

Mediating the Litigated Case

For lawyers in litigation, or poised on the advent of litigation, the entire spectrum of procedural and substantive law, evidence and remedies cabin the boundaries of the dispute and affect its potential resolution within limitations imposed by statutory and case law guidelines.

Whether these limitations are appropriate is beyond the scope of this article, but the mere presence of these restrictions impacts the mediation process in the context of litigation. As a result, resolution of disputes in mediating litigated cases does not always allow creative, imaginative or unbounded solutions available in other contexts. The artificial constructs of decisional and statutory law affect resolution even though the specific law is perceived as inequitable.

A client, immersed in the rhetoric of litigation which emphasizes the adversarial, and who equates "winning" to vindication and "losing" to injustice, must emotionally adjust to the prospect of "compromise." From the point of view of plaintiffs, "compromise" may connote a concession, or surrendering fair entitlement to recompense for an injury or loss; for the defendant, the word represents extraction of an unwarranted financial contribution. Mediation inherently requires reevaluation of litigation as the appropriate forum for resolution of a dispute, but confronted with the alternative of win-lose in jury trials, parties often consider the flexibility of a settlement.

The perspective of litigator and mediator in the process of mediating a litigated case obviously differs as a consequence of their respective roles. Advocates present arguments attempting to cast their case in the best light, whereas mediators evaluate relative strengths and weaknesses of both sides in a quest for vulnerability likely to surface at an eventual trial. Many commentators on mediation recommend certain techniques they have successfully employed to achieve settlement. Mastering these skills is unquestionably important, but a mediator invariably transcends individual styles by attempting to overcome the subjective perceptions of attorney and client in order to objectively identify key elements of litigation played out against the backdrop of trial. In that context, the mediator can identify the reality of: evidence inadmissable on grounds of hearsay, privilege, or other statutory or case law restrictions; weak corroboration of testimony; insuffi-

(Continued on page 8)

Continued from page 7

cient evidence of loss, harm or breach; impeachment of a witness by prior inconsistent statements; and other significant evidentiary issues affecting liability or damages.

Hovering in the background of cases in litigation is the prospect of a jury trial (or court trial or arbitration) and, unlike extra-judicial mediation, this element is injected into the resolution process. Pending trial, a myriad of factors not necessarily related to the merits of the case swirl through the minds of parties. In some instances, the plaintiff is in desperate financial straits, cannot endure the delay in securing a court for trial and accepts settlement of litigation in exchange for immediate payment; or, may accept settlement at a sum less than the potential value of the case rather than risk the uncertainty of a jury verdict. Conversely, a defendant may seek to avoid negative publicity of a trial and elect the privacy of mediation; or an insurance carrier prefers to close a file of questionable merit to forestall potential bad faith litigation. These factors, and innumerable others, are often concealed from the other party (although frequently inferred) but trigger motivation to settle, not litigate, based on issues collateral to the evidence.

A California Supreme Court decision lends a sense of urgency to one of the advantages of mediating the litigated case and avoiding trial: statutorily mandated confidentiality. In *NBC Subsidiary (KNBC-TV) Inc. v. Sup. Ct.*, 20 Cal. 4th 1178 (1999), the Justices drastically limited the power of civil trial judges to impose restrictions on media access to the courtroom. Practitioners may arguably express concern that this decision opens the door to disclosure of the discovery process and its attendant public revelation of deposition transcripts, answers to interrogatories and other discovery requests not necessarily included in court files unless contested. In contrast, the California Legislature has provided protection to all parties against disclosure of conversations and revelation of documents occurring during the mediation process. Evidence Code Section 1115 recites statutory confirmation of confidentiality during mediation. A recent California Rule of Court severely limits non-disclosure of court approved settlements. No such requirement exists in voluntary mediation.

Chemistry of Mediation

The American judicial system divides along legal lines paralleling our social culture. Aside from Constitutional law impacting litigation, state and federal law familiar to all lawyers enforces mutual promises executed between parties in contract, compensates victims of intentional and negligent conduct in tort, and prohibits or limits impermissible intrusions or use of personal and real property. Contract, tort and property all emanate from the democratic tradition protecting individual rights and, more recently, non-union employment has emerged as an increasingly important protected right. Each of these categories involves a different mix of relationships between the parties, a distinct social environment and, for the mediator, a unique "chemistry."

Contract

Except for consumer contracts, breach of a negotiated commercial contract occurs between parties who know each other, or through agents who agreed to a business relationship. Breach of a contractual promise, couched in litigation language, imports more than mundane causes of action alleging nonperformance of terms. The purely "business" dimension of the relationship between parties is damaged, in some cases beyond repair or severely compromised, and breach may also impose hardship on third parties who depend upon performance of the breaching party. But the essence of breach is the moral issue in failing to keep a promise, a loss of faith or trust.

The law attempts to ignore moral rationales under the guise of more neutral words, and not without some justification. A broken promise is labeled a "breach," and "damages" characterized as the secular equivalent of punishment. And by dividing damages into categories, *i.e.*, consequential, benefit of the bargain, or loss of good will, the law compels the jury to identify specific losses rather than applying a variety of moral convictions among jurors. The moral issue is not eliminated, merely replaced objectively.

Parties will undoubtedly avoid or ignore any reference to morality, although not necessarily oblivious to this dimension, focusing instead on the pragmatic effect of the breach. Perhaps parties are outwardly indifferent to the moral issue even if alerted to its existence, yet it underlies every breach of contract. Recharacterizing the breach as a loss of "trust," a close rhetorical ally of "morality," might be more suitable. A mediator who ignores the moral (trust) issue, at least to some extent, may forfeit the opportunity for settlement in those cases where its appearance is more easily recognized.

The world of business, whether consisting of global conglomerates or local entrepreneurs, regularly attempts to solicit customers, venturers, and vendors in whom a contracting party has confidence. An entity embroiled in litigation may not qualify as a reliable source of "trust" regardless of the merits of the underlying case. Resolution of a contractual dispute in mediation may not entirely eliminate damage to business reputation but surely avoids front page press exposure or a column in the business section reporting litigation.

On a parallel level, business disputes causing a financial loss to plaintiffs equates to fraud in their mind rather than nonperformance of a contract. Anger at financial loss caused by another party approximates harm incurred in personal injury. To an entrepreneur, the importance of "business" and its damage or loss is not as apparent as physical injury, but can represent damage to economic survival equivalent to disfigurement. For many people, "work" is their life and business loss is disabling. The desire for punishment in addition to compensation for loss is strong. In this context, emotion transcends the mediation similar to tort, employment and family law.

Property

In property disputes, the parties may have either maintained a relationship with each other, contractual or personal, or are strangers as in some species of tort. Landlord-tenant disputes, initially based on contract (lease), may also involve the right to continuing tenancy. This "chemistry" differs substantially from arguments between adjoining landowners disputing property lines, "view" lines, easements or encroachments. Neighbors often attempt to validate their right *in futuro* as superior to that of another and initiate litigation to impose a perpetual reminder of vindication if they are successful. Frequently the dominant theme in these disputes is the demand for a judicial determination to validate not only a legal right but to confirm personal power. In contrast, tenants in disputes with landlords fear eviction and loss of housing, an economic issue unrelated to ego.

One common property dispute is an allegation by a disappointed buyer of residential real estate who contends the seller has concealed a defect in the house. Buyers either legitimately identify a defect in the property, are guilty of "buyers' remorse," or attempt to extract leverage. Legislation requires the seller to prepare a detailed statement in escrow disclosing known defects or conditions and most residential real estate contracts now require mediation of any dispute between buyer and seller. A mutually executed arbitration clause in the contract mandates arbitration if mediation is unsuccessful. Resolution of the dispute in arbitration replaces litigation and enforces "closure."

Aside from the merits of the dispute, broker(s) are not ordinarily a party to the mediation/arbitration agreement, although the parties may assert their culpability. If mediation between buyer

(Continued on page 9)

Mediating the Litigated Case

Continued from page 8

and seller is unsuccessful, the broker continues to remain outside the process and subject only to litigation. Frequently, a buyer and seller who achieve successful accord in mediation will abandon efforts to compel agent responsibility and forego litigation.

A sales transaction between buyer and seller of residential real property is founded on contract, but the parties, having retained agents, may have never met each other. Crafting a solution to resolve a single failed transaction between residential buyer and seller of a residence unacquainted with each other, differs sharply from mediating a dispute between a long standing and often acrimonious personal relationship among neighbors whose proximity to each other will continue. Purchase and sale of residential real property is a combination of contract and property law, but a mediator cannot ignore the personal dimension of the transaction. Transformation of the word "house" to "home" connotes an emotional sea change for parties. Failure of a buyer to acquire a "new home," or inability of a seller to expend proceeds languishing in escrow, engenders strong feelings of resentment between parties unknown to each other, *i.e.*, "constructive acquaintances." In this context, "property" sheds its legal character and adds a broad panoply of emotions.

Employment

Employment litigation, previously dormant, has escalated in courtroom dockets. Fueled by federal and state legislation conferring legal rights on non-union employees in the workplace, the parties stoke the combustible embers of race, gender, age and disability with allegations of economic loss. Writings or correspondence introduced in contract litigation to establish breach or in tort (evidence of X-rays, MRIs and doctor bills submitted to establish injury) or in property disputes (providing documents or photographs to vindicate rights) is often absent in employment disputes. In some categories, expert witnesses are nonexistent, corroborating witnesses emotionally aligned with respective parties, and credibility is difficult to assess. It's family law without the family. A mediator must frequently construct settlement from mutually contradictory oral statements exchanged between incensed and uncompromising parties or witnesses.

Unless one party to an employment dispute insists on litigation and its concomitant publicity, participants can select mediation with the specific intent of seeking privacy and confidentiality afforded by statute. Publicly exposing intimate or embarrassing details to a jury in sexual harassment cases is not an attractive option to most parties. In employment litigation, the opportunity in mediation to "ventilate" offers a significant alternative to litigating in a public forum. Despite these factors, counsel for plaintiffs in gender, race, age or disability litigation regard jurors as more sympathetic to an individual if an employer is the defendant. Employers, understandably concerned about this factor, will often recommend mediation. Because the parties may remain in a working relationship with each other pre-trial, the option of suggesting alternative remedies in mediation finesses the "win or lose" alternative of litigation and provides an accelerated resolution.

Emotional damage alleged in employment litigation, dissimilar to objective physical injury, is amorphous, subjective and varied. Mental anguish ranges from humiliation, embarrassment and outrage to terror. In some cases, the conduct of a defendant is indefensible; in others, fault is ascribed to a vindictive or avaricious plaintiff. Fashioning causes of action, establishing substantive rules and procedural standards in this context is challenging. What kind of evidence constitutes legally cognizable "hostility" in a working environment? What conduct qualifies as "harassing?"

Employment disputes engender a "chemistry" altogether different from conventional civil law. The volatility of the parties, their personal relationship and the nature of conduct alleged, replicate family law superimposed on labor law. But each of these other two legal categories, equally incendiary as employment law, offers some measure of closure. In labor law, aside from general disagreement on wages and benefits which affects all workers, individual grievances are severed from the collective bargaining agreement between management and labor and resolved separately. The grievance/arbitration procedure affords closure to an individual worker without jeopardizing the main contract between management and labor. Employment law in the non-union context lacks the formal grievance procedure in collective bargaining contracts, and parties may continue working in the same environment with no prospect of resolution absent an internal complaint process. Employers have responded by providing resolution options in the workplace similar to grievance procedures in labor arbitration, subsequently documenting any investigation for use at arbitration or trial.

Employment law is further complicated by objective "differences" between parties based on history or culture. The legacy of slavery manifests itself not only in skin color but perception of racial inferiority. Women, formerly assigned the role of homemaker and child bearer, suffer from a male rejection of their ability to perform comparable work. The elderly experience patronizing exclusion based solely on age, and the disabled rejected as incapable. Legislation attempting to level this playing field, severely criticized as unjustified favoritism, has created political backlash potentially surfacing among jurors during trial or in jury deliberations. In each of these categories, the best intentioned jurors cannot always escape a cultural, historical or personal opinion affecting their verdict. *Voir dire* is unlikely to expose concealed bias, particularly in the public forum of a courtroom. Despite these factors, plaintiffs have succeeded in obtaining significant verdicts, but in the atmosphere of an employment dispute, counsel and their clients engage in a difficult decision evaluating "risk" in public jury trials. And their choice is not always between mediation and litigation, but mediation and arbitration.

Employment law at the federal and state level continues to evolve, creating an aura of legal uncertainty for lawyers. Employers increasingly require waiver of jury as a condition of employment, and recent California Supreme Court decisional law has validated arbitration as an alternative to litigation conditioned upon a quasi procedural due process. The legal risk in a maturing employment dispute world is substantial but statutory and case law complexity in employment litigation is undoubtedly irrelevant to parties unable to view the dispute as other than infliction of emotional damage. The mediator can explain legal uncertainty to the parties, as distinct from factual disputes, introducing an additional reason for re-evaluating litigation.

Attorney fees

Underlying all litigation, and without reference to issues of liability, damages or the nature of the litigation, is the role of attorney fees. In tort, attorneys representing plaintiffs may accept a percentage of any judgment or settlement. Customarily, counsel will accept a reduced percentage if the case settles rather than litigates. The difference between the two figures is a relevant factor in addition to the "risk factor" of litigation. But fees are dominant in all categories of litigation, attributable to the cost of preparation for trial and the trial itself. Regardless of the prevailing party in litigation, fees and costs can reduce a judgment for the plaintiff or increase payment by the defendant. Clients are understandably concerned at escalating costs, whether in tort, contract, property or employment.

Summary

Parties invest varying degrees of emotion in all litigation, regardless of its nature. The emotional component, its degree, the relationship among multiple parties for plaintiff and defen-

(Continued on page 12)

United States Supreme Court Clarifies Fifty-Year-Old Pleading Standard

In *Bell Atlantic Corporation v. Twombly*, 127 S. Ct. 1955 (2007), the United States Supreme Court held that a complaint must allege sufficient facts to support a "plausible" claim for relief. The complaint in *Twombly*, brought on behalf of a putative class of telephone or high-speed internet subscribers, alleged a conspiracy among the four "Baby Bells" regarding competition in their respective geographic markets.

Citing the "notice" pleading standard of Federal Civil Procedure Rule 8(a)(2), the Court of Appeals for the Second Circuit reversed the district court's dismissal of the complaint. The Second Circuit specifically relied on the oft-cited language in *Conley v. Gibson*: "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim that would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41 (1957).

Kahn A. Scolnick

The Supreme Court reversed because the complaint did not include "plausible grounds" to infer a conspiracy. "[R]esisting competition is routine market conduct" — absent some additional factual context to suggest an agreement, "there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway." In short, the plaintiffs needed more facts, beyond just parallel conduct, to "nudge[] their claims across the line from conceivable to plausible."

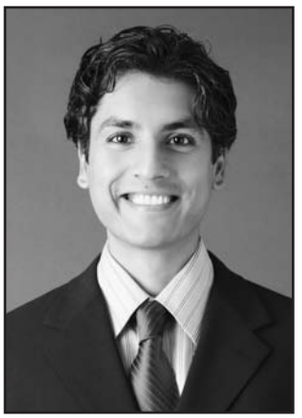
The Court also observed that *Conley's* "no set of facts" language has been "questioned, criticized, and explained away long enough." Although some courts had treated *Conley* as establishing the definitive standard for the adequacy of pleadings, *Conley* simply held that, having stated a claim adequately, a plaintiff was entitled to proceed so long as any set of facts may exist to support his claim. Thus, the Court announced that *Conley's* "no set of facts" language "is best forgotten as an incomplete, negative gloss on an accepted pleading standard."

Twombly is significant for its introduction of a fact-based "plausibility" requirement into the federal pleading regime and for its sweeping rejection of *Conley's* "no set of facts" language, particularly in complex actions. Although the Court disclaimed that it did not "apply any 'heightened' pleading standard" in reaching its decision, *Twombly* is at the very least an important *clarification* of Rule 8(a)(2). And because there is no logical basis for confining *Twombly* to the antitrust context, this decision may effectively raise the bar on stating any type of claim under the Federal Rules.

Lower federal courts are already struggling with *Twombly*. See, *e.g.*, *Phillips v. County of Allegheny*, — F.3d —, 2008 U.S. App. LEXIS 2513 (3d Cir. Feb. 5, 2008) (noting that *Twombly* "will be a source of controversy for years to come," and "declin[ing] at this point to read *Twombly* so narrowly as to limit its holding on plausibility to the antitrust context.").

The Court of Appeals for the Ninth Circuit has not yet discussed *Twombly* in any depth. In *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832 (9th Cir. 2007), the court cited *Twombly* as support for *not* imposing a heightened pleading requirement in a case under the Americans with Disabilities Act. In *Weber v. Dep't of Veterans Affairs*, — F.3d —, 2008 U.S. App. LEXIS 810 (9th Cir. Jan. 15, 2008), the court initially quoted *Twombly's* plausibility standard, but it ultimately held that the complaint must be dismissed for lack of jurisdiction.

Thus far, district judges in Central District of California appear to have given *Twombly* a fairly broad reading. In *Burdick v. Palisades Collection LLC*, 2008 U.S. Dist. LEXIS 4550 (C.D. Cal. Jan. 3, 2008), an action under the federal Fair Debt Collection Practices Act, Judge Phillips cited *Twombly's* plausibility standard as the relevant inquiry at the pleading stage (although the court ultimately denied the motion to dismiss). In *Zella v. E.W. Scripps Co.*, 2007 U.S. Dist. LEXIS 95181 (C.D. Cal. Dec. 18, 2007), Judge Collins relied on *Twombly's* plausibility requirement in dismissing a copyright infringement claim. And in *Mitan v. Feeney*, 497 F. Supp. 2d 1113 (C.D. Cal. 2007), a diversity action alleging various intentional torts, Judge Wilson dismissed plaintiffs' "vague" complaint, citing *Twombly*.



Dhananjay Manthripragada

United States Supreme Court Issues Important Preemption Decision

On February 20, 2008, the United States Supreme Court decided *Riegel v. Medtronic, Inc.*, 2008 U.S. LEXIS 2013, in which it held that federal law preempts state-law products liability claims challenging the design and labeling of medical devices that the federal Food and Drug Administration ("FDA") has found to be safe and effective. The plaintiff alleged that he had been injured when the Medtronic balloon catheter used to treat a clogged artery during an angioplasty burst, and that Medtronic was liable under state law for negligently designing and labeling the balloon catheter. But the FDA had already declared the device safe and effective pursuant to its rigorous premarket approval ("PMA") process, which entails more than 1,200 hours of substantive review by the agency.

The Court held that state-law claims challenging the design and labeling of PMA-approved devices are preempted by an amendment to the federal Food, Drug, and Cosmetic Act, which prohibits States from establishing "any requirement [with respect to a medical device] which is different from, or in addition to, any requirement" imposed by federal law. The Court explained that the design and labeling "requirements" embodied in state-law claims would be "different from" the FDA-approved requirements and would "disrupt[ ] the federal scheme" for regulating the safety and effectiveness of medical devices.

The Court distinguished its decision in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), which held that federal law does not preempt state-law design or labeling claims targeting devices that entered the market through the comparatively streamlined "§ 510(k) process." That process exempts from

(Continued on page 12)

Letter from the President

Hard to believe it is already 2008! While sometimes dangerous, I think it is safe to generalize on this point and claim that we business trial lawyers lead particularly hectic lives and face seemingly impossible demands on our schedules, proving the old adage "time passes quickly when you are so busy you can hardly breathe." And speaking of passing time, seems like it was just yesterday we were facing the dreaded "millennium" and all the crazy planning for the world's computers to crash and burn when the clock struck 12:01 am on January 1, 2000. I suspect a lot of lawyers were secretly disappointed that we ushered in the new millennium without the sky falling or our computers shutting down all around us. Anyway, Happy New Year to all, and I hope your 2008 is off to a good start.

We have, as usual, been busy with the affairs of the ABTL and maintaining our commitment to excellence in legal education and facilitating interaction and relationship between the Bench and the Bar in Los Angeles. Our flagship state-wide event, the ABTL Annual Seminar, was held to a sold-out crowd last October 2007 in Napa Valley at the Silverado Resort and Spa. In addition to the fantastic program and "quite civilized" wine tasting at a private home/vineyard at the north-west end of Napa Valley, we all enjoyed the wise advice from our distinguished keynote speaker, Honorable Justice Sandra Day O'Connor, on the topic of the importance of oral advocacy. The following night we were treated to entertaining stories of the "wine wars" as brilliantly told by Kathleen Sullivan, Dean of the Stanford Law School, who along with Dean Ken Starr successfully represented the interests of certain wineries battling at the Supreme Court over the question of whether laws prohibiting the direct shipment of wine to out-of-state customers were constitutional. Thankfully for wine drinkers everywhere, the wineries prevailed in their fight. I never would have thought the finer details of the Commerce Clause could be so interesting while sitting under the stars in Napa Valley! And speaking of Ken Starr, our chapter's November 2007 dinner program featured Dean Starr (Pepperdine University School of Law) and Professor Irwin Chemerinsky (Duke University School of Law) squaring off on the subject of the Roberts Court and recent developments in Supreme Court jurisprudence. We believe it was the best attended dinner in our organization's history, and definitely one of those rare opportunities to be completely humbled (and awed) by two of the greatest legal minds of our time.

We have a lot to look forward to in 2008, both as an organization in our City of Angels, and generally as citizens of this great country. ABTL programming this year will include an upcoming dinner featuring several of the major public interest law organizations in town to talk about the "High Stakes Public Interest Trial." Our lunch series recently featured a packed-room audience to review some of the potential stumbling blocks arising from the new "E-filing" rules for the Federal Courts, and next month we will have a terrific lunch program featuring seasoned trial lawyers Michael Hennigan and Carl Douglas, along with Judge Jane Johnson, on the subject of "The Art of the Opening Statement." Our state-wide 2008 Annual Seminar will be held September 25-28, 2008 at the Grand Hyatt Resort on Poipu Beach, Kauai. The theme for the 2008 program is "Justice in America: Business in the Courtroom." This will be the ABTL's first trip to the island of Kauai, and I hope you will all be able to join us.

Nationally, we are in the middle of an election year (seems like the campaigning has been going on forever already) and the dust is beginning to settle on the potential presidential candidates. As members of the Bar, we have an elevated obligation to get connected to the process, become educated on the issues, and encourage others around us (friends and family) to do likewise. As my two "kids" respectively are now at and approaching voting age, I recognize the need to talk about the competing views of the several candidates and allow them to explore the issues for themselves. The important thing is that we are all energized in this process, and for all of its flaws recognize that we have the most civilized (and widely emulated) system for the transfer of power of any country in the world.

But as a State, we are facing another budget crunch that will impact all of us who practice, and preside in, the State Courts where our clients' business disputes are being resolved. Last month Governor Schwarzenegger announced that he would be seeking across-the-board 10% budget cuts, including for the State Court system. It has been projected that California will face a $14 billion budget deficit position by mid-2009. We and our clients depend on the efficient and effective administration of justice in our State Courts, and returning to the days of stagnation due to overcrowded dockets and understaffed courts simply is not an option. We each need to be in communication with our state representatives in Sacramento to underscore how necessary it is that this critically important branch of our state government not be impaired during and as a result of this budget crisis, and that it continue to run strong on all cylinders in order to preserve the rights of our citizens to a fair and efficient resolution of their disputes and grievances. This is our home turf, and we all need to act now to do whatever we can to protect it.

Steven E. Sletten

Finally, if you are reading this, chances are you already are a member of the ABTL as this publication is one of the many members-only benefits of our organization. If you have not yet renewed your membership for 2008, please do so as soon as possible. The easiest place to do this is on line at abtl.org. And spread the word — we want as many of our colleagues in town to be able to benefit from membership and participation in the ABTL, and the best source of information is our members who talk up the many reasons why they joined and have been members for so many years. See you at the Biltmore!

— Steven E. Sletten

Contributors to this Issue

Allan Browne the Founding President of *ABTL,* is a partner with Dreier Stein Kahan Browne Woods George LLP in Beverly Hills.

Mollie Burks-Thomas is an associate in the Los Angeles office of Gordon & Rees LLP.

Dale E. Barnes, Jr. and *J. Warren Kissier* are partners in Bingham McCutchen LLP's Los Angeles and San Francisco offices. respectively. *Adrienne L. Taclas* is counsel in Bingham's San Francisco office.

Kahn A. Scolnick and *Dhananjay Manthripragada* are associates in the Los Angeles office of Gibson, Dunn & Crutcher LLP.

Steven E. Sletten is President of ABTL and a partner with Gibson, Dunn & Crutcher.

Hon. Lawrence Waddington (Ret.) is a JAMS panelist and author of an electronic text on Arbitration and ADR practice: www.ArbitrationADR.com

Mediating the Litigated Case

Continued from page 9

dant, and the role of non-parties in various categories of litigation create a shifting chemistry for a mediator. In some cases a loss is personally devastating: breach of contract which decimates a business; personal injury permanently impairing a life; loss or damage of irreplaceable property; mental injury and subsequent fear; allegations of professional incompetence. When a legally cognizable act by one person causes loss, damage or harm to the mental or physical health of another, or challenges personal perception of "wholeness," litigation is a judicial attempt at rectification. Money damages are universally acknowledged as inadequate recompense but the adversarial nature of litigation assures resentment if one party denies responsibility in a public forum, whether rightly or wrongly, or challenges the extent of the loss. Mediation requires compromise, also resulting occasionally in dismay and anger, and settlement money will not necessarily assuage emotion. But the risk of further emotional loss from an unsatisfactory verdict is reduced.

— Hon. Lawrence Waddington

Cases of Note

Continued from page 10

PMA devices that are "substantially equivalent" to certain pre-existing devices, and thus "is focused on *equivalence*, not safety." PMA, in contrast, is "focused on safety" and imposes federal requirements regarding the design and labeling of medical devices.

The Court alerted Congress that, in future cases, it will interpret a reference to state-law "requirement[s]" in a federal preemption provision to include common-law duties, absent a contrary indication. In addition, to be preempted, a state common-law duty need not "apply *only* to the relevant device, or *only* to medical devices." Rather, general common-law duties are preempted whenever a jury's application of those duties would result in state-law design and labeling requirements that are different from applicable federal requirements.

In short, this decision recognizes that Congress has vested the experts of the FDA — not lay juries — with the responsibility for determining the safety and effectiveness of complex medical devices.

— Kahn A. Scolnick and Dhananjay Manthripragada

abtl REPORT

P.O. Box 351649
Los Angeles, California 90035
(323) 939-1999 • FAX: (323) 375-0256
e-mail: abtl@abtl.org • www.abtl.org

abtl REPORT

P.O. Box 351649
Los Angeles, California 90035