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Civil Direct Calendaring in Alameda County Superior Court

On July 1, 2007, the Alameda County Superior Court transitioned from a master calendar system to a full direct calendar system for all general civil litigation. The transition has had a profound impact on the way the court conducts business and consequently on practitioners and their clients. This article describes the impetus behind the transition, the design and structure of the civil direct calendar system, and includes suggestions for practitioners who litigate in this court.

Hon. Robert B. Freedman

Background and History

With 69 judges and 16 commissioners, the Alameda County Superior Court is one of the largest courts in California and was one of the few large courts not to have a significant civil direct calendar component. Many smaller courts have successfully implemented direct calendaring. Federal district courts, of course, have long utilized direct calendaring in civil and criminal cases. Twenty years ago the Alameda Superior Court seriously considered a pilot program, retained outside consultants, involved the local bar, but ultimately retreated from a pilot project proposal.

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Joint Defense Agreements

Most lawyers agree that "joint defense" or "common interest" communications can be critical for successful and efficient representation — whether a matter is at an investigation stage, in the throes of discovery, or in trial.

But could you, as someone who relies on the joint defense privilege, state definitively whether it matters that a joint defense agreement is oral rather than written? Do you know whether your client's joint defense communications are protected any differently if you are in the Ninth Circuit compared to the Second Circuit or California state court? Could your firm be conflicted from representing your client based on a conflict between co-counsel and the plaintiff? What would you do if your client was being cross-examined with information learned during a joint defense meeting?

Stephen H. Sutro

This article discusses several issues to be considered when entering into a joint defense/common interest agreement. Perhaps no other agreement has greater potential to affect your client's privileges.

What Is the Privilege?

The privilege of confidential communications between co-parties has been recognized for over 135 years. *Chahoon v. Virginia*, 62 Va. 822, 842 (1871). Since that time, courts have referred to the privilege as the "joint defense privilege," the "common interest doctrine," the "common interest arrangement doctrine," and the "pooled information doctrine." *Lugosch v. Congel*, 219 F.R.D. 220, 236 (S.D.N.Y. 2003).

The common thread running through these labels is

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In the intervening years, the court maintained a master calendar system. In the master calendar system, cases were assigned a trial date months in advance based on sometimes-speculative estimates of length of trial. On the trial call day, usually a Friday, cases would be assigned to available trial departments or, with frustrating frequency, trailed for a week and then continued to a new trial date.

Beginning with the implementation of the modern case management rules in 2002, pre-trial management of cases was decentralized. Case management was conducted by one of several case management judges (for a time the Alameda Superior Court had more than 40 judicial officers handling case management calendars). Law and motion matters were heard by one of two or more Law and Motion Department judges. Under this approach a typical case would be handled by four or more judges — one for case management, another for law and motion, a third at the master calendar stage and yet another for trial. Case management conferences often were idle exercises due to unresolved pending law and motion matters. The inefficiencies of such a system are obvious as is the potential for negative qualitative experiences for the parties.

Hon. Steven A. Brick

Case and calendar management structures in trial courts are a subject of enduring debate. Proponents of the direct calendar system (see Seabolt, "The Advantages of the Direct/Independent Calendar System Over the Master Calendar System," and "Judicial System Must Evolve, Adapt in Order to Meet Demand," *Daily Journal*, April 2008; Hon. Lee Edmond and Hon. William Highberger, "Direct Calendar Systems Work," *California Courts Review*, Spring 2008) are juxtaposed against contrary views (Judge Elwood M. Rich, "The Compelling Need for a Civil Master Trial Calendar System," *California Courts Review*, Summer 2007) and cautionary evaluations (Justice Ignazio J. Ruvolo, "The Changing Face of Civil Litigation: One Perspective on the Search for Vanishing Trials in California," *California Courts Review*, Summer 2006.

In late 2005, then-Presiding Judge George C. Hernandez, Jr. created a Direct Calendar Task Force to study and recommend alternatives. The Task Force was comprised of representatives from every component of the court — including judicial officers, the executive office, clerk's operational staff, information technology, and research attorneys. The extent of the effort devoted by the Task Force was, modestly put, Herculean, but necessary to successfully re-engineer a decades-old system of case and calendar management. Details of this effort are beyond the scope of this article, but it included substantial research into the structure of civil direct calendaring in other courts, outreach to the bar by meetings and survey, and consultation with other courts with track records in direct calendaring. While civil litigation is a major portion of the court's "business," the Task Force remained conscious that it is only a portion, and the resources to be devoted must respect the other functions of the court. Readers are well aware that court resources around the state have not kept pace with need, and that budget constraints require that courts do more with less, but still do it well.

Outreach to and feedback from the practicing bar was and continues to be a vital component of the development of and transition to direct calendaring. Representatives of a broad spectrum of bar organizations and individuals active in Alameda County and around the San Francisco Bay Area were invited to participate early in the planning process, responded to an on-line survey, and hosted and attended a series of programs in the planning and implementation stages. The survey was particularly instructive, and showed that 78% of respondents favored a direct calendar system. Some common themes in the responses were:

- Judicial familiarity with a case throughout its lifetime promotes consistency and efficiency;
- The system should afford an opportunity to resolve disputes, especially discovery issues, informally and efficiently;
- Direct calendaring would provide more "honest" trial dates; and
- The system should provide for settlement conferences to be conducted by judicial officers other than the assigned judge.

The Civil Direct Calendar System in Alameda County

After more than a year of work by the Task Force, the court's Executive Committee approved the proposal that was fully implemented as of July 1, 2007. Key elements of the Alameda County Superior Court civil direct calendar program are:

- Twelve civil direct calendar departments were created, together with four "Open Trial Departments." Open Trial Departments try cases, but do not conduct case management or law and motion. The two pre-existing complex litigation departments are maintained. As a result, the court currently has 18 departments devoted to general civil litigation, plus an additional full time department handling writ petitions, CEQA petitions and civil law and motion matters in civil cases not included in the direct calendar program.
- All general civil actions as defined in CRC 1.6(4), both limited and unlimited, are assigned for all purposes within two business days of filing to one of the 12 direct calendar judges. Cases provisionally designated as complex are not assigned to a direct calendar department unless and until they are ruled not to be complex. Counsel should note that an all purpose assignment accelerates the timetable for exercising a peremptory challenge under Code of Civil Procedure Section 170.6. This also eliminates another weakness of the master calendar system: the opportunity for a party to derail a trial date by not exercising a peremptory challenge until the case is assigned for trial.

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• Assignment is randomly made by the court's electronic case management system DOMAIN, using seven case type categories to equitably allocate the caseload and case types among the 12 departments. Limited collection cases (until and unless a responsive pleading is filed), unlawful detainer proceedings, writ petitions, CEQA cases, asbestos litigation, and cases deemed complex are excluded from the program. In this regard, the Alameda Superior Court is somewhat unique in combining both limited and unlimited civil cases in the same direct calendar departments. This results in a daunting caseload for direct calendar departments. Currently, direct calendar judges have approximately 595 active cases pending. Suggestions for assisting the court in meeting these caseload demands follow below.

• Of the twelve direct calendar judges, currently eight sit in Oakland, three in Hayward and one in Alameda. Cases are assigned without regard to intracounty venue – in other words, neither the location of the events underlying the lawsuit, nor the branch court in which it may be filed, is considered in determining which direct calendar judge will be assigned the case.

• Direct calendar departments handle all phases of a case from inception to final disposition including case management, law and motion, and trial. Ex-parte applications and post-judgment orders of examination are likewise handled in the assigned department. Settlement conferences may be handled in the assigned department or conducted by another judicial officer on a case-specific basis.

• Research attorney staff supporting the civil law and motion calendars has been redeployed to provide research assistance to direct calendar judges on an ongoing basis, leveraging the benefits of institutional memory to a designated caseload.

• One judge in Department 31 hears law and motion matters in non-direct calendar cases. Additionally, in those rare instances in which the assigned judge is not available and immediate ex-parte relief is necessary (the bulldozer is idling in the driveway about to demolish the plaintiff's property, a shareholder's meeting is imminent, etc.), Department 31 can hear the emergency application.

• Asbestos cases (remarkably, the Alameda County Superior Court has the second largest inventory of active asbestos cases in California, behind only San Francisco) are separately managed for pre-trial purposes in a dedicated department. Asbestos trials, particularly preference cases, are assigned to available Open Trial Departments, but if necessary to comply with statutory obligations may be assigned to direct calendar departments. Non-preference cases are likewise assigned to direct calendar judges on a rotating basis when the trial date is set.

• Alameda County Superior Court Local Rules were amended to reflect the transition to direct calendaring and may be accessed at the court's website at http://www.alameda.courts.ca.gov/domainweb/.

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Mediation: An Effective Way to Connect With Your Clients

Most of us involved in litigation think of mediation merely as a proven process to settle cases, but it also presents incredible marketing opportunities. The process allows you to work collaboratively with your client and to showcase your skills for preparation, advocacy, and negotiation. Managed properly, mediation can solidify your relationship with your client and help you to develop future business.

Negotiation is all about communication. When each side is able to hear, understand, and appreciate the other side's position, and the opportunities or consequences that flow from it, an agreement is more likely. In a properly conducted mediation, the mediator creates an environment conducive to effective communication. It is the mediator's charge to convey the respective parties' points of view in a way that will assure they are received and sincerely considered. If this is accomplished, a settlement will result 90% of the time, enhancing your standing with your client.

John Bates, Jr.

Spending a day with your client in this kind of environment can create a lasting bond. How often do you have a captive audience in an intimate setting where you can demonstrate your professional skills, interact with your client on a personal basis, and probably solve your client's problem? From a business development standpoint, you should recognize this opportunity and make the most of it. Here are some ideas on how to use the process productively.

Involve Your Client From the Outset

Proposing mediation to your client is normally a good thing because it shows you are looking for cost-effective ways to manage the litigation. But the timing is critical. Often, in the early stages of litigation, your client is upset with the other side and wants blood. Be sympathetic. If your client's competitor has just hired away your client's key scientist along with the ideas for a new product, your client will not be thinking about compromise. At this stage, if you begin by explaining that most civil cases settle, you could damage your relationship because your client may think you are not willing to go the distance. Your best course is often to explain how to win, not how to settle. Eventually, after events have unfolded a bit, you can explore settlement options. In order to preserve your role as "hired gun" you might also consider designating a colleague to act as an "ADR specialist" to explain the reali-

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Mediation: Connect With Your Client

ties of civil litigation and the benefits of mediation.

Once your client is open to exploring the mediation option, explain the mediation process. Remind your client that it is entirely voluntary, nonbinding and confidential. Make sure that your client understands that unlike in trial, your client will retain control over the outcome. In that regard, the mediator is not making the decision, but creating an opportunity for the parties to do so.

Involving your client in the selection of the mediator is a good way to connect. You can demonstrate your knowledge of the case and the appropriate person to mediate it. If your client has participated in the selection and the mediator measures up to your assessment, your credibility will be enhanced and your client will come away with a positive reaction, whether or not the case settles.

Involve Your Client in the Preparation For the Mediation Session

Most clients like to be involved, and want to have input, in getting ready for and participating in the mediation session. Seeking your client's collaboration will be appreciated, and frequently your client's insight can be invaluable. If nothing else, the client will have more confidence in you and your knowledge of the case simply by having gone through the process of communicating the information to you.

You should solicit ideas from your client and get your client's reaction to how you would like to manage the process. This back-and-forth will unify you as a team and give your client tremendous comfort. Your client will learn just how important you are to achieving a satisfactory result. At the very least, you should establish with your client the strategy (goals) and the tactics (approach) for the mediation. Keep in mind that your client may well have more experience in negotiations than you do, so you will want to acknowledge your client's skill and take full advantage of it.

During these discussions, remind your client that what you need to do in order to maximize your leverage at the negotiating table is far less than what you would have to do to win at trial. You and your client must decide what you will need for the mediation and then, if the matter does not settle, what you need to do to get ready for trial. By providing a budget, you can demonstrate to your client how you are using mediation as a cost-effective way to manage the litigation. If the case does not settle at mediation, no doubt your client will blame the other side, enabling you to do whatever is necessary to win at trial.

In any pre-mediation conferences with the mediator, consider inviting your client to participate, but understand that if your client is involved, the mediator, in order to maintain symmetry, will have to invite the other side, which could be problematic. You can always ask for a private conference with a mediator, providing your client an opportunity to get acquainted with the mediator and elevating your client's comfort level with the process. Make sure to confirm with a mediator that these discussions will be treated as confidential.

Always prepare a mediation brief. Let your client see a draft and solicit your client's input. You should allow enough time for your client to reflect on the matter so that you obtain useful information with enough time to incorporate it into the brief, and so that your solicitation of suggestions will be perceived as sincere.

During the Mediation, Stay Connected With Your Client

During the mediation session look for ways to engage your client and foster your relationship. As you know, there can be a lot of "downtime" when the mediator is with the other side. Use this time productively to learn about your client's interests and things you have in common. Look for opportunities to share your own attributes and personal background. Spending time with your client, where you are both trapped in a conference room, will be a bonding experience. Stay in touch with your client throughout the session. Never abandon your client and always be aware of your client's needs and make sure they are met, whether they are process-driven or personal. In essence make sure your client is comfortable; this will foster communication, enhancing the chances for settlement, and strengthening your professional and personal relationship.

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Civil Direct Calendaring

The Court and Legal Community Adapt to Civil Direct Calendaring

The transition has been a sea change for both the court and the legal community. Some changes are invisible to the world outside the court; others have a more direct impact on the practitioner and his or her clients.

In structuring direct calendaring, an overarching concern has been that the resources (judicial, staff, facilities) be adequate to meet the needs of the existing and projected civil caseload. Put in other terms, a successful conversion should afford the parties an equal or better prospect of a credible trial date and availability of court time for motions, case management and settlement resources in comparison to a master calendar system. As noted, each direct calendar judge currently has approximately 595 assigned cases, of which around one-fourth are classified as limited jurisdiction and three-fourths are unlimited jurisdiction. These numbers, of course, change on a daily basis as cases are filed and disposed of through settlement, motion, and trial, and occasionally by reason of bankruptcy or removal to U.S. District Court.

To manage these daunting numbers requires a certain collaborative effort between the court and bar. This collaborative effort is enhanced when the parties adopt and support certain "best practices" considered below, many

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of which are applicable without regard to a court's calendar management system and all of which have at their core precepts of honesty, integrity and preparation. Embracing best practices should never be seen as compromising counsel's obligation to protect the interests of their clients.

Civility. For ABTL members and the bar generally, guidelines are found at http://www.abtl.org/pdfs/civility-guidelines/pdfs. The Alameda County Superior Court has also long supported the Alameda County Bar Association's Statement of Professionalism and Civility. (http://www.acbanet.org/documents/pdf/EthicsBrochure2005.pdf)

Informal resolution when feasible. An extraordinary number of disputes are susceptible to informal resolution without undermining the value of the adversary system. Such resolutions yield substantial time and cost savings for the parties and the court. Prime examples are avoiding unnecessary demurrer and motion to strike practice when the opposing party stipulates to amend on receipt of a meet and confer communication, and informal resolution of discovery disputes (*e.g.*, seeking to compel discovery, and protective or limiting orders). Many direct calendar judges make themselves available to confer informally with the parties to resolve pleading and discovery issues without a formal motion, to intervene on a "real time basis" by telephone to resolve an impasse in a deposition, or to have depositions conducted on court premises in lieu of incurring the expense of a discovery referee. Clearly, there are limits on informal resolution and not every dispute in every case is appropriate. Individual judges' availability for these purposes is indicated in the Notice of Judicial Assignment for All Purposes issued at the outset of each case and/or on individual department websites.

Preparation and timely filing of case management statements. It is well understood that not every case needs the same level of judicial attention or court time. Well-prepared attorneys, cooperating reasonably with each other, frequently will need little court time and the case will proceed to resolution through direct negotiations or ADR and failing resolution by those alternatives will need only a mandatory settlement conference and perhaps a trial date. Those cases, which essentially manage themselves on a timely basis, liberate time for other more "needy" cases. Counsel should facilitate the court's resource allocation by timely filing informative case management statements resulting from a meaningful meet and confer session. This may allow the court to dispense with an appearance for a case management conference with advance notice to counsel and allocate the time of the court and the parties more effectively.

Alternative Dispute Resolution. ABTL member readers are well familiar with the array of ADR resources and providers in the legal community. The court recognizes that for small cases or parties with limited resources, locating and obtaining ADR services may be problematic. Regardless of case size or complexity, having an effective ADR program is integral to the court's functions. The Alameda Superior Court has undertaken a concerted effort to increase ADR resources by creating a new position of ADR Program Administrator and to emulate successful ADR programs in other courts. The court will have these resources in place and involve the legal community in implementation in the next several months.

Technology and Direct Calendaring

DOMAIN and the court's website play key roles in facilitating direct calendaring. Most counsel are familiar with the DomainWeb (http://www.alameda.courts.ca.gov/courts/) as a resource for case and calendar information, fully-imaged case files and tentative rulings. In addition, each direct calendar department maintains a separate webpage linked through the court website. The webpage contains current contact information for the department (location, telephone, fax and e-mail, and scheduling) together with directions for reserving and modifying hearing dates for law and motion matters. Most direct calendar judges require that reservation requests be made through departmental e-mail to reduce the burden on hardworking courtroom staff. The court's web-based reservation system used in Department 31 for law and motion in the pre-direct calendar era is not utilized for these purposes.

Additionally, the departmental webpage includes a list of the cases pending in the department by case number, name and date of filing. Clicking on any field in the case listing will link directly to that case's page in DomainWeb.

Finally, the departmental webpage may contain specific suggestions for facilitating practice before the department. Courts are precluded from adopting so-called "local local rules" which vary matters preempted by the California Rules of Court or governed by the Local Rules, but practice suggestions are not precluded and may be very helpful to the practitioner as well as the court. An example from one department's webpage follows:

> (1) Counsel should consider and recommend creative, efficient approaches to valuing and resolving their case (CRC §3.724). (2) Potential discovery and other problems should be anticipated and discussed. (3) No discovery motion shall be filed without prior serious efforts to resolve it. If unsuccessful, Moving party may then e-mail the Court attaching a letter (max 3 pages) outlining the dispute. Opposing party may e-mail a brief response within 24 hours. The Court will advise the parties how the issue will be resolved.

Tentative rulings and case management orders. Most, but not necessarily all, direct calendar judges issue tentative rulings on law and motion matters via DomainWeb. Many direct calendar judges also issue tentative or final case management orders for pending case management conferences through DomainWeb. All counsel are strongly encouraged to consult DomainWeb on a regular basis when motions or conferences are pending to avoid unnecessary appearances and to be prepared to address issues identified in tentative rulings and case management orders.

E-mail communications with the court. As noted, in many direct calendar departments, the court encourages appropriate use of e-mail to reduce the burden on staff,

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and to facilitate prompt informal resolution of matters. Counsel must at all time comply with the restrictions on inappropriate *ex-parte* communications and not use e-mail in a fashion that would not be acceptable for non-electronic communications. Within these broad limits, become familiar with the extent to which the judges to whom you are assigned will accept the use of e-mail to expedite case management and dispute resolution.

Looking Ahead

From the court's view, the first year of full civil direct calendaring has been a successful transitional experience for the court and practitioners. We know, however, that the substantial effort that went into the design and implementation of direct calendaring must be followed by vigilant attention to the need for adjustment to the program. Changing trends in case type and volume require constant monitoring of the adequacy of resources including maintaining the goal of credible trial dates. Continued constructive feedback from the bar is also essential. The court will continue outreach and consultation with the bar through surveys, seminars and informal meetings. We encourage your comments and look forward to continuing to improve the court system.

The Honorable Robert B. Freedman and the Honorable Steve Brick are on the Superior Court for the County of Alameda. Both are also members of the Board of Governors for the Northern California chapter of ABTL.

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Joint Defense Agreements

that counsel for clients with a common interest may communicate without fear of waiving a privilege. The benefits in such cases are obvious — complex transactions and voluminous documents can be jointly analyzed, experts can be shared, and legal theories may be explored, all without compromising client service or loyalties.

The benefits of joint defense relationships are not limited to the parties. The Manual for Complex Litigation counsels that parties in mass tort suits be encouraged to "present joint defenses or to coordinate motions and eliminate repetitive arguments." *Manual for Complex Litigation (Fourth)* § 22.2, Matthew Bender (2007). Indeed, many pre-trial orders in complex, multi-party litigations require that counsel coordinate with one another. *See, e.g., In Re: TFT-LCD (Flat Panel) Antitrust Litigation*, MDL No. 1827 (N.D. Cal. September 25, 2007) (order that cooperation by counsel is "essential" and that communication of information among counsel "shall not be deemed a waiver of the attorney-client privilege or the protection afforded attorney work-product"); *United States v. Stein, et al.*, 05-cr-888 (S.D.N.Y. October 25, 2005) (order in criminal case that counsel cooperate in support of motions).

Perhaps the lone voice questioning the utility of joint defense agreements has been the Department of Justice. Then-U.S. Attorney James Comey of the Southern District of New York, for instance, stated a few years ago that it was difficult "to understand why a corporation would ever enter into a joint defense agreement because doing so may prevent it from making disclosures it either must make if it is in a regulated industry, or may wish to make to a prosecutor." Similarly, the 2006 McNulty Memorandum reiterated a directive that a prosecutor weigh whether a corporation is protecting culpable employees by, among other things, "providing information to the employees about the government's investigation pursuant to a joint defense agreement." The Department has more recently signaled a change in this policy. On July 9, 2008, Deputy Attorney General Mark Filip sent a letter to Congress summarizing pending changes to the Department's principles for prosecuting corporations. Filip wrote that prosecutors, in evaluating cooperation, will not consider whether a company has entered into a joint defense agreement.

Federal vs. State Court Differences On Joint Defense Privilege

Federal Overview. The joint defense privilege is commonly described as an extension of the attorney-client privilege, but more accurately arose as an exception to the rule that the attorney-client privilege is waived where privileged communications are disclosed to a third party who shares a common interest. *United States v. Stepney*, 246 F. Supp. 2d 1069, 1074-75 (N.D. Cal. 2003). It is both an evidentiary rule which precludes disclosure of qualified communications, and an ethical doctrine that prevents counsel from disclosing confidences. *Id*. A party seeking to preclude discovery of a communication must show that communications were made in the course of a common effort, that the statements were designed to further that effort, and that the privilege has not otherwise been waived. *In re Mortg. Realty Trust*, 212 B.R. 649, 653 (C.D. Cal. 1997).

Although one might expect that the privilege could be uniformly applied, "[f]ederal circuits are not all on the same page and perceive the joint defense privilege quite differently." *Lugosch*, 219 F.R.D. at 236. It has been stated that the Ninth Circuit has a "relatively broad view" of the doctrine, whereas the Second Circuit "has adopted a more conservative perspective of the privilege's expanse." *Id*. Depending on the jurisdiction within the federal system, some courts are willing to infer that parties have privilege protection based on broadly-defined common interests, while other courts have refused to find a privilege unless the parties show an ongoing common enterprise or agreement to a common defense strategy. *United States v. Weissman*, 1996 WL 737042, at * 7 (S.D.N.Y. 1996).

California Overview. In contrast to the federal courts, California courts do not recognize a "privilege" for joint defense communications. California courts only apply privileges created by statute and there is no statute pro-

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MARY MCCUTCHEON

On INSURANCE

The California Court of Appeal decision in *Qualcomm Inc. v. Certain Underwriters at Lloyd's London,* 161 Cal. App. 4th 184 (2008) is a cautionary tale for those intending to settle complex cases with insurance money. An agreement with the primary insurer cannot be made in a vacuum. Defense and coverage counsel also must understand whether and how the excess policies are triggered if the insured settles with the primary insurer.

Qualcomm was sued by employees in a class action lawsuit concerning rights to unvested company stock options. Qualcomm sought coverage for defense and indemnity payments in the action under its Directors and Officers ("D&O") liability insurance program. As is common with D&O programs for public companies, Qualcomm purchased several layers of D&O insurance coverage to provide protection for such claims ("the D&O tower"). A "D&O tower" consists of a primary insurance policy and one or more excess layers which typically "follow form" to the primary policy. The primary policy, with limits of $20 million, was issued by National Union; the first excess layer (also for $20 million) was issued by Certain Underwriters at Lloyd's, London ("Underwriters").

While excess policies typically incorporate the terms and conditions of the underlying primary policy unless specifically stated to the contrary, they are considered separate contracts. Excess insurers are not bound by the actions of the primary insurer. Further, excess policies are not triggered until the primary and any other underlying insurance limits are "exhausted." Underwriters' policy stated that it was triggered only after "the underlying insurers [National Union] had paid or been held liable to pay" the full underlying limits.

Qualcomm settled the employee class action, and made a claim against its insurers for defense and settlement expenses on those actions. It settled with National Union for payment of $16 million of the $20 million primary limit. Qualcomm then sought reimbursement from Underwriters for an unpaid portion of the claim in excess of $20 million, contending that payments by National Union, Qualcomm "or other third parties" had satisfied exhaustion of the National Union primary limit. In other words, Qualcomm did not assert that Underwriters should pay all sums in excess of National Union's $16 million payment. Rather, Qualcomm conceded that it "or other third parties" would satisfy the $4 million gap.

Nevertheless, the trial court and the Court of Appeal agreed that Underwriters escaped their coverage allegations because the full underlying limit was not paid by National Union. It found that the "exhausted" provisions were unambiguous. According to the Court of Appeal, nothing in the settlement terms between National Union and Qualcomm, or any other documents, indicated that National Union had paid or been "held liable" to pay the full primary limits. Thus, the excess policy coverage was never triggered, and Underwriters were not obliged to respond to the portion of the claim that exceeded $20 million.

The court rejected Qualcomm's argument that it had a "reasonable expectation" of coverage. It also rejected the argument that failure to require Underwriters to pay covered sums above the $20 million primary limit inhibited the public policy of "promoting settlement and risk-spreading by insurance."

This case is a reminder that a litigator must consider excess policy language when negotiating a settlement, even if the excess coverage "follows form." It is extremely common for a primary insurer, especially when there is any potential coverage dispute, to seek a discount off its full limits. If the insured expects to tap into the excess insurance, it has two choices. First, it can hang tough and insist that the primary insurer pay full limits or risk excess for failure to settle. In the alternative, the insured can try to persuade all insurers, excess as well as primary, that there are serious risks of exposure if the case is not settled, and that each insurer should pay some portion of its limits to settle the case. In that instance, each insurer may agree that all insurers get a discount off their policy limits in recognition of the coverage issue. It also is likely, however, that the insured will be expected to contribute as well, in recognition of the value of the insurers' alleged coverage defenses.

Mary McCutcheon

Finally, it is now considered best practices for brokers to demand that excess policies provide that the excess coverage is triggered if either the primary insurer or the insured pays the full primary limits. Alternatively, some excess insurers offer "limit shavings endorsements" that allow the primary insurer to settle at a discount while preserving coverage by the excess carriers, but also require that the excess carriers receive at least as favorable a discount as the primary insurers.

Attorneys seeking to settle a case which may require contribution from more than one D&O insurer may be tempted to approach the task in a linear fashion, "knocking off" one insurer at a time. This approach ignores the interplay between the various layers of coverage. Coverage can be lost if these complexities are not properly appreciated.

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viding for a common interest privilege in California. *Roush v. Seagate, et al.*, 150 Cal.App. 4th 210, 224 (2007). Nevertheless, the "common interest" doctrine exists in California as an exception to the rule that attorney-client communications are waived upon disclosure to a third-party, but only so long as the communications further the attorney-client or other privileged relationship. *Id.*; *OXY v. Superior Court*, 115 Cal. App. 4th 874, 889 (2004).

To establish that a communication falls within the "common interest doctrine," the parties must establish that the communication is otherwise protected by virtue of a recognized statutory privilege. *OXY*, 115 Cal. App. 4th at 890. Once established, the parties must demonstrate that the disclosure was "reasonably necessary" for the accomplishment of the purpose for which the lawyer was consulted. *Id*. Accordingly, California law differs in several respects from the privilege recognized in federal courts. Most importantly, perhaps, the communication must be "reasonably necessary" to advance the services being provided to the client — which suggests a more stringent scrutiny of the purpose of a joint communication than might be applied in federal court.

Although these differences may not be significant in every matter, the fact that differences exist underscores that counsel must be familiar with the law of the state or circuit in which the matter is pending, as the protection of communications may vary depending on the jurisdiction in question.

Do Our Interests Match?

One issue to consider when entering into a joint defense agreement is whether there is a unity of interests between the parties with whom the agreement will be entered.

The privilege recognized in federal courts does not require a complete unity of interests among the participants. *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965) (rejecting that the privilege applies only where communications are "concerned with trial strategy or defenses" and protecting statement made at a pre-indictment meeting that one defendant would plead guilty); *In the Matter of Grand Jury Subpoena*, 406 F. Supp. 381, 392 (S.D.N.Y. 1975) ("[t]hat a joint defense may be made by somewhat unsteady bedfellows does not in itself negate the existence or viability of the joint defense").

One matter where both federal and state courts concluded a sufficient unity of interests did not exist to prevent a waiver involved McKesson's massive accounting scandal and the internal investigation that subsequently was shared with the government. The question in those cases was whether McKesson shared a common interest with the government. During the investigation, McKesson entered into confidentiality agreements with the government and provided a privileged report based on its internal investigation. Based on this disclosure, plaintiffs and former officers argued in subsequent proceedings that they were entitled to the report. The various courts rejected McKesson's efforts to shield disclosure based on its claim that it shared a "common interest" with the government in uncovering fraud by its officers. *United States v. Bergonzi, et al.*, 216 F.R.D. 487, 496 (N.D. Cal. 2003); *McKesson HBOC, Inc. v. Superior Court*, 115 Cal.App. 4th 1229, 1238 (2004); *McKesson Corp. v. Green*, 266 Ga.App. 157, 164 (Ga. Ct.App. 2004); *see also Saito v. McKesson HBOC, Inc.*, 2002 Del. Ch. LEXIS 125, *19 (2002) (rejecting argument that McKesson and the government shared a common interest, but finding that the report was protected work product); *Aronson v. McKesson HBOC, Inc.*, 2005 WL 934331, *7 (N.D. Cal. 2005) (same).

While this result may not surprise many practitioners, one California court recently examined the *McKesson* holding that there is no privilege where parties merely have "overlapping," rather than "common," interests. *Roush*, 150 Cal.App. 4th at 224. The Court observed that "there is no talismanic method by which parties must prove that a common interest exists so as to eliminate the waiver otherwise created by a third-party disclosure." *Id*. at 225. The court concluded an "overlapping" interest in suing a common defendant did not *per se* mean that they could share information without waiver; the parties were required to show that sharing information was "reasonably necessary to advance [the] case." *Id*. This holding suggests that California courts will be more prone to question the common interest of the parties when measuring whether communications are "reasonably necessary" to advance the services provided to the client.

To Document or Not to Document, That Is the Question

It is not uncommon to enter into oral joint defense agreements where reducing an agreement to writing is too time-consuming given the exigencies of a particular matter. There is no requirement that an agreement be in writing for the communications to be protected. *Stepney*, 246 F. Supp. 2d at 1079 n. 5. Many reasons exist, however, to document a relationship.

In the event of a challenge to a joint defense relationship, for example, "[t]he existence of a writing does establish that defendants are collaborating, thus guarding against a possible finding that a particular communication was made spontaneously rather than pursuant to a joint defense effort." *Id*.

Furthermore, without a writing, there might not be an understanding of the parties' obligations to each other. A writing will provide that communications should remain confidential — even after withdrawal by a party. Should a co-defendant later agree to cooperate with the opposing party, responsibilities related to disclosure of communications could be in dispute. Having a writing helps avoid uncertainties.

Just as important is a written definition of "covered communications," which describes what communications

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PETER BENVENUTTI

On CREDITOR'S RIGHTS

Since the early '90's, the term "zone of insolvency" has been part of the vocabulary of boardroom denizens and the lawyers who advise (and sue) them, thanks to the unpublished but widely disseminated 1991 decision of the Delaware Chancery Court in *Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corporation*, 1991WL 277613 (Del Ch.), 17 Del. J. Corp. L.1099. In *Credit Lyonnais*, involving a dispute over control of the MGM movie empire, the Chancery Court articulated the view that, "[a]t least where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent of the residue risk bearers [i.e., the stockholders], but owes its duty to the corporate enterprise.... [T]he MGM board...had an obligation to the community of interest that sustained the corporation, to exercise judgment in an informed, good faith effort to maximize the corporation's long-term wealth creating capacity."

Over the following 16 years, this pronouncement evolved to the shorthand generalization that, when a corporation's financial condition approached insolvency (and hence, entered that "zone"), the constituency for corporate directors expanded from shareholders alone to include creditors. Some courts and commentators, and many litigants (both prospective and actual), took it a step further to assert that corporate directors therefore owed a duty to creditors that creditors could enforce by suing the board directly.

Needless to say, the aggressive assertion of such a duty by creditors of troubled companies generated no small amount of angst on the part of directors as they struggled to decide whether to spend limited cash to keep the doors open while pursuing possible additional funding or other positive developments (an approach calculated to enhance the prospects of a return for shareholders) or instead to "pull the plug" and thereby preserve cash to distribute in a liquidation to creditors. Understandably, directors wanted advice about their personal exposure to lawsuits by creditors if they chose the former course, and the answer that emerged from the cases was not entirely clear or reassuring. What was thought to be clear, though, was that board decisions made in the zone of insolvency carried added risks and complexity due to the threat of claims for breach of fiduciary duties purportedly owed to creditors directly. So one question directors often asked of their advisors was whether or not the company was "in the zone."

Last year, the Delaware Supreme Court purported to make the zone of insolvency irrelevant. *See North American Catholic Educational Programming Foundation, Inc., v. Gheewalla*, Del., 930 A..2d 92 (2007). Gheewalla and the other defendants were members of the board of Clearwire Holdings, a startup sponsored and funded by Goldman Sachs to exploit radio wave spectrum licenses. Clearwire agreed to acquire rights to licenses from plaintiff NACEPF, but then breached the agreement, failed to acquire or pay for the licenses, and liquidated. NACEPF sued Gheewalla and other Clearwire directors, asserting that they had violated a fiduciary duty owed directly to NACEPF as a Clearwire creditor based on their alleged failure, while Clearwire was in the zone of insolvency, to preserve its assets for the benefit of creditors. The defendant directors allegedly caused Clearwire to hold on to NACEPF's license rights just to "keep Goldman's investment 'in play.'"

The defendants brought a motion to dismiss, requiring the Chancery Court to decide whether NACEPF's complaint, which was asserted solely as a creditor's direct (not derivative) claim against directors, stated a viable claim under Delaware law. The Chancery Court held that it did not. The Delaware Supreme Court agreed, calling the issue one of first impression and framing the question as follows: "as a matter of Delaware law, can the *creditor* of a corporation that is operating within the *zone of insolvency* bring a direct action against its directors for an alleged breach of *fiduciary duty*?"

Peter Benvenutti

The *Gheewalla* decision brought a measure of welcome (if incomplete) clarity to the scope of the duties of directors of financially troubled companies by its express articulation of the following principles of Delaware law:

1. Corporate directors owe no direct fiduciary duty to creditors, and creditors have no direct right of action against corporate directors for breach of any such duty, whether the corporation is solvent, in the zone of insolvency or actually insolvent. 930 A.2d at 99-101.

2. In the case of a solvent corporation, the duty of the directors to exercise business judgment in good faith on behalf of the corporation for the benefit of its shareholders may be enforced by shareholders through a derivative action, even if the corporation is "navigating the zone of insolvency." 930 A.2d at 101.

3. When the corporation is insolvent, the remedy for directors' breach of fiduciary duty to the corporation remains by way of a derivative action, but creditors — as the "principal constituency injured by any fiduciary breaches" — have standing to bring derivative actions. 930 A.2d at 101-102.

Gheewalla has by no means eliminated all the fact-driven complexity from evaluation of the decisions of directors of financially troubled companies, because the context will define the available options and shape the contours of the duties of good faith, care and loyalty. It does not resolve the ticklish issue of trying to decide, in real time, whether a troubled corporation is insolvent. But it has rendered the "zone of insolvency" superfluous, both as a matter of terminology and as a concept with legal significance to the conduct of corporate directors.

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Joint Defense Agreements

— documents, witness statements, etc. — are part of the agreement. In some matters, the government has sought information from the defense on the basis that it is outside of a joint defense agreement. *United States v. McPartlin*, 595 F.2d 1321, 1335-36 (7th Cir. 1979). Defining covered communications will help demonstrate that the parties intended such communications to be privileged.

What Do You Mean There's a Conflict?

One possible consequence of a joint defense relationship is that counsel might expose themselves to disqualification.

In *Essex v. Hartford*, 975 F. Supp. 650, 656-57 (D.N.J. 1997), for example, a magistrate judge determined that all parties to an agreement were disqualified after disclosure that one of the defense firms had previously represented the plaintiff. The District Court subsequently held that a hearing was needed to determine what confidences were shared and the relationship between the tainted attorney and the joint defense group. *Essex v. Hartford*, 993 F. Supp. 241, 252 (D.N.J. 1997). The Court found that a hearing would permit investigation of the relationship among defense counsel to determine what obligations were owed and what confidences were shared. *Id*.

In another notorious case, *United States v. Henke*, 222 F.3d 633 (9th Cir. 1999), party to an agreement pled guilty and cooperated with the government. *Id*. at 636-37. His testimony, however, was different than the story that he had earlier shared with the joint defense group. *Id*. at 637. The lawyers for the other defendants sought to withdraw, believing that the information obtained under the agreement precluded their ability to cross-examine the cooperating defendant. *Id*. The Ninth Circuit found that the agreement at issue created an "implied attorney-client relationship" between the co-defendants' counsel and the cooperating defendant, and disqualified all of the members of the joint defense group from further participation in the case. *Id*.

Like these courts, an ABA committee agreed that if a lawyer received another party's confidences while acting in a joint defense relationship, the lawyer would be disqualified from being adverse to the party in the future. ABA Op. 95-395 (1995).

Few clients would be pleased to learn that their investment in counsel was rendered valueless because of a conflict arising from a joint defense relationship. But with cautious drafting, the potential for conflicts can be reduced.

The dilemma of *Henke*, for instance, might be avoided with an agreement that conditionally waived confidentiality of joint defense materials if the materials were used as part of a defense, *see Stepney*, 246 F. Supp. 2d at 1084-86, or a provision which allowed for impeachment should a defendant testify differently than what was previously communicated to the joint defendants. Additional terms of an agreement that protect against disqualification include: (1) a statement that nothing in the agreement should be construed to affect the separate representation of each client by their respective counsel; (2) a provision that no attorney-client relationship is created with other parties to the agreement and that the duties of loyalty that apply in an ordinary attorney-client relationship do not apply to other co-defendants by virtue of the agreement; (3) provisions that designate certain of the communications as restricted to counsel at a firm working on a matter; and (4) warranties by counsel that there is no conflict with the opposing party.

But We Were Friends

There is no way to "put the toothpaste back in the tube" when previously shared confidential information is disclosed to an adversary. Prudence dictates, therefore, that a joint defense group plan that a party to the agreement will someday withdraw. The agreement should provide that each party not disclose confidences upon withdrawal or cooperation with the government or an opposing party. The agreement should provide that upon an agreement to cooperate, the party withdrawing must notify the joint defendants and return all joint defense communications. An agreement should stipulate that there is no adequate remedy at law in the event of a breach and, therefore, that injunctive relief is appropriate to prevent disclosure of confidential information. In *Waller v. Financial Corp. of America*, 828 F.2d 579 (9th Cir. 1987), the Ninth Circuit pointed to similar provisions to suggest that an aggrieved party could remedy a threatened breach in court. *Id*. at 584 (no reason why a party cannot "seek injunctive relief or the disqualification of counsel, remedies which the joint defense agreement itself expressly prescribes").

In the event that a third party obtains privileged information, the California Supreme Court's holding in *Rico v. Mitsubishi*, 42 Cal. 4th 807, 817 (2007) presumably would require counsel "to refrain from examining the materials any more than is essential to ascertain if the materials are privileged," and to immediately notify the joint defendants. Given this obligation, there always is the spectre that the third party's possession of information was improper, thereby exposing counsel to disqualification. And where the third party is the government, prosecutors will need to demonstrate that the evidence against a defendant was derived from legitimate, independent sources. *See U.S. v. Schwimmer*, 924 F.2d 443, 446 (2d Cir. 1991) (citing *Kastigar v. U.S.*, 406 U.S. 441, 461-62 (1972)).

These are but a few of the issues that need to be considered when entering into a joint defense agreement. Given the worst case scenario that client confidences could see the light of day, counsel should proceed cautiously, understanding the rules of the applicable jurisdiction and carefully evaluating the proceedings as they develop.

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WALTER STELLA

On EMPLOYMENT

There have been a number of significant case developments this year in the area of employment law. Three noteworthy decisions are discussed below.

Give Me A Break. Will wage and hour class actions soon be a thing of the past in California? Both sides of the employment law bar are pondering that question — at least with respect to alleged meal and rest break violations. A recent appellate court decision held that employers are not required to ensure that employees take meal breaks, and that alleged violations of California's break laws are not susceptible to class treatment. *Brinker Restaurant Corporation v. Superior Court*, — Cal. App. 4th —, 2008 WL 2806613 (2008).

In *Brinker*, the plaintiff brought a purported class action on behalf of nearly 60,000 hourly employees at Chili's and Romano's Macaroni Grill restaurants alleging, among other things, rest and meal break violations. The *Brinker* court agreed with several California federal district courts, which previously held that employers do not have an obligation to force their employees to take a meal break. Instead, their obligation is simply to "provide" employees with the opportunity to take the meal breaks.

The court also held that class treatment of the claims was inappropriate because individual issues predominate in these types of cases. The court noted that some employees did take lunch, others were denied meal breaks, while others were required to take a meal break too soon in their shift. Moreover, the reasons for these differences also varied. Explanations for the missed meal breaks included personal choice, managerial coercion and inadequate staffing.

Although employers may breathe a sigh of relief at this latest ruling, the case is likely to be reviewed by the California Supreme Court if appealed. There is a conflicting appellate decision holding that employers have a duty to "ensure" that employees receive meal periods. *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949 (2005).

No Means No. In a long-awaited opinion, the California Supreme Court ruled that Business and Professions Code Section 16600 prohibits employee noncompetition agreements unless the agreement falls within a statutory exception. *Edwards v. Arthur Andersen,* — Cal. 4th — (August 7, 2008). Section 16600 states: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The challenged provisions in *Edwards* prohibited the employee from performing services of the type performed on behalf of the employer for 18 months following termination, and from soliciting the employer's clients for 12 months following termination. The court held that these provisions were invalid under the plain meaning of Section 16600.

The court rejected the argument that Section 16600 only invalidates those restraints that totally prohibit someone from engaging in a profession, trade, or business, while allowing reasonable limitations. Consistent with this holding, the court also rejected the Ninth Circuit's interpretation of California law to allow "limited" or "narrow" restraints.

However, the court expressly declined to address the validity of agreements not to solicit employees, or whether, as several California appellate courts have held, noncompetes are enforceable in California when necessary to protect trade secrets.

Managers Aren't "Persons." The California Supreme Court ruled in *Jones v. The Lodge at Torrey Pines P'ship*, 42 Cal. 4th (2008), that there can be no individual liability for retaliation. In *Jones*, the plaintiff brought an action against his former employer and his former supervisor for sexual orientation harassment, sexual orientation discrimination, and retaliation under the Fair Employment and Housing Act (FEHA). The jury returned a verdict in favor of the plaintiff on the discrimination and retaliation claims against both the employer and the supervisor. The trial judge set aside the verdict against the supervisor on the ground that she could not be held liable for retaliation under FEHA. On appeal, the Court of Appeal reversed.

Walter Stella

The California Supreme Court granted review on the limited question of whether an individual may be held personally liable for retaliation under FEHA. In 1998, the California Supreme Court previously determined in *Reno v. Baird*, 18 Cal. 4th 640 (1998), that individual supervisors could not be held personally liable for acts of discrimination. However, the *Reno* court had not ruled out claims against individual supervisors for retaliation.

The court found that the legislative history behind the bill that added "person" to the retaliation subdivision did not indicate an intent to create personal liability for managers. Furthermore, according to the court, the reasoning which precluded individual liability for discrimination applied equally to retaliation claims. Supervisors cannot avoid making the personnel decisions which are allegedly discriminatory or retaliatory. The court also noted that the FEHA expressly excludes small employers from liability, which could lead to the anomalous result that individuals' supervisors, but not their employers, could be held liable for discrimination and retaliation.

The court left open the possibility, however, that an individual personally liable for harassment could also be held liable for retaliating against someone who complained or opposed that same harassment.

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Letter from the Editor

The ABTL Annual Seminar, alternating each year between great locations in Hawaii and on the "mainland," is always topical, educational, and fun for ABTL members and their families. This year ABTL will make its first visit to the island of Kauai for the 35th Annual Seminar, entitled "Businesses in the Courtroom: Getting Your Message Across." The seminar events will be held at the beautiful Grand Hyatt Kauai Resort & Spa, Poipu, Kauai, Hawaii. See http://kauai.hyatt.com/hyatt/ hotels/index.jsp

This year the annual seminar is on track for a record attendance; this is no surprise, given the great program. This spectacular CLE event focuses on the craft of trying business cases. The keynote speaker will be the Honorable Joyce L. Kennard, Associate Justice of the California Supreme Court.

Thomas Mayhew

On Thursday, September 25, panels will address "*Getting Your Message to the Jury*," with programs on "Rethinking Jury Selection," *voir dire*, and presenting the corporate defendant. Noted jurists, members of the plaintiff and defense bars, and respected jury consultants will all share their views.

On Friday, September 26, panels will address "*Teaching Complexity to Communicate with the Fact Finder.*" Topics including "An Effective Story — Is Your Theme Connecting?,""Seeing Is Believing — Using Graphics to Enhance Your Message," and "Experts as Educators — Making the Complex Understandable" will be on tap. In addition to high-profile legal professionals, expert witnesses and graphics consultants will be on these panels.

Finally, on Saturday, September 27, the panels will focus on "*Working With the Storytellers.*" Panel topics will include "Preparing the Corporate Witness to Testify," "Direct Examination — Telling a Compelling Story," and to paraphrase Yogi Berra, "Cross-Examination — If You Don't Know Where You Are Going, You Might Wind Up Somewhere Else."

Saturday evening, at a special banquet dinner for attendees and their guests, island entertainment will be provided by *The Barefoot Natives*, featuring artists Willie K and Eric Gilliom.

Space at the hotel is filling rapidly. You are responsible for booking your own hotel accommodations by contacting the hotel at 808-742-1234.

Registration, and additional information about the Annual Seminar and hotel facilities, is available on the ABTL's website, at http://www.abtl.org/annualseminar. htm, including a downloadable brochure listing the agenda and schedule for the program. If you have any questions about the Annual Seminar, please contact the event planner, Linda Sampson, at 714-602-2505 or via email at annualseminar@abtl.org. We hope you can join us in Hawaii.

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And finally, my usual note from the Editor: Remember that you too could write for the ABTL Report! One major feature of ABTL membership is the opportunity to publish in the Report, which is distributed to over 4,000 people, including all of the Northern California and San Joaquin chapter members, major law libraries, and federal and state judges throughout California. Writing an article encourages you to focus on the procedural, tactical, or legal issues that confront business litigators, and to take the time (so often limited in the hurly-burly of litigation) to develop your thoughts about the topic. It also shows the legal community that you "know your stuff" and are ready to participate in the dialogue about how we all can improve our business litigation skills and understanding of the process. Please contact me or my co-editor Howard Ullman with your ideas for future issues.

Thomas Mayhew is a partner in the San Francisco office of Farella Braun & Martel LLP. His co-editor Howard Ullman is of counsel in the San Francisco office of Orrick, Herrington & Sutcliffe LLP. Both are members of the Board of Governors for the Northern California chapter of ABTL. tmayhew@fbm.com and hullman@orrick.com