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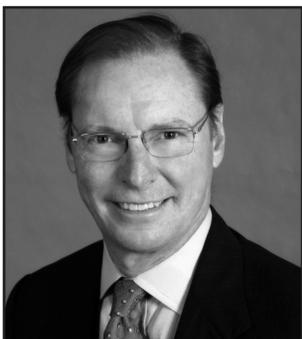
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REPORT

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Effective Law and Motion Practice

For three years before my retirement from the California Superior Court in June 2006, I ran one of San Francisco's two Law and Motion Departments. The workload was staggering, but it was one of most enjoyable jobs I ever had. I was concerned recently when State budget cuts forced the Court to eliminate one of those Departments. Things got worse when the remaining Law and Motion Judge was also given the work of the now-terminated Discovery Magistrates. How could any one Judge handle that? What would be the effect on attorneys who practiced in Law and Motion, which means just about every attorney who litigates in California? What would be the effect on the Court's work product, both in terms of timeliness and quality?



Hon. James L. Warren (Ret.)

I recently served on a panel about successful motion practice with judges still doing this kind of work. It should come as no surprise that, despite some administrative changes and an increased workload for the law and mo-

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The Admissibility of the Internet

Just thirteen years ago, a federal district court judge offered the following assessment of Internet-based evidence:

While some look at the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it as one large catalyst for rumor, innuendo, and misinformation. So as not to mince words, the Court reiterates that this so-called Web provides no way of verifying the authenticity of the alleged contentions that Plaintiff wishes to rely upon in his Response to Defendant's Motion. There is no way Plaintiff can overcome the presumption that the information he discovered on the Internet is inherently untrustworthy. Anyone can put anything on the Internet. No web-site is monitored for accuracy and *nothing* contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content of *any* web-site from *any* location at any time. For these reasons, *any* evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception rules found in Fed. R. Civ. P. 807.

Instead of relying on voodoo information taken from the Internet, Plaintiff must hunt for hard copy back-up documentation....

St. Clair v. Johnny's Oyster & Shrimp, Co., 76 F.Supp. 2d 773, 774-75 (S.D.Tex. 1999) (emphasis in original).

The world has changed a lot in 13 years. It is now clear that Internet-based materials — including such things as web pages, chat room communications, instant messages and Facebook posts — can be and frequently are admitted into evidence. There is no presumption that such materials are “inherently untrustworthy,” nor do most judges regard such evidence as “voodoo information.”

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tion judge, what works and what doesn't is pretty much the same as when I was ruling on motions and demurrers six years ago. It still rings true today that lawyers are often their own worst enemies when it comes to effective Law and Motion practice. When I left the Court to become an arbitrator and mediator with JAMS, I visited law firms whose attorneys had appeared before me and presented to them my views on what worked in Law and Motion. That advice is as pertinent today as it was then.

"Less is More" — This was my mantra on the bench and it remains so in private mediation and arbitration. Blaise Pascal is credited with apologizing for writing a long letter "because I didn't have the time to make it shorter." Those are wise words: shortening a document makes you work. You must think, you must organize, you must delete — but most of all, you must know what you want and you must know how to ask for it clearly. If you don't do this work, the Judge will be forced to do it for you. Given the staggering amount of paperwork that the Judge must slog through each day, that's not a good alternative.

"More is Less" — This is not restating the former principle in reverse. In a way, it is more important. The more you give me to review, the less likely that I will be able to read it thoroughly, to understand it or, in extreme cases, to get to it at all. On the bench I would sometimes get four summary judgment motions in a day, each over a foot thick. That's 48 inches — four feet! — of paperwork, not counting all the other motions up for resolution. This is scary stuff, and I had a staff of three full time law clerks and six volunteer law students to help me get through it.

An average calendar might have 24 matters on it. After a full morning of oral argument, I was left with about three hours to review motions for the next day. Three hours to do 24 motions equals 7 ½ minutes per motion. What if half of them go off calendar? Now the judge has twice as much time to consider your motion. There's your Warholian 15 minutes of fame. You've worked weeks or months on your motion, and the judge is under that kind of time pressure to evaluate it. Make it easier for the court: Less is More, and More is Less!

Demurrers — Think Before You File — Demurrers are the locusts of law and motion practice: they're everywhere. In my experience, however, most are filed as a knee-jerk response to being served with a pleading. Very few lawyers stop to ask the basic preliminary question: "What happens if I win?"

Here's what happens. You read through a complaint and conclude that you could do a better job.

What to do? Teach your adversary a lesson, of course. The demurrer is the perfect vehicle to inform the Court — and your opponent — that the correct way to sue your client is yadda, yadda, yadda. If you're good, you draw a pretty clear road map for counsel to use when he or she re-files the complaint. (Don't even dream of having an early demurrer sustained without leave to amend.) First Amended Complaint still doesn't pass your muster?

Keep going. In the end, thanks to your persistence, your client will end up facing Joe Six Pack instead of the wishy-washy initial effort. The lesson here? Think before you file!

"Why Can't the English..." — The Broadway musical *My Fair Lady* features a song that asks "Why Can't the English Learn to Speak?" In the Law and Motion Department, the lyric would be "Why Can't the Lawyers Learn to Write?" There are many techniques that lawyers could use to make their writing more persuasive. Here are four of my favorites:

- **Avoid Adjectives and Adverbs.** Lawyers love to dress up nouns and verbs with adjectives and adverbs. A "despicable breach of contract" is more descriptive than a "breach of contract;" a "brazen attempt to circumvent the Court's order" carries more weight than a "failure to comply;" counsel "yet again wantonly ignores his discovery obligations" imposes a moral failure on a lawyer's response to interrogatories. Get over it! You're not fooling anyone, you're making your brief too long, and you're weakening the point you're trying to make. This is not to say that adjectives and adverbs don't have a place in good writing. They do; they just need to be used sparingly.

Try this. Write your next brief the way you normally would, then go through and delete all adjectives, invective phrases, and adverbs. You'll be holding the written equivalent of pabulum. Read the brief again, but this time add adjectives or adverbs only where you need them for clarity or punch. Your brief will sing.

- **Use the Active Voice.** The active voice propels your brief forward; the passive voice hinders it. It also hides the person responsible and the details of what happened: "The legislation was passed;" "The perpetrator was apprehended according to accepted procedures;" "The contract was breached." Tell the Court who did what and why they did it.

- **Short Words Work.** Lawyers love long words. They seem to believe that the more florid and ostentatious their rhetoric, the more effective their argument. Hyperbole persuades. Not so. Short words are good. They have power. They persuade. They take up less space. They get to the point. Convoluted, multisyllabic words confound, create misunderstandings, result in misperceptions, derail and disorganize the reader, and circumvent the very conclusion they're trying to create.

- **Don't Count the Commas.** With years of brief writing experience under their belts, many lawyers believe that dependent clauses, when used judiciously, actually help the reader, who, being less familiar with the case than counsel, will be better able to understand the arguments, both legal and factual, if they are presented in a stream of consciousness sort of way, kind of like reading William Faulkner, but, with all due respect to such experience, and to Mr. Faulkner, who was one of my favorite authors in college, although I haven't read his work recently, I personally believe this approach has its disadvantages, the chief one of which is that by the time I get to the end of the paragraph, if I ever get that far, I have lost the point of what the author was trying to say, which is a big problem

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if my job, as a deciding judge, is to be persuaded that the author's point, whatever it might have been, is correct.

Hey, look. I'm human. My attention span is limited. I'm also very busy. I'll give it my best shot, but when you toss me into the comma quicksand, I'm going to get lost.

I titled this subsection "Don't Count the Commas." Maybe that was wrong. Count them. If you hit three, you've got too many.

Courtesy Copies Count — Our local rules require that counsel file a courtesy copy of motion papers directly with the Law and Motion Department. You wouldn't believe how often this rule is violated. It may seem trivial, but in practice this is a big deal. When Law and Motion processes a motion, we put notes and underscoring on the papers, we dog-ear them, sometimes we even cut them up or take them apart. When I was there, getting a motion ready for hearing was a very tactile experience. The Department can't do that with the papers that you file with the Clerk.

The effectiveness of courtesy copies is not limited to Law and Motion. My Inn of Court recently presented a tutorial that addressed the challenges faced by the Court in the wake of budget reductions. In preparation, I wrote to every judge running a civil department in San Francisco, and asked each what attorneys could do to make things run more smoothly in his or her court. Eighty percent (80%) put filing courtesy copies on the list, frequently as Item 1. Take a lesson from this response.

"Foundation, Foundation, Foundation" — In real estate, it's "Location;" in motion practice, it's "Foundation." You would be surprised to learn how many motions are lost because counsel fails to lay the proper foundation for an exhibit, an interrogatory answer, or a deposition transcript. If the foundation isn't there, the court will sustain an objection to the exhibit. If we're talking about a summary judgment motion, which is always filed at the last possible moment, the motion is lost and there's no time to re-file. Take the extra time you need to ensure that your document is properly authenticated and the foundation for it is accurately laid. These are two different concerns, and they both need to be done correctly.

Spellcheck Doesn't Cut It — Before you file your papers with the Court, read them — for content. Running the brief through Spellcheck isn't enough. Here are two examples of what can happen.

In the middle of a somewhat novel but interesting legal argument, an associate had inserted the editorial parenthetical: "[Does this pass the smell test?]" It was filed that way with the Court, but there were no misspellings. The next is my personal favorite. At oral argument, I had granted a motion for summary judgment filed by one of the City's larger law firms. I asked counsel for his form of order. A fairly senior attorney strode grandly up to the bench and handed me a piece of paper. The proposed order properly granted the motion, but it did so with the

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Drafting and Litigating Offers of Judgment: Top Ten Rules

Turning the tables is good. Pitfalls are bad. It's a good idea to keep both these things in mind when drafting — and litigating — offers of judgment. The rules are somewhat different in state and federal courts. Whether based on Rule 68 of the Federal Rules of Civil Procedure or section 998 of the California Code of Civil Procedure, though, the basic principle is the same: if you make an offer of judgment and the other side doesn't do better at trial, your client recovers certain offer "costs" and also avoids paying at least some of the other side's costs. Particularly where the liability cards are stacked against you, making an offer of judgment can level the playing field by giving your opponent a downside.

Under state law, such "costs" consist of the costs a party incurs after the offer is made, see CCP § 1032, including attorney's fees if authorized by statute or contract. CCP § 998(d) also gives the court discretion to award post-offer expert witness fees. Not only that, a plaintiff suing under a "one-way" fee-shifting statute that only provides for a fee award to a successful plaintiff, and who imprudently rejects a defendant's § 998 offer, also must pay the defendant's post offer attorney's fees. *Bates v. Presbyterian Intercommunity Hosp., Inc.*, 204 Cal. App. 4th 210, 213 (2012). Under federal law, the situation is much the same except there's no discretion to award expert witness fees.



Robert Stumpf

The Big Ten

So, particularly where the dispute arises out of a contract with an attorney's fees clause, drafting or litigating an offer of judgment is serious business. Here are ten important rules to keep in mind:

Rule #1: Some Plaintiffs Are Out of Luck. In state court, "any party" can make an offer of judgment. Not so in federal court, where only a "party defending against a claim" can make a Rule 68 offer. *See, e.g., Robins v. Scholastic Book Fairs*, 928 F. Supp. 1027, 1030-1031 (D. Ore. 1996). However, this description includes a plaintiff defending against a counterclaim. *Simon v. Intercontinental Trans. (ICT) B.V.*, 882 F.2d 1435, 1439 (9th Cir. 1989).

What about diversity actions in federal court? Do state law rules (such as CCP § 998) regarding permitting plaintiffs to make offers of judgment apply? Some courts say yes. *See, e.g., Armacost v. Amica Mut. Ins. Co.*, 821 F. Supp.

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75, 78-79 (D.R.I.), *aff'd*, 11 F.3d 267 (1st Cir. 1993). But the Ninth Circuit says no. *Home Indem. Co. v. Lane Powell Moss and Miller*, 43 F.3d 1322, 1331-1332 (9th Cir. 1995).

Rule #2: Timing Is Everything. The time limits are also a little different in state and federal courts. Under CCP § 998, the window for making offers closes ten days before trial (or arbitration). The other side then has 30 days, or until the start of trial if fewer than 30 days, to accept. Under Rule 68, the defendant can make an offer any time until 14 days before trial. The plaintiff has 14 days to accept. FRCP 68(c) provides that where liability has been determined but the *extent* of liability remains to be decided, the defendant may also make an offer of judgment at least 14 days before the hearing on damages.

Rule #3: The Tie Goes to the Offeror. In both state and federal courts, “more favorable” means just what it says. If the offer of judgment was \$100,000, a judgment after trial for exactly \$100,000 is not *more* favorable. So the party making the offer wins. *Lang v. Gates*, 36 F.3d 73 (9th Cir. 1994). In federal court, the defendant bears the burden of showing that its Rule 68 offer was more favorable than the judgment. *See, e.g., Reiter v. MIA N.Y. City Transit Auth.*, 457 F.3d 224, 231 (2d Cir. 2006).

“A point to be made at the outset is that a judgment that is identical to the Rule 68 offer is not more favorable, and Rule 68 therefore applies in such a situation.” 12 Fed. Prac. & Proc. § 3006.1 (2d Ed.).

Rule #4: Beware Making “Ambiguous” Offers. Here’s where it gets interesting. Although an offer of judgment is indeed an offer, it is no ordinary offer. It’s not the starting point for a negotiated agreement. There is no “negotiation.” The party receiving the offer has only two choices: accept it or not. In state court, an offeror usually can revoke its § 998 offer before acceptance. *Berg v. Darden*, 120 Cal.App.4th, 721, 731 (2004). But several federal Circuit Courts hold a Rule 68 offer is not revocable. *See, e.g., Webb v. James*, 147 F.3d 617, 620 (7th Cir. 1998). The Ninth Circuit has not spoken. And unlike ordinary offers, a party cannot decline an offer of judgment with impunity because doing so could have serious consequences.

All these things, not to mention simple fairness, entitle such offerees to a clear, straightforward, and unambiguous offer. Thus, an offer under CCP § 998 “must be strictly construed in favor of the party sought to be subjected to its operation.” *Garcia v. Hyster Co.*, 28 Cal.App. 4th 724, 732-733 (1994). If accepted, an offer of judgment is also part of a contract of adhesion. The principle of construing ambiguities against the drafter “applies with peculiar force” to such contracts. *Neal v. State Farm Ins. Cos.*, 188 Cal.App. 2d 690, 695 (1961). In other words, when it comes to offers of judgment under state law, *contra proferentem* plays a much more significant role than usual and is often dispositive.

Federal law is even more emphatic on this point. In the Fourth Circuit, if a Rule 68 offer is ambiguous, that’s the end of the matter. Courts must construe it against the defendant as drafter and may not, as with ordinary com-

mercial contracts, even *consider* extrinsic evidence to try to resolve the ambiguity. *Bosley v. Mineral County Comm’n*, 650 F.3d 408, 414 (4th Cir. 2011) (“Evidence extrinsic to the offer’s terms should not be considered.”) The Third Circuit agrees. *El Club Del Barrio, Inc. v. United Cmty. Corps.*, 735 F.2d 98, 100 (3d Cir. 1984). So do various district courts in other Circuits.

The Ninth Circuit does not go that far and permits district courts in this Circuit to consider extrinsic evidence to construe an ambiguous Rule 68 offer. But only to a limited extent. In construing ambiguities in a Rule 68 offer in federal civil rights cases, the Ninth Circuit made clear a district court’s consideration of extrinsic evidence is limited to determining whether the ambiguous clause “was intended by both parties” to have the meaning advanced by the offeror. Otherwise the court must construe it against the offeror. *Muckleshoot Tribe v. Puget Sound Power & Light Co.*, 875 F.2d 695, 698 (9th Cir. 1989). In a related context, the Court held that “[i]f the ambiguity persists even after resort to extrinsic evidence, we generally apply the rule of *contra proferentem* and construe the ambiguity against the drafter.” *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187, 1194 (9th Cir. 1996). To avoid *contra proferentem*, there must be “clear evidence” that effectively *eliminates* the ambiguity. (*Id.*)

The bottom line advice to offerors in both state and federal courts is the same: make ambiguous offers of judgment at your peril.

Rule #5: An Unaccepted Offer of Judgment May Sometimes Be Admissible. Both state and federal law are clear that unaccepted offers of judgment are generally not admissible. There are exceptions, though. In federal court, a Rule 68 offer can sometimes be admitted to prove the court lacks subject matter jurisdiction or for some purpose other than to prove or disprove liability or the amount of a claim. *See, e.g., O’Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 574 (6th Cir. 2009) (Rule 68 offer that satisfied the plaintiff’s entire demand mooted the case and thereby deprived the district court of subject matter jurisdiction). Likewise, an unaccepted § 998 offer is admissible for purposes other than to prove liability, *e.g.*, that an insurer was acting in good faith. *White v. Western Title Ins. Co.*, 40 Cal.3d 870, 888 (1985).

Rule #6: An Offer of Judgment Can Contain Non-monetary Terms, But Be Careful. Most times, we think of offers of judgment as offering a specific amount of money. However, it doesn’t have to be that way. A § 998 offer may, for example, offer a waiver of costs in exchange for a dismissal with prejudice. *Hartline v. Kaiser Found. Hosps.*, 132 Cal.App. 4th 458, 471 (2005).

On the other hand, including nonmonetary terms may make it more difficult than usual to determine whether an offer of judgment was more or less “favorable” than the result at trial. *See, e.g., Association for Retarded Citizens v. Olson*, 561 F. Supp. 495, 498-499 (D.N.D. 1982, *aff’d*, 713 F.2d 1384 (8th Cir. 1983) (judgment challenging conditions of confinement and treatment of mentally retarded persons more favorable than complicated Rule 68 offer). According to one district court in the Ninth Circuit, “the

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better course is to compare monetary awards only.” *Real v. Continental Group, Inc.*, 653 F.Supp. 736, 738-739 (N.D. Cal. 1978).

In California state court, a § 998 offer may not be conditioned on terms that cannot be valued in monetary terms. *Barella v. Exchange Bank*, 84 Cal. App. 4th 793, 801 (2000). Nor may it include a provision disposing of claims beyond those at issue in the pending action. *Chen v. Interinsurance Exch. Of Auto. Club*, 164 Cal. App. 4th 117, 121 (2008).

Rule #7: An Offer of Judgment Can Also Leave Certain Matters For Court Determination. In both state and federal courts, offers of judgment can be effective even if they leave some terms open-ended for later determination by the trial court. Under state law, for example, a § 998 offer to pay “reasonable attorneys’ fees” to be determined by the court is valid and not too uncertain to be effective. *Elite Show Services, Inc. v. Staffpro, Inc.*, 119 Cal. App. 4th 263, 268-269 (2004). (Query whether such an offer could also include a term offering to permit the court to determine whether, in its discretion, to award pre-offer prejudgment interest.)

So, too, in federal court, with one important gloss. Rule 68(a) permits a defendant to make an offer of judgment “with the costs then accrued.” According to the Supreme Court, this language means that to be effective, a Rule 68 offer may not *exclude* pre-offer costs. *Marek v. Chesny*, 473 U.S. 1, 6-7 (1985). Likewise, a Rule 68 offer in a civil rights case may not exclude attorneys’ fees. *Bentley v. Bolger*, 110 F.R.D. 108, 111-114 (C.D. Ill. 1986). However, an offer of pre-offer costs may either be open-ended or in a fixed amount. *Id.* at 7.

Interestingly, if a Rule 68 offer is *silent* as to costs, it is likely invalid. *Grissom v. Mills Corp.*, 549 F.3d 313, 320 (4th Cir. 2008). By contrast, a § 998 offer that is silent as to costs does not prevent a plaintiff from recovering costs (or statutory or contractual attorneys’ fees) as the prevailing party in the litigation. *Ritzenthaler v. Fireside Thrift Co.*, 93 Cal. App. 4th 986, 991 (2007).

Rule #8: Be Really Careful in Making — or Responding to — Offers Involving Multiple Parties. The fact that there is more than one party on the other side doesn’t always rule out offers of judgment. But it does make them a little trickier. It’s clear, for example, a § 998 offer doesn’t have to be directed to all adverse parties. *Arno v. Helinet Corp.*, 130 Cal. App. 4th 1019, 1026 (2005). Warning: a § 998 offer to several plaintiffs conditioned on acceptance by all of them is ineffective unless they have a “unity of interest such that there is a single, indivisible injury.” *Peters v. John Crane, Inc.*, 154 Cal. App. 4th 498, 505 (2007). Though not all Circuits agree, the Ninth Circuit takes a different view and holds that a Rule 68 offer conditioned on acceptance by all plaintiffs is valid and effective. *Lang v. Gaates*, 36 F.3d 73, 75 (9th Cir. 1994).

What about offers of judgment made *by* multiple parties? In general, and unless an allocation is clear, offers made jointly by plaintiffs are generally ineffective under

state law. *Hurlbut v. Sonora Community Hosp.*, 207 Cal. App. 3d 388, 410 (1989). Conversely, if defendants are sued as joint tortfeasors, a § 998 offer by such defendants will ordinarily be construed as an offer by each of them. *Steinfeld v. Foote-Goldman Proctologic Medical Group*, 50 Cal. App. 4th 1542, 1547 (1996).

The situation is even murkier regarding joint offers by defendants under federal law. The Fifth Circuit has held that Rule 68 was inapplicable to a joint offer by several defendants when the plaintiff’s recovery from a settlement and a judgment exceeded the offer. *Johnson v. Penrod Drilling Co.*, 803 F.2d 867, 869-870 (5th Cir. 1986). The Third Circuit holds an unapportioned offer by several defendants to a single plaintiff is valid under Rule 68 if it can be “readily comparable” to the judgment. *Le v. University of Penn.*, 321 F.3d 403, 408-409 (3d Cir. 2003).

Obviously, permutations abound. Two watchwords: be clear and be careful.

Rule #9: The Judgment that Arises From Accepting an Offer of Settlement Is Res Judicata. If a party accepts an offer of settlement, the judgment the court enters is *res judicata* and has a claim-preclusive effect just like any other judgment. *Folsom v. Butte County Ass’n of Governments*, 32 Cal.3d 668, 677 (1982). *Garcia v. Scoppetta*, 289 F. Supp. 2d 343, 350 (E.D.N.Y. 2003). However, because no issues are *actually* litigated in connection with a judgment entered on a Rule 68 offer, collateral estoppel will not apply absent clear intent otherwise in the parties’ agreement. *Arizona v. California*, 530 U.S. 393, 414 (2000).

Rule #10: Offer of Judgments in Class or Derivative Actions? Maybe. The law is full of surprises, at least in federal court. Some district courts hold that Rule 68 is simply inapplicable to class actions. *See, e.g., Martin v. Mabus*, 734 F.Supp. 1216 (S.D. Miss. 1990) (Rule 68 does not apply because class action settlements require court approval.)

Others, however, have held Rule 68 offers in class actions valid if they are made before class certification. *See, e.g., Jones v. CBE Group, Inc.*, 215 F.R.D. 558, 564-565 (D. Minn. 2003). The Third Circuit, however, has held that picking off named plaintiffs in this way “contravenes one of the primary purposes of class actions — the aggregation of numerous similar (especially small) claims in a single action.” *Weiss v. Regal Collections*, 385 F.3d 337, 342-345 (3d Cir. 2004.)

In state court, “[w]e shall assume, without deciding, the broad issue that valid settlement offers can be made under Code of Civil Procedure section 998 in a certified class action.” *Nelson v. Pearson Ford Co.*, 186 Cal. App. 4th 983, 1025 (2010). As to derivative actions, the law is scanty or nonexistent. However, “policy and practicality considerations make application of the [Rule 68] offer of judgment rule to class and derivative actions questionable.” 13 Moore’s Fed. Prac. 68.03[3], at 68-15 (3d ed. 2004).

Bottom line: opportunities and pitfalls. Enough said.

Robert Stumpf is a partner in the San Francisco office of Sheppard Mullin Richter & Hampton LLP. RStumpf@sheppardmullin.com.



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following signature line: “Hon. James L. Warren, Judas of the Superior Court.” Counsel didn’t have a very good answer when I asked why he hadn’t simply filed a 170.6? This lawyer departed the courtroom with substantially less spring in his step than when he approached, most probably because his thoughts were focused on a soon-to-be-very-unhappy associate.

Oral Argument Isn’t an Invitation to Argue — I enjoy the oral argument part of motion practice, yet it is often the most frustrating. For some reason counsel often view the opportunity to talk to the judge as an invitation to disparage opposing counsel. Rather than speak directly to the court, counsel frequently turn and talk face to face with the opposition. If feelings between the two are strained, finger pointing is sure to follow. Interruptions are common, usually with a raised voice. Why do some counsel view oral argument as an opportunity to engage in shenanigans?

While the other side is arguing, I’ve seen counsel slap their forehead and twirl around in mock desperation when they hear an argument they don’t like. I’ve seen counsel move furniture, start whispering to their colleagues (usually with words that contain a lot of “sssss”), get a glass of water and, when they return, balance it on the edge of the table where it looks like it will soon fall over. I’ve seen — and heard — lawyers bang sheaves of paper together on the table to get them into a neatly aligned bundle. But my most memorable experience was one lawyer who, as soon as the opposition started to argue, reached into his pocket, withdrew an emery board, and proceeded to file his fingernails. I don’t remember the issue being argued, I don’t remember the other counsel, I don’t even remember the name of the case. But I will never forget the lawyer!

I hope you’ll give at least a few of these pointers a shot. You’ll find that your practice in law and motion becomes more productive and — here’s the zinger — you’ll make the judge’s life much easier!

The Hon. James L. Warren (Ret.) is a former judge of the San Francisco Superior Court, and is now a full time neutral at JAMS in San Francisco.
jvarren@jamsadr.com.



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Admissibility of the Internet

This article discusses how Internet-based materials may be admitted into evidence, what hurdles exist to their admissibility, and how evidentiary foundations can be laid for such materials.

Evidentiary Framework

The rules governing the admissibility of Internet-based evidence are the same rules that govern the admissibility of all other evidence: the Federal Rules of Evidence and their state court counterparts. For Internet-based materi-

als to be admitted into evidence, they must get past the same basic evidentiary thresholds as any other evidence, including that the evidence is relevant (FRE 401), is authentic (FRE 901(a)), is not hearsay (FRE 801 et seq.), does not violate the original writing rule (FRE 1001-1008), and is not more prejudicial than probative (FRE 403). See *Lorraine v. Market Am. Ins. Co.*, 241 F.R.D. 534, 538 (D. Md. 2007).

Authentication is often the thorniest issue for Internet-based evidence, and is the main focus of this article. In order to authenticate any evidence, the proponent must make a prima facie showing that the evidence is what the proponent claims it to be. See FRE 901(a). The Federal Rules provide a non-exhaustive list of different methods by which evidence can be authenticated. See FRE 901(b)(1)-(10). Authentication is “not a particularly high barrier to overcome.” *Lorraine*, 241 F.R.D. at 542. Indeed, a court need not necessarily find that the proffered is what it purports to be but, rather, simply that there is sufficient evidence to allow a reasonable juror to find in favor of authenticity. See *United States v. Tank*, 200 F.3d 627, 630 (9th Cir. 2000). Nonetheless, there does seem to be a higher level of skepticism towards Internet-based evidence (and electronic evidence generally) than towards “hard copy” documents. See, e.g., *Lorraine*, 241 F.R.D. at 542-43 (“authentication of ESI may require greater scrutiny than that required for the authentication of ‘hard copy’ documents”). Yet, courts have declined to adopt different rules of authentication for such evidence, and instead continue to rely on the traditional analytical framework. See, e.g., *In re FP*, 878 A.2d 91, 95-96 (Pa. Super. Ct. 2005) (“We see no justification for constructing unique rules for admissibility of electronic communications such as instant messages....”).

Websites and Web Pages

Websites are most commonly authenticated under Rule 901(b)(1) through a “witness with knowledge.” But courts differ regarding how much knowledge is required. In several cases, website printouts have been authenticated through simple declarations attesting that the declarant printed a true and correct copy of the web pages, usually with some additional indicia of reliability such as dates and/or URLs. See *Osborn v. Butler*, 712 F.Supp. 2d 1134, 1146 (D. Idaho 2010); *Premier Nutrition, Inc. v. Organic Food Bar, Inc.*, Case No. SACV 06-0827 AG (RNBx), 2008 U.S. Dist. LEXIS 78353, *17-19 (C.D. Cal. Mar. 27, 2008); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F.Supp. 2d 1146, 1154 (C.D. Cal. 2002).

More frequently, however, courts require a declaration from a webmaster or similar person with knowledge at the company who runs or owns the website. See *In re Homestore.com, Inc. Securities Litigation*, 347 F.Supp. 2d 769, 782-83 (C.D. Cal. 2004) (“To be authenticated, some statement or affidavit from someone with knowledge is required; for example, Homestore’s web master or someone else with personal knowledge would be sufficient.”); *United States v. Jackson*, 208 F.3d 633, 638 (7th Cir. 2000) (finding that website postings were not authenticated due to absence of evidence that the postings were posted by

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PETER BENVENUTTI

On CREDITORS' RIGHTS

The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, establishes a strong federal policy in favor of arbitration. The U.S. Supreme Court has consistently reaffirmed this policy in a variety of settings, including when a party asserts claims based on federal statutes. *Shearson/Am. Express, Inc. v. McMabon*, 482 U.S. 220 (1987).

But what happens when a dispute covered by an arbitration agreement arises in a bankruptcy case? Bankruptcy plays out in a specialized federal court vested with exclusive jurisdiction over bankruptcy “cases” (the main proceedings for liquidation or rehabilitation initiated by filing a bankruptcy petition) and over all of the assets of a debtor and its estate, as well as extremely broad *concurrent* jurisdiction over other disputes that arise under bankruptcy law or arise in or are “related to” a bankruptcy case. The automatic bankruptcy stay empowers the bankruptcy court to control whether, when, and where almost all litigation involving the bankruptcy estate will proceed, so that the bankruptcy court can manage the bankruptcy process efficiently, taking into account rights created by the federal Bankruptcy Code and relevant state law and the conflicting interests of the myriad parties implicated in the bankruptcy process. So when does the federal policy in favor of arbitration trump federal bankruptcy policies? This question has been the focus of debate in bankruptcy and appellate courts for decades.

In *Continental Insurance Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011 (9th Cir. 2012), the Ninth Circuit addressed this issue as a matter of first impression in the circuit. Thorpe, a long-time insulation contractor and distributor, filed a chapter 11 case seeking to confirm a plan under Bankruptcy Code § 524(g). That provision, limited to debtors with mass asbestos liabilities, authorizes the creation of a trust to which current and future asbestos claims are channeled. As is typical, Thorpe’s plan contemplated that insurance recoveries primarily fund the trust.

Continental, one of Thorpe’s insurers, filed a bankruptcy claim alleging breaches of a pre-bankruptcy settlement of insurance coverage litigation. Most of the alleged breaches related to Thorpe’s filing and prosecution of its bankruptcy case, including a pre-bankruptcy negotiation over a possible bankruptcy with asbestos plaintiffs’ lawyers, structuring the plan and proposed § 524(g) trust, and assignment to the trust of contribution rights against Continental that Thorpe had obtained in settlements with other insurers. Continental also alleged that Thorpe had wrongfully encouraged plaintiffs to file “direct actions” against Continental under California Insurance Code § 11580. Invoking the settlement’s arbitration clause, Continental demanded arbitration of its bankruptcy claim. The bankruptcy court denied the arbitration request and disallowed Continental’s claim, and the Ninth Circuit affirmed.

The Ninth Circuit’s analysis began with the rule an-

nounced by the Supreme Court in *McMabon*: a court may decline to enforce a valid arbitration provision if Congress intended to preclude waiver of judicial remedies under a federal statute, as shown by the text of the statute, its legislative history, or “an inherent conflict between arbitration and the statute’s underlying purposes.” 671 F.3d at 1020 (quoting *McMabon*, 482 U.S. at 227). Because there was no relevant express language or legislative history, the Ninth Circuit focused on the third alternative — a possible inherent conflict between arbitration and bankruptcy.

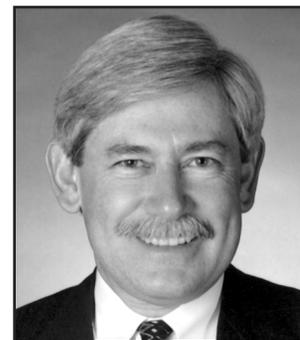
Reviewing decisions from other circuits, the court distilled, clarified, and adopted the governing principles of arbitration and bankruptcy. It held that initially, the court must determine whether the dispute is a “core” proceeding as defined in 28 U.S.C. § 157(b) — *i.e.*, one that is central to the administration of a bankruptcy case, such as granting or denial of a debtor’s discharge, dischargeability of individual debts, confirmation of plans, and allowance or disallowance of claims against the estate. If the dispute is *not* core (*e.g.*, a trustee’s suit to recover money on a pre-bankruptcy contract), the bankruptcy court “generally does not have discretion” to deny arbitration. 671 F.3d at 1021. And in a core proceeding, the right to arbitration must be analyzed under the *McMabon* standard: “only if arbitration would conflict with the underlying purposes of the Bankruptcy Code” may the bankruptcy court deny arbitration. *Id.*

Applying these principles, the Ninth Circuit concluded that the bankruptcy court had discretion, and properly exercised it, to deny arbitration here. The court readily concluded that Continental’s claim and Thorpe’s objection to it presented a core proceeding. On the more complicated question — conflict with the purposes of the Bankruptcy Code — the Ninth Circuit agreed with the bankruptcy judge’s analysis: the contract breaches that Continental alleged were “inextricably intertwined” with the conduct of Thorpe’s bankruptcy (filing the case, formulating a plan, negotiating with creditors about that plan), so adjudicating the propriety of that conduct in a non-bankruptcy forum “would conflict with ‘fundamental bankruptcy policy.’” *Id.* at 1022. The court also noted that one aspect of Continental’s breach of contract claim — alleging wrongful pre-bankruptcy “encouragement” of direct actions — likely would have been subject to arbitration had it been presented as a free-standing claim. But Continental refused to separate that claim from the “bankruptcy process” allegations, so denial of arbitration was proper.

Thorpe Insulation now gives welcome guidance to bankruptcy courts and practitioners — both in the Ninth Circuit and elsewhere — in navigating the confusing intersection of arbitration and bankruptcy.

Disclosure: I represent the Thorpe Insulation Creditors’ Committee, which also opposed the request for arbitration.

Mr. Benvenuti is a partner at Jones Day in San Francisco. pjbenvenuti@jonesday.com.



Peter Benvenuti



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the groups running the websites rather than the defendant); *Costa v. Keppel Singmarine Dockyard Pte, Ltd.*, Case No. CV 01-11015 MMM (Ex), 2003 U.S. Dist. LEXIS 16295, *29 n.74 (C.D. Cal. Apr. 25, 2003) (refusing to consider pages from company's website because of absence of testimony from company representative attesting that the company had placed the information on the website); *Wady v. Provident Life & Accident Ins. Co. of Am.*, 216 F. Supp. 2d 1060, 1064-65 (C.D. Cal. 2002) (sustaining objection to printouts from corporation's website because proponent could not authenticate that they were statements of the corporation); *Sun Prot. Factory, Inc. v. Tender Corp.*, No. 604CV732ORL19KRS, 2005 WL 2484710, *6 (M.D. Fla. Oct. 7, 2005) (excluding for lack of authentication websites attached as exhibit to plaintiff's summary judgment brief); *Asbworth v. Round Lake Beach Police Dep't*, No. 03 C 7011, 2005 WL 1785314, *3 (N.D. Ill. July 21, 2005) (excluding training outline purportedly used by police department taken from a website not affiliated with the police department); *Illusions-Dallas Private Club, Inc. v. Steen*, No. Civ.A.3:04CV0201-B, Civ.A. 3:04CV0609-B, 2005 WL 1639211, *9 (N.D. Tex. July 13, 2005) (excluding studies printed from various web addresses because of absence of personal knowledge that the studies are what they are claimed to be).

Archived Websites

Parties sometimes seek to admit evidence showing how a website appeared in the past. To do this, parties often rely on the Wayback Machine (located at <http://archive.org>), an online tool maintained by the Internet Archive that provides access to past versions of websites. Upon request, the Internet Archive will provide an authentication affidavit that explains how the Wayback Machine works and attests that pages printed from the Wayback Machine are true and correct copies of the Internet Archive's records.

Only a few cases have addressed the admissibility of pages printed from the Wayback Machine. In *Telewizja Polska USA, Inc. v. Echostar Satellite Corp.*, No. 02 C 3293, 2004 WL 2367740 (N.D. Ill. Oct. 15, 2004), the court admitted Wayback Machine printouts (authenticated by an Internet Archive affidavit) over the plaintiff's objection that the Internet Archive was an "unreliable source." *Id.* at *6. There is some uncertainty, however, as to whether *Telewizja Polska* should be regarded as good authority. According to Wikipedia, the district court judge in *Telewizja Polska* overruled the magistrate judge at trial and excluded the Wayback Machine evidence and the Internet Archive affidavit. See Wayback Machine, Wikipedia (Dec. 19, 2012, 5:30 PM), http://en.wikipedia.org/wiki/Wayback_Machine#Telewizja_Polska. The Wikipedia discussion, however, does not cite to any authority to support this assertion, and there does not appear to be a written order reflecting such a ruling.

More recently, the Tenth Circuit affirmed in a criminal action the admission of screenshots obtained from the Wayback Machine, authenticated by a government wit-

ness who "testif[ied] about how the Wayback Machine website works and how reliable its contents are" and who "compared the screenshots with previously authenticated and admitted images from [the defendant's] website and concluded, based on her personal knowledge, that the screenshots were authentic." See *United States v. Bansal*, 663 F.3d 634, 667-68 (10th Cir. 2011).

However, courts have rejected Wayback Machine evidence that was not accompanied by adequate testimony to explain its reliability. See *St. Luke's Cataract & Laser Inst. P.A. v. Sanderson*, No. 8:06-CV-223-TMSS, 2006 WL 1320242 (M.D. Fla. May 12, 2006) (holding that an Internet Archive affidavit from a different case did not provide adequate authentication, but acknowledging that an affidavit by a "representative of the Internet Archive with personal knowledge of its contents, verifying that the printouts Plaintiff seeks to admit are true and accurate copies of Internet Archive's records would satisfy Plaintiff's obligation"); *Novak v. Tucous, Inc.*, No. 06-CV-1909(JFB)(ARL), 2007 WL 922306, *5 (E.D.N.Y. 2007) (excluding printouts from Wayback Machine because plaintiff "proffers neither testimony nor sworn statements attesting to the authenticity of the contested web page exhibits by any employee of the companies hosting the sites from which plaintiff printed the pages").

Social Networking Evidence

Social networking sites present their own unique issues. Profiles on social networking sites can be created by anyone with an email address, users can create accounts under any name, and the accounts can be accessed by anyone with the username and password.

A recent case from Maryland, *Griffin v. State*, 19 A.3d 415 (Md. 2011), provided one of the most thoughtful analyses to-date of how to authenticate social networking evidence. There, the court excluded pages allegedly printed from the defendant's girlfriend's MySpace profile (including a threatening post), notwithstanding the fact that a photograph of her with the defendant and her date of birth appeared on the profile. The court was concerned that someone other than the girlfriend could have either created the site or posted the threatening comment. *Id.* at 423-24. The court, however, was careful to note that it "should not be heard to suggest that printouts from social networking sites should never be admitted," and it went on to identify three non-exhaustive avenues for authenticating printouts from social networking sites. *Id.* at 427. The first avenue is to ask the purported creator of the social networking page whether, in fact, she or he was the author. *Id.* The second method is to search the computer of the alleged creator and do a forensic examination to determine whether that computer was used to originate the material in question. *Id.* The third option is to obtain authenticating information from the social networking website that "links the establishment of the profile to the person who allegedly created it and also links the posting sought to be introduced to the person who initiated it." *Id.* at 428. The third method was used (in conjunction with other corroborating evidence) in a criminal case to admit chat messages exchanged over MySpace

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WALTER STELLA

On EMPLOYMENT

Before the U.S. Supreme Court's 2011 decision in *AT&T Mobility LLC v. Concepcion*, California case law contained several rules that limited the enforcement of the mandatory arbitration agreements often included in consumer or employment contracts. *Concepcion*, relying on the preemptive effect of the Federal Arbitration Act (FAA), disapproved of one such rule: the so-called *Discover Bank* rule, under which an arbitration agreement's waiver of class claims is unconscionable. Since *Concepcion*, a Ninth Circuit opinion and several California Court of Appeal cases have addressed *Concepcion's* effect on other aspects of California law, including whether the FAA preempts the *Broughton-Cruz* rule, under which a plaintiff may not be compelled to arbitrate private attorney general claims under the California Consumer Legal Remedies Act.

The California Supreme Court is considering several cases that should provide definitive guidance as to *Concepcion's* impact on other rules of California law. Although review has not yet been granted for a case involving the *Broughton-Cruz* rule, the Court will be deciding whether FAA preemption limits aspects of the unconscionability analysis that the courts have applied to determine whether an arbitration agreement is enforceable in the context of a particular case. Although some of these cases arise in contexts far from employment law, they will affect the practice of employment law in California.

To provide some background, the FAA preempts state laws that prevent or hinder the enforcement of arbitration agreements, but it permits courts to refuse to enforce an arbitration agreement on any ground that would be a defense to enforcement of any contract. In *Concepcion*, the U.S. Supreme Court rejected the contention that the *Discover Bank* rule simply was a "refinement" of California's general unconscionability law. *Concepcion* makes clear that the FAA will preempt such a rule of general application if, as applied, it "stand[s] as an obstacle to the accomplishment of the FAA's objectives," which are to "ensure that private arbitration agreements are enforced according to their terms."

Based on *Concepcion*, the Ninth Circuit recently held in *Kilgore v. Keybank, N.A.*, that the FAA preempts the *Broughton-Cruz* rule. The Ninth Circuit has granted rehearing in that case, but there are indications that the bulk of the decision may remain intact. Other recent California decisions agree with this holding. See *Nelsen v. Legacy Partners Residential, Inc.*; *Caron v. Mercedes-Benz Fin. Servs. USA LLC*.

While the California Supreme Court will almost certainly take up cases involving the *Broughton-Cruz* rule, it is already considering several cases raising the issue whether, and to what extent, the FAA may limit the unconscionability doctrine as it has been applied to arbitration agreements, particularly since *Armendariz v. Foundation*

Health Plan Psychcare Services, Inc. In that regard, *Concepcion* cites law review articles that argue that California courts have violated the FAA by applying the unconscionability doctrine more freely to arbitration agreements.

Pending California Supreme Court cases that will provide guidance on these issues include:

- *Sonic-Calabasas A, Inc. v. Moreno*, No. S174475. The California Supreme Court originally ruled in a 4-3 decision that: (1) an arbitration agreement containing a waiver of the employee's right to a so-called Berman administrative hearing is contrary to public policy and unconscionable, and (2) the FAA did not preempt application of these California contract defenses. The U.S. Supreme Court granted certiorari and directed the California Supreme Court to reconsider its decision in light of *Concepcion*.

- *Sanchez v. Valencia Holding Co., LLC*, No. S199119 (review granted March 21, 2012). The Court of Appeal held that an automobile sales contract's arbitration provision was unconscionable for several reasons. The case directly raises the question whether the FAA, as interpreted in *Concepcion*, overrides some or all of the Court of Appeal's unconscionability analysis. Of note, the California Supreme Court cited *Sanchez*, a consumer case, as the lead case when it ordered a "grant and hold" in the employment case of *Mayers v. Volt Management Corp.*, No. S200709 (review granted June 13, 2012).

- *Iskanian v. CLS Transp. L.A., LLC.*, No. S204032 (review granted Sept. 19, 2012). The Second District Court of Appeal has held that the FAA preempts (i) the *Gentry* rule, which bars enforcement of class arbitration waivers if class arbitration would be "a significantly more effective" means of vindicating the affected employees' rights, and (ii) any rule that would bar arbitration of representative claims under California's Private Attorney General Act.

The California Supreme Court's recent decision in *Pinnacle Museum Tower Ass'n v. Pinnacle Market Dev. (US), LLC* may offer clues about how it will respond to *Concepcion* in its pending cases. There, the Court reversed the Court of Appeal's holding that an arbitration provision was unconscionable because it was contained in CC&Rs, which the plaintiff homeowners association never had a chance to negotiate because they were recorded before the association came into existence. The California Supreme Court's reasoning could indicate that, consistent with *Concepcion*, in the future its unconscionability analysis will give much less weight to whether an arbitration agreement constitutes a contract of adhesion.

In any event, until these pending cases are decided, it will be difficult to know whether, and to what extent, millions of employment agreements in California contain enforceable arbitration provisions. Let's hope that the wait is not a long one.

Mr. Stella is a partner at the Miller Law Group in San Francisco. He was assisted with this column by Joe Mascovich, a special counsel in the firm.
ums@millerlawgroup.com; jpm@millerlawgroup.com.



Walter Stella

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between the defendant and his victims. See *People v. Clevestine*, 68 A.D.3d 1448, 1450-51 (N.Y.App. Div. 2009) (legal compliance officer from MySpace explained that the messages had been exchanged by users of accounts created by the defendant and his victims).

Chat and Instant Messages

Chat and instant messages are Internet-based communications that allow real-time direct transmission of text. Chat and instant messages present particular challenges for authentication because participants can use made-up screen names that do not reveal their identities. Parties can lay foundations for such evidence through the testimony of participants in the chats, often in conjunction with other circumstantial evidence. For example, in *United States v. Tank*, 200 F.3d 627 (9th Cir. 2000), the government admitted evidence in the form of chat logs from a private password-protected chat room in which the members traded and discussed child pornography. The Ninth Circuit found that a proper foundation was laid for the evidence through the testimony of another member of the chat room who had created the chat logs. *Id.* at 630. See also *United States v. Barlow*, 568 F.3d 215, 220 (5th Cir. 2009) (participant in online chats authenticated transcripts of chats with defendant); *United States v. Gagliardi*, 506 F.3d 140, 151 (7th Cir. 2007) (transcripts of instant message chats involving defendant authenticated by other participants in the chats); cf. *United States v. Simpson*, 152 F.3d 1241, 1249-50 (10th Cir. 1998) (printout of chat room discussion authenticated by circumstantial evidence indicating that the defendant was the author). But see *People v. Von Gunten*, C035261, 2002 Cal. App. Unpub. LEXIS 2361 (Cal. App. Apr. 4, 2002) (excluding instant messages because of lack of direct evidence connecting defendant with the screen name of the author of the instant messages).

Email

By far the most ubiquitous type of Internet-related evidence is email. The most common way to authenticate email is through testimony of a person with knowledge, typically the person who wrote and sent the email. See *United States v. Safavian*, 435 F. Supp. 2d 36, 40 n.2 (D.D.C. 2006). Absent a person with knowledge, emails are sometimes authenticated through “distinctive characteristics” under Rule 901(b)(4), such as a defendant’s email address, signature block, use of a nickname, or email content involving matters known to the defendant. See, e.g., *United States v. Siddiqui*, 235 F.3d 1318 (11th Cir. 2000); *Safavian*, 435 F. Supp. 2d at 40 n.2. In addition, several other methods can potentially be used to authenticate emails, including by expert testimony or comparison with an authenticated exemplar (Rule 901(b)(3)), through trade inscriptions (Rule 902(7)), or as a certified business record (Rule 901(11)). See *Lorraine*, 241 F.R.D. at 555.

A Word on Hearsay

Other than authentication, the issue that arises most fre-

quently in connection with Internet-based evidence is hearsay. There are a few points about hearsay that merit attention. First, courts have held that if material posted on a website is offered to prove that it was posted rather than for the truth of the information, then it is not hearsay. See, e.g., *United States v. Standring*, 2005 WL 3981672, at *2 (S.D. Ohio Oct. 19, 2005); *Cybernet Ventures*, 213 F. Supp. 2d at 1155; *Telewizja*, 2004 WL 2367740, at *4. Second, some courts have found that information posted on a government website can qualify as a public record or report pursuant to Rule 803(8). See, e.g., *EEOC v. E.I. DuPont DeMours & Co.*, 2004 WL 2347559, at *1 (E.D. La. 2004), *aff’d*, 480 F.3d 724 (5th Cir. 2007) (material from U.S. Census Bureau website); *Chapman v. S.F. Newspaper Agency*, 2002 WL 31119944, at *3 (N.D. Cal. Sept. 20, 2002) (printouts from state board of education website). But see *St. Clair*, 76 F. Supp. 2d at 774-75 (information on Coast Guard website not admissible).

Emails can often be admitted over hearsay objections either as party admissions, see, e.g., *Cybernet Ventures*, 213 F. Supp. 2d at 1155; *Siddiqui*, 235 F.3d at 1323; *Safavian*, 345 F. Supp. 2d at 43-44, or under a hearsay objection such as present sense impression (Rule 803(1)), excited utterance (Rule 803(2)), or then existing state of mind or condition (Rule 803(3)). See *Lorraine*, 241 F.R.D. at 568-70. And while it is theoretically possible that emails could qualify as business records under Rule 803(6), there are many examples of courts refusing to admit emails as business records. See, e.g., *Monotype Corp. v. Int’l Typeface Corp.*, 43 F.3d 443, 450 (9th Cir. 1994); *Westfed Holdings, Inc. v. United States*, 55 Fed. Cl. 544, 566 (2003), *rev’d on other grounds*, 407 F.3d 1352 (Fed. Cir. 2005); *State v. Microsoft*, 2002 WL 649951, at *2 (D.D.C. Apr. 12, 2002); *Rambus, Inc. v. Infineon Technologies AG*, 348 F. Supp. 2d 698, 705-06 (E.D. Va. 2004); *United States v. Ferber*, 966 F. Supp. 90, 98-99 (D. Mass. 1997).

One recent California case addressed whether the hearsay exception for “published compilations” under California Evidence Code section 1340 applies to a website database of telephone numbers used by the police to identify owners of cell phones. See *People v. Franzen*, 210 Cal.App. 4th 1193 (2012). The court concluded that the database failed to meet the definition of “published compilation,” which it defined as an “organized, edited circulation in some fixed form analogous to printing.” *Id.* at 1209. According to the court, “[f]rom the user’s perspective, a database bears less resemblance to an organized fixed presentation than to an invisible, shapeless mass of information.” *Id.* at 1211.

Long gone are the days when evidence obtained from the Internet would be viewed as “adequate for almost nothing.” Courts have shown themselves to be remarkably nimble at applying the traditional analytical framework of admissibility to the rapidly evolving modes of communication and expression that exist on the Internet.

Tony Schoenberg is a partner at Farella Braun & Martel LLP in San Francisco. TSchoenberg@fbm.com



JOHN GREEN

On INSURANCE

General liability policies can provide coverage for a wide range of lawsuits, including antitrust claims, patent disputes, trade secret claims, as well as other commercial litigation between competitors, or suppliers and their customers. This potential for coverage is often overlooked.

What should clients and counsel look for? While there are a wide variety of circumstances that could trigger coverage, there are two types of allegations in particular which should immediately raise a red flag regarding the potential for insurance: 1) any allegation that the party made unfavorable comments about the other party or its products, or 2) any allegation that the party filed improper lawsuits or otherwise misused the litigation process. These types of factual allegations may trigger the policy coverage for “disparagement” or “malicious prosecution,” both of which are broadly construed and do not require that the specific tort be expressly pled.

The typical general liability policy includes coverage for “oral, written, or electronic publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services.” Business litigation often includes express claims for defamation or disparagement. Such allegations trigger a duty to defend both the covered and uncovered claims, although the carrier may subsequently seek reimbursement of any costs solely related to uncovered claims. *Buss v. Superior Court*, 16 Cal. 4th 35, 50 (1997). On a practical level, however, establishing such an allocation is difficult and reimbursement claims are rarely, if ever, pursued by insurers.

The disparagement coverage may apply even if there is no express cause of action for disparagement, as long as the facts alleged or known to the party potentially involve disparagement. In the recent case of *Travelers Property Casualty Co. of America v. Charlotte Russe*, 207 Cal.App. 4th 969 (2012), Charlotte Russe had been sued by one of its suppliers. The supplier alleged that its brand was identified as “premium” and “high-end,” but that Charlotte Russe had published prices for its goods that implied that they were not, resulting in “significant and irreparable damage to and diminution” of the supplier’s brand and trademark. While there was no express claim for trade libel, the court found these factual allegations created a potential of coverage for “disparaging” the supplier’s products, and thus triggered the insurer’s duty to defend.

Coverage has also been found for allegedly false claims of patent infringement. See *Atlantic Mut. Ins. Co. v. J. Lamb, Inc.*, 100 Cal.App. 4th 1017 (2002). There, it was alleged that the insured had falsely told the underlying plaintiff’s customers that the plaintiff’s products were subject to patents, and purchasing those products would

subject them to litigation. The court found that these allegations fell within the “disparagement” coverage because the statements were “derogatory to the plaintiff’s title to property, or its quality, or to his or her business in general.”

Coverage has also been found for antitrust claims. In *CNA Casualty of Cal. v. Seaboard Surety Co.*, 176 Cal. App. 3d 598 (1986), the underlying plaintiff alleged, as part of his antitrust claim, that the defendant misrepresented “the business, property and rights possessed by plaintiffs to persons with whom plaintiffs did business in an effort to disrupt and prevent” these business relationships. This allegation was found sufficient to trigger the “disparagement” coverage of the policy.

Other false statements criticizing a business or its goods also constitute “disparagement” if they explicitly or implicitly call into question the company’s honesty, integrity, or competence. *Polygram Records, Inc. v. Superior Court*, 170 Cal. App. 3d 543, 550 (1985). For example, if plaintiff alleges that the defendant falsely accused the plaintiff of trade secret theft, this statement impugns the company’s honesty and integrity and would trigger the disparagement coverage.

As indicated above, the policy also covers “malicious prosecution.” The term “malicious prosecution” has been construed broadly to include other similar torts, including abuse of process. See, e.g., *Lunsford v. Am. Guarantee & Liab. Ins. Co.*, 18 F.3d 653, 654-56 (9th Cir. 1994).

Courts have also found that the “malicious prosecution” coverage extends to antitrust claims based on the “sham” litigation exception to the *Noerr-Pennington* doctrine. In the *Seaboard Surety* case, *supra*, plaintiff also alleged, as one of the factual bases for his antitrust claim, that the insured filed “false, frivolous and sham counterclaims in this action.” 176 Cal. App. 3d at 608 n.3. The court held that these allegations triggered a duty to defend because they “raised at least the possibility of liability under the malicious prosecution coverage contained in the insurance policies.” *Id.* at 608-09.

Counterclaims in patent litigation may also fall within the “malicious prosecution” coverage, since they often allege that the plaintiff’s efforts to protect its patent rights, in that suit or in other suits, amount to “sham” litigation intended to monopolize the market. Similarly, so-called “Walker Process” claims involve allegations that the insureds attempted to enforce a fraudulent patent. These allegations of improper action to enforce a patent may also trigger a duty to defend.

As these cases illustrate, general liability policies can apply in a wide variety of commercial litigation settings. Counsel defending such claims (or counterclaims) should be alert to this potential and take full advantage of the insurance purchased by their clients.

Mr. Green is a partner in the San Francisco office of Farella Braun & Martel LLP. jgreen@fbm.com



John Green

Letter from the President

2012

has been a great year for ABTL thanks to all of you and the hard work of our dinner program chairs, Larry Cirelli and Mike Plimack, and our membership chairs, Marshall Wallace and Stephen Schrey. The mission of ABTL —promoting a dialogue between the bench and bar on business litigation issues — motivates all of us to provide the best programs possible in an atmosphere in which all of our members can meet and socialize with other lawyers and with current and former judges who attend our programs regularly.

The bench and bar tradition is exemplified by the prominent lawyers and judges who have presented this year's "Ten Most Important" theme in five programs in San



Mary Jo Shartsis

Francisco, one in Palo Alto and one in the East Bay. Thanks to attorneys Arthur Shartsis, Joe Cotchett, Jim Brosnahan, George Riley, Nanci Clarence, Catherine Lacavera, Jay Monahan, Paul Roeder, Claude Stern, Chuck Hansen, Jerry Falk, Jon Eisenberg, Joel Zeldin, Pamela Phillips and Susan Harriman for sharing their experiences and their insights. And thanks to Northern District Judges Marilyn Patel, Edward Chen, Charles Breyer, Claudia Wilken and Sandra Brown Armstrong, and State Court Judges Peter Busch, Barry Goode, Wynne Carvill, Justice Anthony Kline and

Supreme Court Justice Carol Corrigan for sharing their judicial perspectives with us.

Our Leadership Development Committee led by Larisa Meisenheimer also presented four outstanding programs this year for lawyers practicing less than ten years. All were well attended and provided an opportunity for young lawyers to meet and socialize with young lawyers in other firms and build their networking skills.

I'm also happy to report that the ABTL Annual Seminar in September on Kauai, on "Trying the Social Media Case with Cutting Edge Technology," attracted over 400 attendees from all five ABTL Chapters. Thanks to all of you who joined us and thanks to our Annual Seminar representatives, Bruce Ericson and Alison Tucher, for assuring that our Northern California lawyers and judges had a strong presence on the panels. Thanks also to Judge Richard Kramer for another of his uniquely witty hypotheticals.

Finally, thanks to all of those who contributed to the ABTL Report's issue this last summer, which included exceptional articles on preliminary injunctions, the importance of the record on appeal, consenting to a Magistrate Judge for trial, environmental law, trademarks, and litigation skills. This winter issue will be the last for our outstanding, and very hard working long-term editor, Tom Mayhew, who will be passing the baton to Frank

Cialone as Tom takes on the job of Program Co-Chair for 2013.

We owe our success this year and every year to our members who support ABTL through annual law firm group memberships and by individual memberships. We could not provide the quality programs that we are known for without strong financial support through both membership and dinner revenues. Law firm group membership has been a tradition for the past 20 years and hopefully will continue and increase next year. We have not raised membership dues for many years because we believe that the group membership tradition benefits all of us by keeping membership dues as low as possible while keeping ABTL financially healthy.

I hope we have fulfilled our mission this year. It has been a privilege and a pleasure to serve as the nineteenth President of ABTL, and I look forward to joining you as a member of the audience next year as our 2013 President, Rick Seabolt, brings you more outstanding programs beginning on January 29.

Mary Jo Shartsis was the 2012 President of the Northern California chapter of ABTL.
MShartsis@sflaw.com.

ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl
NORTHERN CALIFORNIA

c/o Michele Bowen, *Executive Director*
 P.O. Box 696 • Pleasanton, California 94566
 (925) 447-7900 • www.abtl.org

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