

Q&A with the Hon. Thomas N. Thrasher
by Dean J. Zipser & Linda A. Sampson



[Editors' Note: Dean Zipser and Linda Sampson caught up with Judge Thomas N. Thrasher (Ret.) for this judicial interview. Judge Thrasher was appointed to the Orange County Superior Court by Governor George Deukmejian in 1988 and, after serving 16 years on the bench (including stints as Assistant Presiding Judge and Supervising Judge of the Civil Panel), has recently retired. He is now enjoying a new chapter in his life as a private neutral with JAMS. He was a founding member of ABTL Board of Governors -

- one of many organizations to which he meaningfully contributes -- and he spearheaded the process to beautify all of the Orange County Courthouses.]

Q: How has life changed since your retirement?

A: As you know, I now conduct private mediations at

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Proposition 64 and Its Application to Cases Pending at the Time of Its Passage
by Dale J. Giali

"I had hoped . . . that the excesses of the unfair competition law might be judicially curbed by action of our Supreme Court. Before that could take place, though, the electorate took matters into their own hands . . . [T] his case represents what will hopefully be the last of a breed of lawsuits against businesses where lawyers make big bucks, and clients nothing, for finding some tiny arguable technicality and bringing an unfair competition suit."

Benson v. Kwikset Corporation, 2005 Cal. App. LEXIS 256, *91-*92 (4th App. Dist., Div. 3, 2/10/05) (Sills, P.J., concurring and dissenting).



Proposition 64's limitations to unfair competition and false advertising claims are, by any account, significant. Reports in California's legal newspapers characterized Proposition 64 as a "knockout punch" that "significantly curtail[ed] the reach of California's unfair competition law" and effected a "clampdown on §17200 claims." In short, as a result of the passage of Proposition 64, "17200 has been gutted." And now, three of the four Court of Appeal decisions to address the issue have held that Proposition 64's significant limitations apply to lawsuits pending at the time of its November 2 passage, not just those filed after its effective date.

The Change in the Law from Proposition 64

California's unfair competition laws, set forth in sections 17200 and 17500 of the Business and Professions Code, have always been intended to protect businesses and consumers from unlawful, unfair and fraudulent business practices and false advertising. For years, however, business interests have complained that the

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President's Message by Hon. Sheila B. Fell



If you are reading this, then yes, you too have made it this far into 2005. It hardly seems possible that we are at that time when we have once again [for the eighth time, if my counting is correct] turned over the gavel of the presidency of this organization. I am very proud to be your eighth president.

As my first official greeting from the President's chair of this organization, I want to thank all of my predecessors from former boards for setting up this strong and professional organization. From our first board through the retiring members of 2004, our chapter has drawn continuing benefit from the top quality of our members, and a view of legal excellence from our talented presenters and their programs. Special thanks to our 2004 Executive Board, which included Dean Zipser (our immediate Past President), Gary Waldron and Jim Bohm, as well as Michael Yoder (2003 President) and Martha Gooding, our Program Chair, for giving us such a worthwhile year.

In my several years of ascending the chairs en route to the Presidency, I have never failed to be impressed with our group of talented leaders and legal professionals from whom we have all learned. It has been gratifying to see and hear the programs and talent introduced from both outside our group and from our own outstanding presenters. As a member of the Trial Bench, I can clearly vouch for the results gained in trial through the exercise of preparation, knowledge and legal collegiality.

We have added a few innovations for this year. In addition to our competent Board, with seven new members, we now have a Judicial Advisory Board consisting of eight Judicial Officers from the various local courts. We believe this addition to our structure will lend valuable perspectives and enrich our operation.

Our programs for the year will meet our goal of maintaining the high quality of educational presentations at our regular meetings. Additionally, we will repeat our highly successful PLC benefit -- our wine tast-

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The TAP Program: Civil Litigators Can Benefit from Working Inside the Criminal Justice System

by Vikki L. Vander Woude and Marcus Salvato Quintanilla



Vikki Vander Woude

Imagine learning at 10:00 a.m. that you have a trial beginning right after lunch. You have not reviewed the file yet. In fact, you know nothing about the case. You have just enough time to phone your witnesses, review your key evidence and prepare jury instructions before you begin voir dire. You know next to nothing about the witnesses or evidence your adversary will present because there has been no pretrial discovery. Welcome to the fast-paced life of a misdemeanor DA in Orange County.



Marcus Quintanilla

If you are a business litigator like us, the frenetic (and unpredictable) trial practice of a misdemeanor prosecutor no doubt sounds rather foreign, not to say a bit unnerving. Still, you have to admit that a couple of months of

this kind of training could have immense value for strengthening the self-confidence and courtroom savvy of civil trial lawyers. Fortunately, such opportunities are available -- through the Trial Advocacy Partnership ("TAP") program of the Orange County District Attorney's Office.

The TAP program was established through the joint efforts of several local law firms and the District Attorney's office for the purpose of providing invaluable courtroom experience to civil litigators and, at the same time, assisting the DA's office with its heavy caseload. Following one-week of MCLE-approved classroom training on trial tactics, evidence, criminal procedure and ethics by some of the most talented prosecutors, TAP attorneys spend eight weeks working side-by-side with prosecutors, defense counsel, judges and court staff, handling all aspects of misdemeanor criminal cases, including charging, plea negotiations, motions and trials. In addition, TAP attorneys are called upon to handle felony preliminary hearings, which frequently involve expert

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Just Say "Privileged"?

by Mark D. Kemple

Plaintiff propounds document demands. Defendant offers a single-word, boilerplate objection that Plaintiff's demands seek the documents that are "privileged." Plaintiff moves to compel (or Defendant moves for a protective order). Up through and including the date of the hearing on the motion (to compel or for protective order) Defendant does nothing to support its one-word assertion that unidentified responsive documents, written by unidentified authors to unidentified recipients, are "privileged."

May the trial court order the responsive documents produced? Before answering, also assume that the trial court first orders the party to prove up its assertions of privilege, and the party fails to do so. May the trial court ever order the withheld documents produced? In what appears to be a significant departure from precedent, two recent decisions of the Courts of Appeal suggest that a trial court may not order documents claimed "privileged" to be produced, regardless whether the party asserting the privileges makes any or no evidentiary showing to back the assertion. Such a rule turns the logic of discovery on its head by investing any party who invokes the magic word ("privilege") with unilateral discretion as to whether or not a document will be produced, and invites mischief.

A. Best Products.

In *Best Products, Inc. v. Superior Court* (2004) 119 Cal.App.4th 1181, the defendant asserted only "boilerplate objections of attorney-client privilege" to the plaintiff's inspection demands. (*Id.* at 1184.) Plaintiff moved to compel. (*Id.* at 1184-85.) In response to the plaintiff's motion, the defendant submitted no verified privilege log, or otherwise attempted to establish that any document was privileged. At the hearing on plaintiff's motion to compel, the trial court explained to defendant its view that:



If you don't support your objections and demonstrate that there are privileged documents that haven't been produced, this is the point where that falls apart, where the rubber meets the road.... At the point where you served your

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The Fading General Rule Against Discovery In Arbitration

by James Poth



Arbitration provisions are often favored based on the assumption that they will allow parties to resolve disputes more efficiently and economically than litigating matters in the courts. One common basis for this assumption is that costly discovery can be greatly curtailed, if not avoided altogether. This would seem reasonable given the judicial comments ap-

proving strict limits on discovery in arbitration. But there appears to be an increasing trend toward allowing the very discovery that the arbitration provision might have initially been designed to avoid. In short, unless expressly excluded by the arbitration agreement, discovery in arbitration might look (and cost) just like discovery in litigation.

The general presumption that discovery is not allowed in arbitration is well founded in the jurisprudence on the matter. Courts have long made it clear that an agreement to engage in arbitration equated to an agreement to forego formal discovery. In *McRae v. Superior Court*, the Court succinctly dismissed an attempt to take a deposition for discovery purposes in arbitration by observing that “the arbitrator is expressly denied the power to order a deposition for such purpose.” 221 Cal. App. 2d 166, 170 (1963).

More recent cases continue to acknowledge the *McRae* court's observation that discovery is not something generally allowed in arbitration. In *Coast Plaza Doctors Hospital v. Blue Cross of California*, the court rejected an argument that an arbitration clause was unconscionable because it would preclude discovery. 83 Cal App. 4th 677, 689-90 (2000). The Court noted that “[l]imited discovery rights are the hallmark of arbitration.” *Id.* at 689. Further, if the parties desired discovery they could have so provided in their contracts. The Court in *Alexander v. Blue Cross of California* (2001), 88 Cal. App. 4th 1082 (2001) observed that “[a]s a general rule, the right to discovery is highly restricted in arbitration proceedings.” Other courts have been equally reluctant to allow discovery in arbitration. *Vandenberg v. Superior Court* (1999), 21 Cal. 4th 815, 831; *Brock v.*

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Brown Bag Lunch with Judge James Selna

by Irfan A. Lateef

March's Bench/Bar Brown Bag Lunch with Judge James Selna was an extraordinary opportunity to get to know this district court Judge. I was one of about 14 young attorneys attending the event. We all appreciated the ABTL's efforts in arranging such events for young attorneys so that we can get some insight into different judges' practices.

We met Judge Selna in his courtroom in the U. S. District Courthouse in Santa Ana. Judge Selna invited us to sit around the law clerk's table, begin lunch and start introducing ourselves.

After introductions, Judge Selna discussed his employment at O'Melveny & Myers and his tenure as a state court judge. He mentioned that while sitting in Superior Court he was able to preside over many more trials than he does now at district court. Because he enjoyed trials, Judge Selna mentioned that this aspect of his Superior Court tenure was very satisfying.

Then, several attorneys asked questions about the Judge's preferences regarding summary judgment motions, criminal matters, trial and hearing presentations, and other conduct before the Court. Judge Selna discussed various preferences he has regarding these matters in detail. For example, Judge Selna dislikes briefs that have no pinpoint cites in their case or evidence citations. Moreover, the Judge said lawyers should focus their oral arguments along the lines of his tentatives, which are posted the Friday before the hearing.

Judge Selna also offered anecdotes from cases that have come before him. For example, the Judge described a deportation proceeding where the soon-to-be deportee, who had lived in this country for the majority of his life, was going to be deported to a place where he had lived only when he was an infant. Because the man was going to be leaving behind his family, the man was in tears and in anguish over what was going on. Judge Selna commented that



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A WORD FROM OUR SPONSOR

The Relationship between Lost Profits & Business Value: A Primer for Legal Professionals

by William B. Beeson and Kenneth D. Rugeti

Most attorneys who have spent their careers in commercial litigation have a general understanding of damages calculation. Some may have developed a basic understanding of the accounting and financial methodologies used in determining lost profits and valuing a business. Those with significant experience can do a rough estimation of lost profits, and there are surely Lawyers out there who, but for lack of credentials, could write a valuation opinion by themselves.

To most attorneys and judges, lost profits and lost business value damages are very different, if not mutually exclusive. Yes, they are both different approaches to measuring damages and are often employed under different circumstances, but can lost profits and lost business value be used interchangeably in calculating damages? Can they be used in tandem? Following is an overview of how the two concepts relate to one another and their coexistence, or lack thereof, in business disputes.

A Lot in Common

Although the typical fact patterns under which lost profits analysis and business valuation are employed may seem very different (especially to attorneys and judges), the two concepts actually have a lot in common. Using a lost profits analysis, streams of income are forecasted using financial and accounting analysis and discounted for the time value of money and risk. Using a business valuation approach, it's basically the same thing. At their roots, lost profits analysis and business valuation utilize many of the same methodologies and financial data. In some sense, a lost profits calculation is a business valuation, the only distinction being that rather than valuing the entire business, lost profits measure only a portion of the business that was lost or damaged.

Setting aside some of the idiosyncrasies discussed below, there are circumstances in which calculations of lost profits and lost business value can be equal. At a minimum, if feasible, the two can be used as reality checks against one another.

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A WORD FROM OUR SPONSOR

Electronic Media in the Modern Trial **by Charles Wright - The Data Company**

The need to present a case in a simple and logical manner is as old as the law itself. Not long ago, graphics for trial were basically chalkboards, and animations were, at best, a scale model. Thanks to computers, computer artists, trial presentation software and 3D animators, demonstrative evidence can be more powerful than ever.

There are many factors to consider when incorporating technology into your case. The first thing the attorney usually asks is, "How do I present my case to be clear to a jury?" Attorneys often wonder whether they need a lot of graphics, an animation or annotation screens. Lawyers should begin by considering, "What **MUST** you convey to the jury to win?" This sounds simple, but it is often overlooked. Usually there are only one or two main points that you must convey to the jury to get them to find for your client. That is where the focus of the visual strategy begins. Once you know what you **MUST** get across to the jury, you are ready to begin.

Opening Statements

This is where the groundwork for your case is laid out, and powerful graphics can leave a lasting impression on your jury. An effective opening statement is key to getting the jury to think like you are thinking. The use of graphics is a powerful tool setting the tone for the case. According to the U.S. Department of Labor, after 72 hours, people remember only 10% of what they hear, and 20% of what they see, but an astonishing 65% of what they both hear *and* see. Here are a few things to remember when selecting the correct media for an opening statement:

1. **Computer Slides vs. Boards.** This is a common question we hear with respect to openings. The question is usually answered by determining what needs to stay up during the opening and what needs to be presented during key points. Another thing to consider is how many total slides you anticipate using. If you only need one or two slides for your opening, boards may be a better alternative. Graphics such as timelines are great for boards. They can be put on easels and left up during an opening as a

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laws were used as a mechanism for lawyer-driven (and lawyer-enriching) shake down lawsuits. *Benson*, 2005 Cal. App. LEXIS 256, *77 (Sills, P.J., concurring and dissenting). In many cases the complaints were justified. The unfair competition law allowed attorneys to file suit on behalf of the “general public” against companies accused of inconsequential or technical statutory violations – and to bring actions without an injured client, without a client that had any dealings whatsoever with the defendant, without any necessary corresponding public benefit, and without the procedural protections of class certification. *Id.*, *11-*12.

Problems associated with the abuses of 17200 actions issue literally became front page news when the practices of the Trevor Law Group were brought to light, including its apparent business model of generating lawsuits -- on behalf of a Trevor Law Group affiliated entity -- under 17200 and 17500 based on technical violations of law and for the primary purpose of extracting a quick settlement and moving on. *Id.*, *88-*91 (Sills, P.J., concurring and dissenting). As summarized in *People ex rel. Lockyer v. Brar*, 115 Cal. App. 4th 1315, 1316-17, “[t]he abuse is a kind of legal shake-down scheme: Attorneys form a front ‘watchdog’ or ‘consumer’ organization. They scour public records on the internet for what are often ridiculously minor violations of some regulation or law by a small business, and sue that business in the name of the front organization.”

The November 2004 passage of Proposition 64 changed all that. The initiative (which passed by a 58.9 to 41.1% margin) took direct aim at the abuse of the private attorney general lawsuits filed under both sections 17200 and 17500, changing drastically California’s consumer laws. Proposition 64 changed the unfair competition and false advertising law in two fundamental respects.

First, to bring a claim under sections 17200 or 17500, a private plaintiff now must allege that he or she has suffered a personal impact or injury resulting in monetary or property damage. Previously, any “person” -- even ones that never dealt with the defendant or suffered harm from the complained-of conduct -- could bring a claim under 17200 and 17500 on behalf of the “general public.”

Second, in addition to the named plaintiff being personally injured by the challenged conduct, plaintiffs

seeking to sue on behalf of others are now subject to class action formalities, including class certification and notice to class members. Under prior law, a private plaintiff could sue as a “private attorney general” to vindicate the rights of the “general public” without having to establish that the case was appropriate for class treatment or that the named plaintiff truly represented the interest of the general public. By requiring that 17200 and 17500 actions brought on behalf of others comply with the formalities of class certification, the new law not only helps to eliminate frivolous lawsuits, but also addresses one of the most vexing aspects of the former law, i.e., that defendants sued under 17200 and 17500 were unable to conclude the cases with any certainty that future claims would be barred.

Proposition 64 took effect on November 3, 2004 -- the day after the election (*Benson*, 2005 Cal. App. LEXIS 256, *12; *Bivens v. Corel Corporation*, 2005 Cal. App. LEXIS 208, *11 (4th App. Dist., Div. 1, 2/18/05)) -- and the changes in the law brought about by the initiative therefore apply to any cases filed on or after that date.

Prop 64’s Applicability to Cases Pending at the Time of Its Passage

A significant issue is whether the new law applies to section 17200 and 17500 cases that were filed prior to the effective date of the initiative but for which there is no final judgment. Three of the four Court of Appeal decisions to address the issue so far have held that the changes do apply. See *Bivens v. Corel Corporation*, supra, *Branick v. Downey Savings and Loan Association*, 2005 Cal. App. LEXIS 201 (2nd App. Dist. 2/9/05); *Benson v. Kwikset Corporation*, supra. Because judgments are not final “so long as the action in which it is entered remains pending and an action remains pending until final determination on appeal,” even cases that are currently on appeal from a trial court judgment are subject to the limitations of Proposition 64 and, therefore, subject to dismissal if the plaintiff cannot satisfy the new standing requirements. *Id.*; *County of San Bernardino v. Ranger Inc. Co.*, 34 Cal. App. 4th 1140, 1149 (1995).

The *Bivens*, *Branick* and *Benson* decisions rest on the principle that Proposition 64 ushered in changes to rights and remedies flowing solely from a statutory grant, not common law. Rescission of a statutory claim is effective immediately and is applicable to pending cases, including those on appeal because “all statutory

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remedies are pursued with full realization that the legislature may abolish the right to recover at any time.” *Id.*; see also, e.g., *Governing Board v. Mann*, 18 Cal. 3d 819, 829 (1977); *Brenton v. Metabolife International*, 116 Cal. App. 4th 679 (2004); Gov. Code § 9606. As summarized in *Bivens*:

Courts generally presume that a newly enacted statute does not have retrospective effect unless there has been some clearly expressed contrary intent. However, although courts normally construe statutes to operate prospectively rather than retrospectively, courts also generally hold that when a pending action rests solely on a statutory basis, and when no rights have vested under the statute, “a repeal of [the statute] without a saving clause will terminate all pending actions based thereon.” This is because a court must “apply the law in force at the time of the decision” when a remedial statute is repealed prior to final judgment being entered in a case.

Bivens, 2005 Cal. App. LEXIS 208, *13-*14 (citations omitted).

In the first (though now minority) published appellate decision on Proposition 64’s applicability to pending cases, the First District Court of Appeal’s decision in *Californians for Disability Rights v. Mervyn’s*, 2005 Cal. App. LEXIS 160 (2/1/05 1st App. Dist.) held that changes in California’s unfair competition law occasioned by Proposition 64 are not applicable to cases that were pending at the time of its passage. In *Californians for Disability Rights*, plaintiff sued Mervyn’s alleging its store aisles were too narrow. The trial court entered judgment in favor of Mervyn’s and plaintiff appealed. The voters approved Proposition 64 and Mervyn’s moved to dismiss the appeal. *Id.*, *3-*5.

Without analyzing or applying the principle relied on by the *Bivens*, *Branick* and *Benson* courts --that the repeal of a statutory grant applies absent a savings clause - the First District analyzed Proposition 64 as a new statute that is presumed not to apply to pending cases unless the court could find an express indication that the statute is to act retroactively. Once it framed the issue in that way, the First District had little problem reaching a result that Proposition 64 was not applicable to pending cases:

Proposition 64 contains no express declaration of

retrospectivity, as Mervyn’s rightly concedes. Proposition 64 is wholly silent on the matter. The terms of the statutory amendments, the legislative analysis, and the ballot arguments make no mention as to whether Proposition 64 is meant to apply retroactively to preexisting lawsuits. The language used in the proposition and ballot materials also fails to provide any implicit indication that the electorate intended the law to be retroactive. If anything, the statutory language and ballot materials suggest an intention that the law apply prospectively to future lawsuits . . . When read as a whole, the only fair conclusion is that the question of whether Proposition 64 applies to pending lawsuits was not presented to, nor considered by, the electorate.

Id., *6-*7.

Eight days after the *Californians for Disability Rights* decision was issued, *Branick* was decided, “disagree[ing] with the First District’s reasoning regarding the applicability of Proposition 64 to pending cases.” *Branick*, 2005 Cal. App. LEXIS 201, *16, n7. A day later, the Benson court published the second decision expressly disagreeing with *Mervyn’s* analysis, and eight days after *Benson*, *Bivens* followed suit.

In *Benson*, plaintiff, on behalf of the general public, sued defendants for marketing deadbolts and doorknob sets as “Made in the USA” when, in fact, some parts were made or manufactured in a foreign country. After a bench trial, the trial court entered judgment “enjoining defendants . . . from labeling any lockset intended for sale in the State of California ‘All American Made,’ or ‘Made in USA,’ or similar unqualified language, if such lockset contains any article, unit, or part that is made, manufactured, or produced outside of the United States.” *Benson*, 2005 Cal. App. LEXIS 256 at * 8-*9. Both parties appealed, resulting in a June 2004 decision rejecting both appeals and affirming the judgment. *Id.*, *4. After issuing the opinion, however, the Court of Appeal granted a rehearing on a non-merits collateral matter. While the rehearing was pending, Proposition 64 became law. Defendants then moved to vacate the trial court judgment and dismiss the appeal. *Id.*

Benson -- like *Branick* a day earlier and *Bivens* eight days later -- held that Californians for Disability Rights erroneously relied on legal principles applicable to statutes that rescind a common law claim. While true that the changes in law occasioned by Proposition 64 only

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became effective after the November election (*Benson*, *16),

[t]he First District’s reasoning reflects a fundamental misunderstanding of the repeal principle. This doctrine is premised on the recognition that certain rights or remedies exist solely because of legislative action, and one who seeks to enforce such a right or remedy does so in recognition of the Legislature’s power to abolish it at any time. In this circumstance, the right or remedy abates, i.e., it is abolished by a repeal unless the repealing act contains a savings clause or one has acquired a vested right by converting that right or remedy to a final judgment . . . [¶] *Californians for Disability Rights* alludes to the repeal doctrine, but concludes the defendant’s reliance on it “exposes a seeming conflict in canons of statutory interpretation,” which the court resolves by concluding “the presumption of prospectivity is the controlling principle.” This analysis ignores the fact *Governing Board v. Mann*, supra, 18 Cal.3d 819, expressly recognized the general principle that statutes are construed prospectively, but found the nature of the right affected, i.e., one existing solely by way of statute, rendered the presumption of prospectivity inapplicable . . . [¶] Consequently, the repeal principle does not violate the general presumption that statutory amendments apply prospectively.

Benson, *25-*28 (citations omitted; emphasis added). (Now supported by three cases disagreeing with the analysis in the *Californians for Disability Rights* opinion, Mervyn’s filed a petition for rehearing on February 16, 2005.)

Though the *Benson* court held that Proposition 64 applies to pending cases (which would lead to dismissal as the case was then postured), the court remanded the matter “to the Superior Court with directions to afford plaintiff an opportunity to satisfy the newly enacted standing and representative claim requirements for unfair competition law and false advertising law actions.” *Id.*, *33.

With three published decisions in quick succession directly on point, the applicability of Proposition 64 to cases pending at the time of its passage is now fairly assured. Accordingly, all pending cases -- regardless of

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ing event in summer. I might also add that it isn’t too early to block-out time to attend the Annual Seminar to be held this October in Tucson. The collaborative program has been in the making for some months and boasts participation by statewide notables.

We look forward to seeing our old friends, and some new faces as well, at our scheduled meetings and our special events.

■ *Hon. Sheila B. Fell is a Judge in the Orange County Superior Court.*

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testimony, and are encouraged to watch jury trials by experienced trial lawyers.

Over the last year, both of us were fortunate enough to participate in the TAP program, working in the Central Justice Center as specially-appointed Deputy District Attorneys. Between the two of us, we tried four jury trials to verdict, and conducted two court trials, numerous contested evidentiary hearings and over eight felony preliminary hearings involving expert testimony. In each of these proceedings we were the first and only chair. We each had the experience of preparing witnesses and evidence, selecting jurors, arguing pre-trial motions and presenting (and cross-examining) precipient and expert testimony -- all without the aid of prior deposition testimony and many of the other “control documents” that we rely on in civil practice. The ability to think on your feet, portray confidence to the court and to the jury, and put together a compelling presentation on the fly were all at a premium. When not in trial, we spent our time negotiating plea bargains with defense counsel, filing complaints, watching numerous jury trials, getting to know judges and court staff, and supervising law clerks during evidentiary hearings.

At the end of our respective tours of duty, we feel far better equipped to represent and advise our own clients in civil litigation, and we are a more valuable part of our litigation teams having had this experience. There are, for instance, significant benefits to thinking like a “trial lawyer” rather than a litigator, and approaching settlement negotiations without the apprehension of going to trial. This has proven true for senior and junior

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litigators alike.

All of this could not have taken place without the support of our law firms and the many other firms who participate in the TAP program. During the two months that we were away, both Morrison & Foerster and O'Melveny & Myers treated our work for the DA just as they would any other client representation, giving us full credit against our annual minimum billable hours and encouraging our full participation and time commitment to the program. By demonstrating a real commitment to developing the trial and courtroom skills of their attorneys, the TAP program gives participating firms a leg up in recruiting.

Undoubtedly, this is a worthwhile investment for any firm that wishes to expand the trial, courtroom and negotiation skills of its attorneys, but it is also a great way to give back to the County in which we practice. As District Attorney Tony Rackauckas has emphasized, the contributions of TAP attorneys go a long way toward permitting the kind of vigorous law enforcement that keeps our community safe.

The DA's office reports that, in 2004, 16 volunteer TAP attorneys participated in the program and collectively completed 30 jury trials, 177 preliminary hearings, four court trials and 40 motions. These attorneys contributed 144 weeks and several hundred thousand dollars worth of hours of service to the County at no cost to taxpayers.

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when filed and even if currently on appeal following a trial court judgment -- in which plaintiffs are unable to satisfy the personal injury and class action formality requirements are subject to dismissal.

■ *Mr. Giali is a partner in the firm of Howrey, Simon, Arnold & White in Irvine, California.*

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opposition to this motion [to compel] was the point that that showing had to be made. It hasn't been made. You have the burden to support the privilege objection with admissible evidence. You have missed something if you think you don't have to support your objections at the hearing on the motion to compel with admissible evidence. Any objection on the grounds of attorney-client or work-product privilege is by the board here as a result of no privilege log verified.
(*Id.* at 1186.)

Sounds reasonable, right? The Court of Appeal reversed, and held specifically that the trial court could not assess defendant's "failure to proffer any justification for its objections" "at this juncture of the proceeding." (*Id.* at 1188, n.2.) The Court of Appeal's subsequent discussion suggests that even at the proper "juncture," an order of *production* is never the remedy. Rather, a trial court may only order a more particularized showing, and follow that order with an *evidentiary* sanction if a litigant somehow fails to comply with an order for a more particularized showing. (*Id.* at 1189.)

In reaching its conclusion, the Court of Appeal focused exclusively on CCP section 2031(m) subdivision (3), to the exclusion of subsections (1) and (2). Subdivision (3) states that if a party "deems that (3) an objection in the response is without merit or *too general* ... that party may move for an order compelling further response to the demand." (Emphasis added.) From there, the Court of Appeal suggested that the only *remedy* for a motion brought on that basis is an order for "further responses that adequately identify and describe documents for which a party (here, defendant) has raised boilerplate assertions of the attorney-client and work product privileges." (*Id.* at 1189.)

The holding may be questionable for at least two reasons. First, this language nowhere appears in C.C.P. section 2031(m)(3). It also ignores subsection (1), which provides that if a movant "deems that (1) a statement of compliance with the demand is incomplete... that party may move for an order compelling further response to the demand" -- precisely the motion made by the plaintiff in *Best Products*. The *Best Product* decision also ignores Section 2031(n), which provides: "If a party filing a response to a demand for inspection un-

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-Privileged: Continued from page 9-

der subdivision (g) thereafter fails to permit the inspection in accordance with that party's statement of compliance, the party demanding the inspection may move for an order compelling compliance." This construction also appears to run contrary, including the California Supreme Court's decision in *D. I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, 729 ("The party claiming privilege carries the burden of showing that the evidence which it seeks to suppress is within the terms of the statute"). See also *Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1619 (same); *Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050, 1063, 1073 (same). Indeed, the California Evidence Code acknowledges that courts may order the production of materials claimed "privileged" but for which a privilege is not sustained: "No person may be held in contempt for failure to disclose information claimed to be privileged unless he has failed to comply with an order of a court that he disclose such information." Cal. Evid. Code § 914(b).

Apart from the questionable statutory basis for this holding, it seems contrary to common sense. This holding -- even with a threatened evidentiary sanction -- creates a safe harbor for discovery abuse. Most notably, the court did not articulate how a party would fail to comply with an order to "adequately identify and describe documents for which [it] has raised boilerplate [privilege] assertions," *Best Products* at 1189 and thereby be subject to sanctions. So long as the litigant lists out all the documents it withholds -- privileged or non-privileged -- there could be no "violation" of an order to trigger the sanctions. After all, under this reading, the court may *never* evaluate the substantiation of the privilege and order non-privileged documents produced.

B. The People ex rel. Lockyer

In *The People ex rel. Lockyer v. Superior Court* (2004) 122 Cal.App.4th 1060, the Court of Appeal expanded the apparent opportunity to obfuscate created by *Best Foods*. In *The People ex rel. Lockyer*, in response to the defendants' document demands, the People offered boilerplate "privilege" objections followed by a privilege log that listed only "categories of documents, rather than individual privileged documents." *The People ex rel. Lockyer* 122 Cal.App.4th at 1066. Defendants moved to compel on their document demands, and also noticed the People's deposition and demanded that additional documents be produced at the People's deposi-

tion. The People moved for a protective order on the ground that the deposition notice sought "privileged" documents. In response to defendants' motion to compel, and on the People's motion for protective order, the People presented no evidence to support its "privilege" assertion. The trial court granted defendants' motion to compel, and denied the People's motion for protective order, specifically noting that the People "failed to sustain [its] burden to support the relief requested." (Not quoted in the Court of Appeals decision.)

Once again, the Court of Appeal reversed, and adopted the holding of *Best Foods*. Because "no motion was made under section 2031, subdivision (m) seeking a further and more specific identification of documents withheld on the basis of privilege," the defendants had no remedy. (*Id.* at 1075.) And in recapping the holding of *Best Products*, the Court of Appeal erected still another hurdle for any party seeking to probe any assertion of privilege. It held that:

First, deficient objections or claims of privilege are not grounds for waiver, so long as a party, such as the People here, made timely objections in their original response. Further, *there is no obligation to produce a privilege log at all, unless ordered to do so by the court upon a motion by a party seeking such a document*. No such motion was made, and no such order was entered. Second, even if the court had ordered the People to produce a privilege log, or to produce a more detailed one, and the People failed to do so, no waiver of privileges could be found. While the court would have other sanctions available to it in such a situation, a waiver of privileges was not authorized by statute.

(*Id.* at 1075 (emphasis added.))

Thus, if the asking party seeks relief *before* the responding party proffers a privilege log, under the rule of *Best Foods*, the court may not compel production "at this juncture." *Best Foods*, 1189. However, even if the asking party waits until *after* the responding party proffers a privilege log, under the *Lockyer* rule, the court may not compel production at *that* juncture -- or at any other juncture. *Lockyer, supra*.

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C. What To Do?

Litigants seeking to side-step these decisions may argue that they are limited to questions of *waiver* by a failure to *assert* privilege in a particular manner (e.g., by a certain date, or with sufficient specificity), as distinct from a failure to *establish the existence* of a privilege, at all, for a particular document. *Best Foods*, however, characterized this as a “proverbial distinction without a difference.” *Best Foods*, 1182 n. 2. Likewise, the facts underlying *The People ex rel. Lockyer* would not appear to support this distinction because the trial court there found that the party asserting privilege failed to *establish* its burden regarding its existence, rather than simply holding that it waived its right to assert it.

In all events, a party who receives a response to a document demand that includes privilege objections (that is, *all* parties that propound document demands) should immediately seek an *order* requiring that assertions of “privilege” be set forth in a proper log. (Recall that in *The People ex rel. Lockyer*, the Court of Appeal distinguished between a voluntarily produced a log, and one ordered by a court.) Only then can a propounding party seek a sanction for failure to produce a particularized log.

Beyond that, these decisions appear to place the first and last line of defense against potential abuse in the hands of the would-be abuser -- the party asserting “privilege.” One may hope that a party asserting privilege forced by court order to further detail its assertions, would withdraw more dubious assertions as they are illuminated. Ultimately, however, *Best Products* and *The People ex rel. Lockyer* suggest that the party asserting privilege will have sole discretion to determine what will be produced, and what will not, regardless how strained the assertion of privilege.

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Kaiser Foundation Hospitals, 10 Cal. App. 4th 1790 1802 (1992). It would, thus, appear that the general rule severely limiting discovery in arbitration is alive and well.

The rule's health, however, is subject to some question. Several courts outside California called into question the rule's general application. In counterpoint to the *McRae* decision, a federal court in Indiana observed that the belief that discovery is not available in arbitration proceedings is “without merit.” *Hires Parts Service, Inc. v. NCR Corp.*, 859 F. Supp. 349, 353 (N.D. Ind. 1994). Indeed, in matters applying the Federal Arbitration Act, as opposed to California's version, authority exists for the proposition that an arbitrator's power to order discovery is broad. *Mississippi Power Co. v. Peabody Coal Co.* 69 F.R.D. 558, 567 (S.D. Miss. 1976) (Interpreting the FAA as “allow[ing] the arbitrator, in his discretion, to permit any discovery necessary to the performance of his function.”) Such holdings are not, however, confined to arbitration involving the FAA. *Stanton v. Pain Webber Jackson & Curties, Inc.*, 685 F. Supp. 1241, 1242 (S.D. Fla. 1988)(In matter governed by AAA rules, court found that arbitrator may order and conduct any discovery they find necessary.)

More close to home, the general rule against discovery in arbitration has been eroded by the legislature. In 1970 the California Arbitration Act was amended to provide that any arbitration provision covering a personal injury or wrongful death claim included rights to discovery “as if the subject matter of the arbitration were pending in a civil action before a superior court. . . .” Calif. Code of Civil Procedure §1283.05(a). Courts have acknowledged that this amendment reverses the general rule announced by *McRae* at least for certain types of cases. *Alexander v. Blue Cross of California*, 88 Cal. App. 4th 1082, 1088 (“[S]ections 1283.1 and 1283.05 grant arbitrators broad authority to order discovery in certain types of arbitration proceedings.”)

The amendments allowing discovery in arbitration involving claims of personal injury and wrongful death arose from a basic notion that it was not fair to preclude claimants from discovery in such matters. The notion of fairness is, of course, not confined to matters involving personal injury and wrongful death. Even in matters where courts recognize the limit on discovery in arbitration, there has been a recognition that basic dis-

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covery makes sense. *Integrity Ins. v. American Continental Ins.*, 885 F. Supp. 69, 73 (S.D.N.Y. 1995) (“Common sense encourages the production of documents prior to the [arbitration] hearing so that the parties can familiarize themselves with the content of the documents.”)

There is some indication that the broad rights to discovery conferred in arbitration involving personal injury and wrongful death will not be long confined to those matters. In enacting §1283.05 to provide for broad discovery, the legislature also made it clear that the parties to any arbitration agreement could agree that these broad rights of discovery would apply to any arbitration. Calif. Code of Civil Proc. §1283.1(b). Parties interested in using the full range of discovery in arbitration have argued that any arbitration agreement generally incorporating the California Arbitration Act necessarily incorporates §1283.1 and its reference to broad discovery rights.

An employer arguing that arbitration provisions in employment contracts were not unconscionable argued this point in *Armendariz v. Foundation Health Psychare Services, Inc.*, 24 Cal. 4th 83, 104-05 (2000). In that case after the court observed that discovery in cases involving FEHA claims was “indispensable,” it noted that the employer had argued that the arbitration at issue provided adequate discovery because the agreement incorporated the entire California Arbitration Act, including the broad discovery provided by §1283.05. Without specifically ruling that such an incorporation of full discovery occurs whenever an arbitration provision incorporates the terms of the CAA, the Court held that employers who agree to arbitrate FEHA claims implicitly agree to the discovery which is indispensable to vindicating those claims. *Id.* at 106.

The argument that arbitration agreements referring to the CAA implicitly incorporate the broad rights of discovery provided by §1283.05 requires reading §1283.1 (b) broadly. Instead of reading §1283.1(b) to require an express agreement to incorporate §1283.05 into any arbitration, this argument rests on a notion that §1283.05 can be implicitly incorporated into the agreement absent an express intent to preclude discovery. If *Armendariz* provides any indication as to how the courts might rule on this argument, it would appear that any arbitration provision incorporating the CAA may be held to include broad rights to discovery. This would be particularly

true in a matter, like *Armendariz*, where there is a colorable argument that discovery is essential to vindicating the claims at issue in the contractually required arbitration.

Arbitrators who think that discovery should be allowed have several avenues for doing so even without resorting to the argument that the arbitration clause incorporates §1283.05. In arbitration subject to the AAA rules, an arbitrator can resort to Rule 22 which provides for pre-hearing exchanges of information in order to allow some form of discovery. Arbitration subject to JAMS rules necessarily incorporate JAMS Rule 17 with its extensive voluntary disclosures and provision for at least one deposition per side. In short, any arbitrator who feels it is necessary to permit discovery has a number of different routes for doing so.

Parties seeking to preclude discovery when agreeing to arbitration need to take note of this evolution of the general rule against discovery in arbitration. There is a possibility courts examining arbitration clauses in the future will conclude that minimum discovery is necessary to make them enforceable in situations beyond those involving FEHA claims. Set against this, if parties negotiating a contract truly want to secure the economy and efficiency afforded by arbitration without discovery, they need to make that intention clear in the language of the arbitration provision. Absent such language there is a very real possibility that arbitration will involve discovery that is indistinguishable, in terms of both time and cost, from what would have taken place in a matter before a court.

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-Interview: Continued from page 1-

JAMS. Although I mediated many cases at the Orange County Superior Court, there I felt somewhat constrained. For instance, as a judge, I had to juggle mediations around handling all of my other inventory -- my trials and my law and motion calendar. As a private mediator, I can devote much more time and attention to a particular case. Furthermore, as a judge I was not able to conduct follow-up calls when cases did not settle as it would have been improper to participate in *ex parte* communications. As a private mediator, I am not so restricted. I am able to call the parties before a mediation begins to determine if there is something I should know ahead of time, and I can follow-up with the attorneys and continue the mediation over the telephone if I believe there is still a possibility the case will settle.

Q: You are well known as the judge who created the mediation program in Orange County Superior Court. What benefits do you believe mediation offers?

A: Many lawyers know my "top ten reasons to mediate." I will just name a few. It goes without saying that mediation is much more efficient than trial. A trial can last days, weeks or even months, but mediation can resolve a case much quicker, often in one or two sessions. And even though mediation can be expensive, the cost pales in comparison to taking just a few depositions, not to mention the cost of going to trial. Often the parties attempt to mediate at the onset of their case -- sometimes before an Answer is even on file. A mediation also is much less traumatic than a trial and mediation allows each of the parties to maintain control. Jurors do not know about the lives of the individual litigants or what is important to them personally. At mediation, each party can tailor a settlement that reflects their own personal views, opinions, and needs.

Q: Do you have any advice to attorneys (and/or their clients) to better increase their odds of settling a case?

A: The best advice I can give is to be prepared. Be prepared with a realistic opening offer or demand. Be prepared to respond to questions from the mediator and opposing counsel if necessary. Furthermore, I cannot emphasize enough the importance of an attorney preparing his/her client for the mediation. Often times a client has never been to a mediation. The attorney should inform the client ahead of time of the role of the mediator and what may be asked of him/her.

Q: What do you believe makes a good mediator?

A: I believe mediators must start out as a facilitators. They must let both sides know that they understand their respective positions and that they have done their homework to get up to speed on the case. This is particularly important because, at some point, the mediator's role necessarily changes to that of an evaluator. Sometimes a case will only settle if one of the parties sees the weaknesses of its case. Good mediators must make both sides feel comfortable that they understand the case from both points of view.

Toward that end, I believe it is crucial for a mediator to give credibility to the party's attorney. Clients often argue that they know what a jury will do and can believe that their attorney has an overly negative view of their case. If that happens, I ask a party how many times they have been before a jury or how many times have they been on a jury. The answer is usually a very small number, if at all. I then point out that both I and the client's lawyer have seen, and participated in, many trials and have a better understanding of the risks and events that can occur.

Q: Do you miss being on the bench?

A: I loved being a judge. It was a culmination of the best things I liked about being a lawyer -- new and exciting cases and concepts from a bird's eye view. Fortunately, I still get that same excitement from being a mediator. I do miss my chambers, my clerk, my bailiff, and my reporter -- the people with whom I worked. That said, I do not miss a lot of the stresses associated with being a judge. Indeed, the robe does weigh heavy. For instance, I would worry about those people trailing and worry about making the right decision during law and motion. Joining the private mediation sector, I free myself of a lot of these stresses and can focus on working to settle and resolve disputes.

In that same vein, I prefer mediating cases over adjudicating them. Generally, when I would try a case, I would simply feel like a traffic cop, keeping the parties to their time limits and handling evidentiary issues. And immediately after the verdict was read, the attorneys often would run from the courtroom to talk to the jury. I only saw them again if they brought post-trial motions. In mediation, I get to be actively involved and see the matter through its end. In mediation, everyone

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leaves happy -- or at least relieved -- and I get to be a part of that. In fact, I have even received a few hugs

after successful mediations. That certainly never happened after a trial.

Q: Do you prefer having the parties submit confidential mediation briefs or do you prefer the parties exchange their briefs?

A: I favor the concept of confidential briefs if the parties truly provide me with confidential information. For instance, if the parties present both the strengths and weaknesses of their respective cases and set forth an accurate picture of their settlement posture, confidential briefs can be invaluable. Unfortunately, few provide this information. So, if the parties are merely going to provide me with information that reads like a trial brief or their latest law and motion papers, I would prefer that the parties exchange these briefs.

Q: You are also well known as the judge who spearheaded the beautification process at the Orange County Superior Court. How did this come about?

A: The concept first came to me when I was traveling across the country. I enjoyed stopping in to see local courthouses. During my travels, I noticed that many courthouses, particularly those in smaller towns, had so much history in them. When I came back to our courthouse, it seemed very austere and that's when I began my crusade, which looking back was started almost 10 years ago. The first thing to go was the "tacky" bulletin board behind the sheriff's counter -- yes that was meant to be a pun. That came down, and I was then able to obtain bronze plaques in honor of Judge Francis and Justice Gardner. Then I obtained an exhibit case to display pictures of the Old Courthouse. I came in touch with the grand niece of the first judge in Orange County, Judge Towner, and she provided me with Judge Towner's Civil War memorabilia. From there, we put up pictures of all the retired judges (my picture just recently went up), shaped up the judges' lunchroom, put live trees on every floor and obtained many additional historical pictures of Orange County. Recently, the Irvine Museum provided us with 50 loaned Orange County 1920/1930's impressionist paintings (and another 50 are on the way) and the legal community, including ABTL, has rallied around and supported these efforts (both financially and otherwise). We are also

awaiting the unveiling of a bronze statue on the main floor of the courthouse, which was made possible by the Orange County Bar Foundation and its supporters. The statue is beautiful and will be unveiled in a ceremony reception on April 7th in the courthouse.

Q: If money were no object, what would you like to see done to further beautify the courthouses in Orange County?

A: I would like to obtain additional historical pictures to decorate each of the jury rooms, provide a catalog of all the judges and their profiles for people to read and enjoy, and I would like to have a Declaration of Independence-like record that sets forth the history of Orange County framed in a prominent location in the courthouse.

Q: What do you enjoy doing when you are not working?

A: I enjoy spending time with my wife Sande, golfing, and watching UCLA games. I also enjoy spending times with my grown children, all of whom I am fortunate to have live nearby, and my grandchildren. And just a few days ago, the number of grandchildren that I have was greatly increased as my daughter just gave birth to triplets.

Q: How has your golf handicap changed (for the better or for worse) since retiring from the bench?

A: I wish I could say that I have been golfing more often, but the weather has not been very cooperative. Besides, there has not been much time to golf as I have only been off the bench for four months and have been busy getting used to being the "new guy" at JAMS.

Q: If you could choose any job in the world other than a judge or mediator, what job would you choose?

A: I think I already had my dream job -- it was being a judge. Second to that, I always wanted to be a professor and I was fortunate enough to be an adjunct professor for 20 years teaching a real property course at Western State University. I also taught American History in the Navy. Besides that, I would have loved to have been an astronaut.

Q: We thought for sure you would say that your dream job was to be a professional golfer or UCLA coach?

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A: You said dream job, not fantasy job. I know my limitations.

Thank you Judge Thrasher for your time.

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-Profits: Continued from page 5-

Some Differences

Despite having many things in common, lost profits analysis and business valuation are not one and the same. Following are a few examples of differences between lost profits analysis and business valuation.

First, the measure of profit analyzed under each methodology is different in most situations. Take an example of a Plaintiff suing for breach of contract and claiming a loss of a portion of its sales. Generally speaking, lost profits damages would be equal to the lost sales, less the additional (sometimes described as variable or incremental) costs that would have been incurred in achieving those sales. The result is lost, or incremental, profit. Under a valuation methodology, the profit being analyzed is a function of *all* revenues and *all* expenses, pending certain adjustments and add-backs of items such as interest, taxes, depreciation and amortization. Thus, in order for a valuation methodology to approximate a lost profits analysis, you must either be dealing with the complete loss of a business, or comparing the difference between the value of a business but-for the breach, and the actual value after the breach.

Second, while lost profits analysis shares similarities with the income approach to business valuation, there

are two other common approaches to valuing a business: asset and market. Of the two, the asset approach is the most unique, since it establishes the value of a business based on the net value of its underlying assets and liabilities. Imagine a manufacturing operation that has among its assets, inventory, equipment and real estate. The asset approach would establish a value for each asset or group of assets of the business, add up the total and subtract the amount of any outstanding liabilities.

The market approach establishes the value of a business by looking at valuation data for similar companies, commonly referred to as comparables. It may look to stock price data for publicly traded companies, or data on the prices at which similar companies were sold. A common approach to the market method of valuation is to establish multiples of earnings, which basically take the value of a comparable company and divide it by a measure of its income such as revenue, net income or net cash flow. Once this multiple is established, it is applied to the subject company's comparable measure of income to establish an estimate of its value. Although the formula is different, the market approach has more in common with the income approach than the asset approach since it also utilizes the income of the business to establish its value.

Finally, the lost profits method calculates damages from the perspective of the Plaintiff, who has been harmed. The result of most, but not all, valuation analyses is a hypothetical sale price for a business or asset to which a willing buyer and willing seller would agree in order to execute a transaction. Without getting too complicated, this analysis can sometimes take into consideration sources of value specific to a buyer such as the ability to operate a business more profitably than it is currently being run, or potential synergies with other assets or businesses owned by the buyer. These differences in profit expectations, perceived risk and reinvestment assumptions can lead to differences in the discount rates employed in each methodology. In addition, transactions can be subject to discounts for the lack of marketability for non-public companies and premiums or discounts for control when the interest being sold may or may not represent the controlling, or majority interest in the business. Another potential difference has to do with the willing buyer/willing seller assumption used in business valuation. Is the Plaintiff in a breach of contract lawsuit a willing seller of its business or a part thereof?

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While these differences can be reconciled, they do require careful consideration.

Can Both be Used Together?

Can a business suffer a loss in profits and also suffer a loss in value? Yes. By default, a business that has lost profits *has* lost value. The critical issue is that assuming full recovery is achieved by the end of the damages period being analyzed, the calculation of lost profits makes the Plaintiff whole, and in many cases there would be no residual loss in value.

Generally speaking, a calculation of lost profits and a calculation of lost business value covering the same time period may have a high degree of redundancy. As mentioned previously, a lost profits calculation is merely a valuation of the loss. The financial projections used in a lost profits analysis would be similar to the difference between the projections used in a but-for valuation and those used in an actual valuation. Caution is urged in using these concepts together in the same time period to ensure that damages are not double counted.

There are, however, circumstances in which both could be used together. Suppose a business has suffered a loss in profits without full recovery by the time of trial. In this circumstance, the business is likely to incur losses into the future. One option is to continue to project the lost profits into the future, which may or may not be accepted depending on the Court that is hearing the case. The other option is to calculate the lost value of the business at the date of trial as a proxy for future damages. If done correctly, this should produce a similar result.

Another example is a loss event which causes the Plaintiff a period of lost profits followed by the total destruction of the business. It may be fair to measure lost profits during the earlier period and perform a valuation-based loss analysis to add the results of the permanent loss of the business.

Can Lost Profits Exceed Business Value?

Consider the following scenario. Plaintiff had a business that just prior to any harm was valued at \$1,000,000 (the “but-for” value). Next, assume he was harmed in such a way that the value of his business was impaired permanently from \$1,000,000 to \$500,000 and that the liability for that harm has been established. Fur-

ther, consider a future lost profits analysis that provides an indication of present value of the damages of \$2,000,000. Here we have a situation where the damages clearly exceed the “but-for” value of the business by \$1,000,000.

If the value of business is derived from its profits, how can the present value of future lost profits exceed the value of the “but for” whole business? This is a common question posed by damage and valuation experts and Attorneys alike. Welcome to Pandora’s Box.

Several things can lead to a situation like this. First and as mentioned previously, the discount rates used in each type of analysis are likely to be different. The value of a business usually considers the perspectives of hypothetical buyers and sellers and what they could earn on investments with similar risk profiles.

From the perspective of the Plaintiff seeking the present value of lost profits, an argument can be made that a market rate of return over-estimates the risk he perceives and would therefore provide an indication of value that is lower than it would be otherwise. It is clear then that there needs to be a factual basis establishing that the Plaintiff is no longer functioning as a hypothetical willing seller or subject to hypothetical fair market value conditions. This can be clearly demonstrated through the lack of alternative investment opportunities similar to his business prior to the damage.

Second, the business value will likely consider some reduction in value to address the lack of ready liquidity (i.e. marketability discount) for the business. This lack of marketability can be expressed as either a direct reduction to value (marketability discount) or by increasing the overall rate of return with which to discount future earnings back to present value. Again, from the Plaintiff’s perspective, such a lack of liquidity may not be relevant to the lost profits analysis at hand.

Third, a lost profits analysis may be adjusted (either directly or indirectly) to account for the Plaintiff’s specific tax situation which could result in a value higher than the one estimated as the business value. One theory prevalent in lost profits damages is that the Plaintiff should not suffer adverse tax consequences resulting from his award and hence, a corresponding increase in value would be warranted.

Finally, the discrepancy can sometimes be traced to
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two different sets of projected profits and earnings with entirely different sets of assumptions and expected outcomes. This happens often when two experts are analyzing a matter independent of one another. Seems obvious enough, but it is an area often overlooked for its explanatory power and the practicing Attorney is well advised to explore this possibility.

Carefully Consider Your Circumstances

Lost profits analysis and business valuation have many differences, although they are much more similar than most legal professionals realize. While careful consideration must be given to the facts of the dispute and the Court's willingness to accept one analysis over the other, lost profits and business valuation, if used properly, are both acceptable tools to use in calculating damages. At Moss Adams, our forensic accountants and valuation professionals have extensive experience in these areas and can help you address them.

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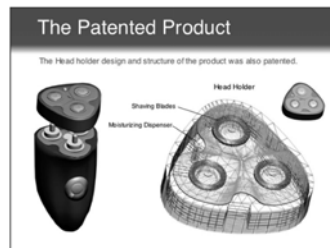
-Media: Continued from page 5-

constant reference. Bullet points, charts, graphs, etc., are usually better presented via a computer slide. The slide can be brought up once for the jury to see and then taken down. The main thing to remember when using slides or boards is not to become dependent on the demonstrative aid. The facts are still the key, and the demonstrative aid is used to enhance the presentation of the facts.

- 2. Audio, Video & Animations. Unless a media file has already been pre-admitted as evidence, it can be difficult to use audio/video visuals during an opening. If you have pre-admitted audio/video visual pieces of evidence, the most effective way to present them is via a computer. Use of DVD's, VHS tapes and audio decks can slow down and break the flow of your opening.

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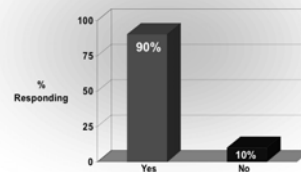
would either pass them a document or have them write something on a board and explain it to the jury. Using these methods, the jury cannot easily follow along or comprehend, since they cannot see and be led through the exhibit.



With technology, key documents can be brought up on a big screen where you can highlight, zoom into key areas, and compare to other documents, simultaneously. This same technology can be used on

photographs and transcripts. Singular presentation of evidence is very powerful since everyone is looking at the same thing at the same time while it is being explained.

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Demonstrative exhibits such as charts, graphs, timelines, can also be used to enhance a witness' testimony. Expert testimony can be complicated and difficult to explain to the average person. Well-designed graphics can help explain complex information in a way that most can understand. The key thing to remember with your graphics is they must not be over complicated. Sometimes a simple bar chart will convey the message and sometimes a complex graphic is needed. If you ever wonder whether your graphic is conveying the message in a logical manner, ask someone in your office or a friend who knows nothing about your case, "does this makes sense to you?" If they say, "I understand it fine" -- leave it alone. If they have no idea what you are trying to convey, ask them, "what would make it make sense to you?" Remember, it's not how pretty a graphic is, it's whether it does its job.

Cross Examinations

Cross-examinations are where you can really benefit from technology. Computers and software have taken cross-examinations to a new level. Most of the old



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techniques for crossing a witness have been changed with technology. One of the biggest weapons for cross has been the creation of trial presentation software. Trial presentation software such as Sanction or Trial Director is databases with a presentation function. These software's give you access to any of your case material with the push of a button. These

software packages will accept scanned documents, transcripts, photos, video depositions, PDF files and many more file types. Depositions can also be synchronized to court reporters transcripts allowing instant access to any portion of a deposition instantly for impeachment. Instead of loading VHS tapes and trying to fast forward or rewind to the portion you need, you can quickly create video impeachment clips or jump to a page and line number of a deposition in seconds. This instant access to testimony is key so that you don't lose the moment. The best way to prepare for a "technology" cross is to take your cross outline and write in after every question the bates number of the document you plan to use or the video impeachment ID. If you take the time to write in your ID's in your outline, you can quickly and efficiently bring up documents and impeachment cites.

Closing Statements

The closing is your last chance to speak to a jury before they begin deliberations, but more importantly your last chance to persuade them. Research has shown that many jurors have not made up their mind about a case until closing arguments. Closing arguments are often more complex when it comes to technology. So much evidence has usually been introduced during a trial, which can make it difficult to choose what to present. You should think back to your original plan with regards to what you MUST get across to a jury to win. Using a combination of documents, graphics, video clips or animations can be a very powerful lasting impression on a jury before deliberations.

Outsourcing vs. Doing It Yourself

This is a dilemma that does not have to be that difficult. If your case is relatively simple, yourself or your firm can create most of this technology easily. If your case involves a lot of documents or visuals, it may be advised to seek assistance - you want it to be profes-

- Q. Mr. Johnson, you have previously testified that you didn't think Ms. Shields has been exposed to enough asbestos to cause cancer.
- A. That is correct. (July 5, 2000 Depo. P. 50 lines 6- 10) Clip 4
- Q. You also wrote in your report that you did not think Ms. Shields had been exposed to enough asbestos to cause cancer?
- A. That is correct. Exhibit 31
- Q. You also agree that Ms. Shields never worked at Smith Industries long enough to have sufficient exposure to asbestos?
- A. Correct. (August 10, 2000 Depo. P. 10 lines 5-8) Clip 5

sional and efficient.

Too Flashy?

A common concern, typically among defense firms with large corporate clients, is whether the technology will appear too flashy. Today's jurors live in a world where technology is all around them. Jurors expect to see evidence and will not be offended if your client is willing to present the best case possible. As more courtrooms around the country become "wired", this will be less of an argument as judges and juries will expect the use of technology. Never fear technology if it can benefit your client.

Final Thoughts.

Technology benefits a trial more so than ever. It can be the difference maker in a trial but cannot win it. Technology is a powerful tool but not an alternative to preparation. Trials are still won and lost, usually, on the facts. Technology is a way to enhance and better present the facts of your case.

■ *Charles Wright is the President of The Data Company. The Data Company is a full service litigation support company which offers trial support services, document management, e-discovery, courtroom graphics, 3D animations, and video services. They have offices in Memphis, San Francisco and San Diego.*

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some criminal cases can similarly become very emotional.

The Bench Bar Brown Bag Lunch is an exceptional opportunity for young lawyers to meet with judges sitting in Orange County. Such events help young attorneys get face time with a judge, feel more comfortable around them, and hopefully become better advocates.

■ *Irfan A. Lateef is a partner in the Orange County office of Knobbe, Martens, Olsen & Bear and specializes in patent litigation.*

Wednesday, April 6, 2005

**Corporate America
on Trial: The Disney
Shareholder
Litigation**

A lively and informative presentation by trial counsel in the ongoing Walt Disney Company shareholder derivative action relating to the hiring and termination of Michael Ovitz as the company's president.

Stephen D. Alexander

Fried, Frank, Harris, Shriver & Jacobson

Mark H. Epstein

Munger, Tolles & Olson

Westin So. Coast Plaza Hotel
6 p.m. Reception
7 p.m. Dinner & Program

Program registration is available on the ABTL website,

www.abtl.org

or call the ABTL office at
323.939.1999

SAVE THE DATES

Wednesday May 4, 2005

Brown Bag Lunch

with

Hon. David Velasquez

(see the next page for registration information)

Wednesday, June 8, 2005

Dinner Program and Fundraiser Benefiting the Public Law Center

featuring...

Hon. William Bedsworth

Westin So. Coast Plaza Hotel
6 p.m. Wine Tasting Fundraiser
7 p.m. Dinner & Program

**Wednesday,
September 14, 2005**

Dinner Program

Westin So. Coast Plaza Hotel
6 p.m. Wine Tasting Fundraiser
7 p.m. Dinner & Program

October 21-23, 2005

**ABTL Annual Seminar
Ventana Canyon Resort
Tucson, AZ**



BROWN BAG LUNCH WITH A JUDGE

We are pleased to invite you to our next “brown bag” lunch with a member of the bench. The lunch will be with the *Hon. David C. Velasquez* of the *Orange County Superior Court, Complex Civil Center*, and will take place at 12 noon, Wednesday, May 4, 2005.

These luncheons enable ABTL members with less than 10 years in practice to interact with distinguished members of our local bench in an informal setting, without a pre-set agenda. Each lunch is limited to 10 attorneys, and reservations will be accepted on a first-come basis.

You can make your reservations by completing the form below and faxing to the ABTL, fax 323.935.6622. Reservations will be accepted on a first come basis. We will contact you to confirm your participation. Once your attendance has been confirmed, a list of attendees will be provided to the coordinator of this event and the Judge. Should a conflict arise which prevents you from attending, please call us as soon as possible, and in no event later than 48 hours before the scheduled lunch, so we can select an alternate participant. There is no cost to attend this event -- just remember to arrive on time and bring your own lunch and beverage.

NAME: _____

FIRM: _____

YEAR ADMITTED TO THE CALIFORNIA BAR: _____

E-MAIL ADDRESS (required for confirmation): _____

PHONE: _____

