ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

ORANGE COUNTY

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Q&A with the Hon. Richard D. Fybel
by Richard Grabowski

[Editors' Note: Richard Grabowski caught up with Justice Richard D. Fybel for this judicial interview. Justice Fybel was originally appointed to the Orange County Superior Court by Governor Gray Davis in 2000 and, after serving two years on the state court bench, was elevated to the Fourth District Court of Appeal. He is also a member of ABTL Board of Governors.]

Q. I know you are involved in Inns of Court, working with some of the newer members of the Bar. What advice do you give to new lawyers?

A. New lawyers need to learn their craft. This challenge includes: the ethical practice of law; learning how to

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The Class Action Fairness Act of 2005
by Marc K. Callahan

In February, President Bush signed the Class Action Fairness Act of 2005 ("CAFA") into law. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. §§ 1332(d)-(e), 1453, 1711-1715 (2005)). CAFA applies to any civil action commenced on or after February 18, 2005. (*Id.* § 9.) Among other things, CAFA responds to perceived abuses of class actions in state courts by attempting to federalize the resolution of a greater percentage of class actions. To do so, CAFA makes significant changes to previously "hornbook" law on diversity and removal jurisdiction. This article details those changes. [1]

Findings and Purposes

CAFA is grounded in the Congressional recognition that the class action lawsuit is an important and valuable part of the legal system, *id.* § 2(a)(1), but which has been abused over the past decade to the detriment of class members, *id.* § 2(a)(2)(A), defendants, *id.*, interstate commerce, *id.* § 2(a)(2)(B), public respect for the judicial system, *id.* § 2(a)(2)(C), and the concept of diversity jurisdiction as intended by the framers of the United States Constitution. **(***Id.* § 2

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1. CAFA also responds to abuses which were perceived to be harmful to plaintiffs by imposing a Consumer Class Action Bill of Rights. (28 U.S.C. §§ 1711, *et. seq.)* Not the focus of this article, the Consumer Class Action Bill of Rights increases judicial scrutiny over class actions, protects class members from settlements that would cause them to lose money or that would discriminate based on a class member's geographic location, proscribes rules on how attorney's fee awards will be distributed in coupon settlements, and forces the notification of federal and state officials in the event of a settlement, giving those officials the opportunity to act if they feel the settlement is inappropriate. (Pub. L. No. 109-2, § 3.)

President's Message
by Hon. Sheila B. Fell

"Quality," that overused word is, nonetheless, vitally important in our profession. To paraphrase a noted Supreme Court Justice, "You know it when you see it." It should be the standard for each of us to attain as we go about our lives -- both personal and professional.

Quality starts with being a "quality" individual with moral and ethical integrity. It is being absolutely honest even though the consequences are great. It is putting someone else's needs before our own (sometimes referred to as "courtesy"). These qualities engender trust, respect, and admiration. It requires strong fiber to be a quality person.

Quality in the practice of law has many of the same characteristics. From the perspective of the trial bench, there are a few extra considerations. Of course, quality requires absolute honesty. Quality in the courtroom also requires solving some mechanical challenges. Quality pleadings exhibit care in presentation of ideas. They are organized, they are reviewed for reasonably proper grammar, they are "spell-checked," they give a complete picture, and they capture the interest of the reader. Win or lose, the preparation generated by the quality professionals appearing in our courtrooms have earned them their fees.

We are fortunate in Orange County to have great opportunities to learn from the best. In addition to our own ABTL, we have a variety of Bar Association Sections, Inns of Court, and professional organizations too numerous to mention. Our members are committed to following the road to excellence.

I commend our quest for quality. May it never end.

ABTL 32nd ANNUAL SEMINAR

October 20-23, 2005
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Keynote Speaker:

Hon. Mary Schroeder, Ninth Circuit

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Chamberlan v. Ford Motor Company: The Ninth Circuit Identifies Criteria For Evaluating Requests for Permission to Appeal Class Certification Orders

by Melissa R. McCormick and Julie M. Davis

Melissa McCormick

Julie M. Davis

A federal district court's decision on a plaintiff's motion for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure is often a pivotal moment in a putative class action because the side that prevails on the motion gains an important tactical advantage. If a class is certified, the plaintiff often wins superior bargaining position because the defendant's potential liability increases dramatically. If a class is not certified, the defendant usually gains the upper hand because continuing to litigate the named plaintiff's individual claims may be too costly for the plaintiff to proceed.

Because the class certification decision can have such a substantial impact on a case, both plaintiffs and defendants face a common question when on the losing side of a class certification motion in federal district court -- how to obtain interlocutory review of that order. Procedurally the answer is simple: Rule 23(f) of the Federal Rules of Civil Procedure.[1] But, until recently, parties litigating in the Ninth Circuit Court of Appeals could not be certain of the criteria the Ninth Circuit would consider in evaluating whether to permit an interlocutory appeal under Rule 23(f) because the court had not addressed that issue. In the recent decision of *Chamberlan v. Ford Motor Company*, 402 F.3d 952 (9th Cir. Mar. 31, 2005) (*per curiam*), the court for the first time identified the criteria it will consider in evaluating Rule 23(f) requests to appeal.

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1. Federal Rule of Civil Procedure 23(f) provides in relevant part: "A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order."

The CEO as Witness: Super Hero or Arch Villain

by Gerald A. Klein

In recent months, there have been numerous trials where jurors have had to ask this question: "Was the boss in the know, and if so, what did he/she know?" The overwhelming lesson learned from these jury trials is whether or not a chief executive officer ("CEO") claimed to have been in the dark about what his or her underlings did. The overwhelming assumption of jurors was that the boss ***must*** have known. This juror mindset is something attorneys must recognize whether they are attacking or defending a CEO at trial.

The Reality

Anyone who works with CEOs of large companies knows the CEO is often ***not*** familiar with the details of what is going on in the company. The reality of a large company is there is too much information for any one person to absorb, let alone analyze. The larger the corporation, the more difficult it is for CEOs to know every aspect of what is happening inside a company. Even managers with "hands on" management styles cannot be on top of every new development happening in a company. This is a business reality.

The Perception Problem

Whatever the objective reality might be, jurors come into trials with distinct perceptions about what a CEO ***should*** know. From the recent jury verdicts regarding corporate mismanagement and misconduct, jurors have sent a message: whether or not the CEO had actual knowledge of certain events, he or she ***should*** have known about them and responded appropriately. This perception - valid or not - is something every lawyer should recognize whether attacking or defending the CEO. Accordingly, the following are eight lessons lawyers should learn from the recent jury verdicts regarding corporate wrongdoing.

A. Jurors Demand Accountability

Harry Truman had a plaque on his desk that said

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The Sixth Annual Wine Tasting Fundraiser

by Linda A. Sampson

On June 8, 2005, the ABTL hosted the Sixth Annual Wine Tasting Fundraiser and Dinner Program to support Orange County's Public Law Center. Last year's fundraiser raised $15,000 for the Public Law Center -- 50% more than the year before. Although the final figures for this year's fundraiser are not yet in, by all accounts this was another successful year and we are hoping to have had the best year yet.

As usual, this event would not have been possible without the support of the various law firms and individuals that consistently step up on a regular basis to help the ABTL thrive. We thank each of you.

The Dinner Program -- entitled the "Care and Feeding of Judges" -- featured Associate Justice William W. Bedsworth of the Fourth District Court of Appeal. Mixing in his usual wit and humor, Justice Bedsworth offered insights into judicial ethics. Indeed, he began his program with the statement that he was "pro-ethics" and within approximately 90 seconds had thanked the audience for attending the program and left the podium. With much cajoling -- okay, not really -- he returned center-stage and continued to entertain and educate us on ethical limitations facing judges. For example, Justice Bedsworth discussed Government Code section 68210, the section that requires a judge to issue a decision within 90 days from the date of submission. And, in this regard, Justice Bedsworth shared with us a skillful way to "remind" the Court that the clock was ticking.

Justice Bedsworth also explained the limitation on exchanging gifts with judicial officers. In particular, subject only to certain exceptions for family members and personal friends with a preexisting relationship that would prevent the judge from hearing a case involving that person, no judge may accept gifts from any single source in a calendar year with a total value of more than $250. (Justice Bedsworth expressly noted that this amount includes green fees.)

He wrapped up his presentation with a final explanation as to why many judicial officers decline what would

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Brown Bag Lunch with Hon. David Velasquez

by Jay B. Freedman

I was fortunate enough to be one of the few attorneys able to enjoy an informal lunch with Judge David C. Velasquez as part of the ABTL's "Brown Bag Lunch" series. Judge Velasquez has been sitting on the superior bench since 1990 and is currently the supervising judge on the Civil Complex Panel. He was gracious enough to give up some of his limited free time to answer our questions and provide some valuable insights into the inner workings of the courts.

Judge Velasquez offered several lessons to those of us who litigate. Initially, he reminded us to remember our audience when writing motions. In Santa Ana, the first set of eyes to review our work belongs to the court's research attorneys. The complex judges all have their own research attorneys, but the judges in the main courthouse generally share three research attorneys per floor. While the judges rely on their research attorneys to differing extents, the initial recommendation on your motion will come from the research attorney. Judge Velasquez recommends that we get to the point and make our arguments easy to find and understand.

If you are appearing in front of Judge Velasquez, he does read all of the papers and relevant case law himself and he overrules his research attorney about 15% of the time. If you have ever seen one of his tentative rulings, you know that they are detailed, well-reasoned and thoughtful. He explained that he does not offer internet tentatives because he is often still working on them the day of the hearing but that advance copies can be obtained by calling his clerk. When arguing in front of Judge Velasquez, if you see him reading from paper that is turned horizontally, he is reading from the work-up provided by his research attorney rather than from his own notes.

Judge Velasquez stressed civility to opposing counsel and the court at all times. He warned us that the judges do talk to each other and that a poor reputation can and does work against us. On the other hand, a reputation for honesty and integrity can make the difference on an otherwise close call. For those appearing before Judge Velasquez, he also provided us with a few of his personal likes and dislikes:

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A WORD FROM OUR SPONSOR

Online Document and Media Repositories

by Charles Wright, The Data Company

The ability for counsel to share real-time information is key to efficient discovery management. Online document and media repositories allow counsel to effectively work together in real-time. Online databases and application hosting are still relatively new and not all attorneys have warmed up to the idea of putting their clients information "on the web." With litigation becoming larger and more complex, this fear needs to be set aside. Online repositories are safe and effective ways of sharing information.

Document Intensive Litigation

Much of the litigation today involves lots of documents -- paper and electronic. Discovery in big litigation can sometimes be overwhelming. Parties in document intensive litigation are under tremendous pressure to review and produce documents in a timely manner without making mistakes. In the past, counsel would divide documents among partners and associates for review. The control process in this method is very hard to manage. Add multiple defendants, plaintiffs, firms and the process can become a nightmare. Adopting an online document database can make this process easier. Once a central, online document database is selected, counsel are all working and seeing the same information in real-time. If the matter is time sensitive, multiple attorneys can be given access from anywhere. There is also greater control over privilege, responsive, etc. Since all attorneys can see the same documents in real-time, it is less likely that a document that is privileged will leak out. Likewise, you are less likely to fail to produce responsive documents. With today's powerful databases, literally millions of pages, paper and electronic, can be loaded into a single database.

Geography is Not an Issue

Document intensive cases can involve multiple firms, some with multiple offices. If multiple firms or offices are involved in litigation, it becomes very difficult to manage document discovery. The older method was to photocopy the documents and send a set to each firm/ office for review. The obvious problems with this method are cost, inaccuracies with copies, shipping, and actually seeing what others are doing with the documents. Photocopying for discovery in big litigation is a

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A WORD FROM OUR SPONSOR

Deposing and Cross-Examining the Financial Expert: An Expert's Perspective

by James M. Skorheim, JD, CPA, CVA, CFE, CrFA

Let's begin with a little trip down Memory Lane. Something happened in 1974 that virtually changed the way business litigators did their jobs. This notable event in 1974 also created a whole new "cottage industry" of professionals who now serve primarily in the litigation arena.

Can you guess what it was that occurred in 1974 that revolutionized business litigation in America? Before we answer this intriguing question I'm going to hold you in suspense just a little bit longer while I open my presentation with a short vignette to help put my comments into perspective:

> Suppose you are plaintiff's counsel in an important high-stakes business litigation case. You have just completed the presentation of your evidence and so far things are going well for you.
>
> Before opposing counsel stands up to present his case, the Court looks down on you in admiration and says "Counsel, you are bright, articulate and credible. I'm very impressed with your presentation so far. I'll tell you what I am going to do for you. I am going to allow you to do some summing up to the jury even before opposing counsel presents any evidence whatsoever….
>
> "In fact, I am going to let you do your summing up from the witness stand with the full imprimatur accorded official evidence in this case….
>
> "And, oh by the way, please feel free to use whatever ***inadmissible evidence*** you believe would be helpful for your jury presentation….
>
> "My only request is that you use an expert witness to do so."

While this vignette is obviously somewhat of a tongue-in-cheek oversimplification, it demonstrates in essential terms the power and value of using a competent financial expert in today's modern business litigation case. Add to that the persuasiveness of an experienced

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(a)(4).) In particular, Congress found that state and local courts had kept cases of national importance out of federal court, *id.* § 2(a)(4)(A), had acted in ways that demonstrated bias against out-of-state defendants, *id.* § 2(a)(4)(B), and had made judgments that imposed their view of the law on other states and bound the rights of the residents of those other states. (*Id.* § 2(a)(4)(C).) Accordingly, CAFA is expressly intended to, *inter alia*, restore the intent of the framers of United States Constitution by providing for federal court consideration of interstate cases of national importance under diversity jurisdiction. (*Id.* § 2(b)(2).)

To achieve this federalization, CAFA:

- eliminates the "complete" diversity rule with regard to class actions;
- eliminates the "no aggregation" rule, which prohibited the aggregation of all class members' claims to determine whether the amount in controversy had been satisfied, and concurrently increases the threshold to an amount in excess of five million dollars;
- liberalizes removal by, *inter alia*, eliminating the "home state" rule; and
- includes some mass actions (actions where 100 or more plaintiffs' claims are proposed to be tried jointly because of common issues of law or fact) within the definition of class actions for the purposes of 28 U.S.C. § 1332(d).

Historical Perspective

CAFA emphasizes that its goal is to restore the original intent of the framers of the Constitution. (*Id.* §§ 2(a)(4), 2(b).) However, the motivations that led the framers of the Constitution to include the provision for diversity jurisdiction have long been the subject of academic debate. The classical rationale for diversity jurisdiction emphasized the avoidance of actual or perceived prejudice against out-of-state litigants in state courts. Many scholars believe that the real rationale focused more on economics than on the avoidance of regional or state bias, and that the framers believed that federal courts offered a means for protecting commercial groups from more democratically inclined state legislatures, which might pressure state courts into decisions antagonistic to business interests. (*See* Jack H. Friedenthal et al., Civil Procedure § 2.5 (1st ed. 1985).)

Both views are echoed in CAFA. Indeed, CAFA contains express findings that the *status quo ante* was harmful to interstate commerce, Pub. L. No. 109-2, § 2(a)(2)(B), and prejudicial to out-of-state defendants. *Id.* § 2(a)(4)(B). CAFA's express purposes include "benefit[ing] society by encouraging innovation and lowering consumer prices," *id.* § 2(b)(3), implicitly adopting the need to protect commercial interests from state courts.

One of These Parties is Not Like the Other

The first major change CAFA makes is to the notion of "diversity." Prior to the passage of CAFA, diversity jurisdiction required "complete" diversity, that is, diversity jurisdiction could not exist if any party on one side of a dispute was a citizen of the same state as any party on the other side. (*Strawbridge v. Curtiss,* 7 U.S. 267 (1806).) In the context of class actions, the rule was satisfied if the named plaintiff(s) (as opposed to all class members) were completely diverse from the defendants. (*Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921).)

Now, for class actions, diversity exists when:

1) ***any member*** of a class of plaintiffs is a citizen of a state different from ***any defendant***;
2) ***any member*** of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and ***any defendant*** is a citizen of a state; or
3) ***any member*** of a class of plaintiffs is a citizen of a state and ***any defendant*** is a foreign state or a citizen or subject of a foreign state.

28 U.S.C. § 1332(d)(2) (emphasis added).[2]

Under CAFA all members of the class are fair game when determining diversity; it only takes one party of either side being from a different state than any opposing party to create diversity. In short, CAFA replaces complete diversity with minimal diversity.

The New Math

CAFA makes significant changes on both sides of the amount in controversy equation. On one side of the equation, CAFA changes the required amount in controversy. Prior to CAFA, the threshold amount in controversy for all diversity jurisdiction actions, including class actions, was $75,000. (28 U.S.C. § 1332(a).) CAFA introduces a special $5 million threshold that must be exceeded for diversity jurisdiction to exist for class actions. (28 U.S.C. § 1332(d)(2).)

On the other side, CAFA changes how that amount is

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2. Citizenship is determined from the filing date of the complaint or amended complaint in federal court or, if the case as filed was not initially subject to federal jurisdiction, the date of any pleading, motion, or other paper that indicates the existence of federal jurisdiction. (28 U.S.C. § 1332(d)(7).)

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calculated with regard to class actions. For traditional class actions, CAFA rejects the "no aggregation" rule adopted by the United States Supreme Court in *Snyder v. Harris*, 394 U.S. 332 (1969), and extended to class actions in *Zahn v. Int'l Paper*, 414 U.S. 291 (1973). *Snyder* held that aggregation in any civil case was permissible if 1) only one plaintiff aggregated two or more of their own claims against a single defendant, or 2) two or more plaintiffs united to "enforce a single title or common right in which they have a common and undivided interest." (*Snyder*, 394 U.S. at 335.) *Zahn* held that, in class actions, the claims of each member of a class needed to exceed the amount in controversy for the federal court to exercise jurisdiction over those claims. (*Zahn*, 414 U.S. at 300.)

This rule began to erode with the passage of the supplemental jurisdiction statute. (*See* 28 U.S.C. § 1367.) A split developed between circuits that allowed the use of supplemental jurisdiction over the claims of unnamed class members if one named plaintiff satisfied the amount in controversy, *see In re Abbott Laboratories*, 51 F. 3d 524 (5th Cir. 1995), aff'd, 529 U.S. 333 (2000); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F. 3d 599 (7th Cir. 1997); *Rosmer v. Pfizer Inc.*, 263 F. 3d 110 (4th Cir. 2001); *Gibson v. Chrysler Corp.*, 261 F. 3d 927 (9th Cir. 2001), and those that did not. **(***See Leonhardt v. Western Sugar Co.*, 160 F. 3d 631 (10th Cir. 1998); *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F. 3d 214 (3rd Cir. 1999); *Trimble v. Asarco, Inc.*, 232 F. 3d 946 (8th Cir. 2000).)

CAFA definitively resolves the issue by providing that in any class action, the claims of the individual class members shall be aggregated to determine whether the amount in controversy exceeds $5,000,000, exclusive of interest and costs. **(**28 U.S.C. § 1332(d)(6).) This suggests that discovery into class members claims will need to be conducted at the outset of many cases in order to resolve motions for remand.

Exceptions and Limitations

While CAFA was designed to put "interstate cases of national importance" back in federal court, Pub. L. No. 109-2, § 2(b)(2), it was not intended to federalize *all* class actions that fall under its general rule. CAFA contains notable limitations under which the federal courts must or may decline to exercise jurisdiction, notwithstanding the general rule, as well as several exceptions to the newly expanded rule.

Mandatory Declination of Jurisdiction

CAFA mandates that a district court decline to exercise diversity jurisdiction over class actions in two instances. First, the court must decline to exercise diversity jurisdiction over class actions if two-thirds or more of the members of all proposed plaintiffs classes in the aggregate, and the *primary defendants,* are citizens of the state where the action was originally filed. **(**28 U.S.C. § 1332(d)(4)(B).)

Second, a district court must decline to exercise diversity jurisdiction over a class action if:

1) greater than two-thirds of all the members of all proposed plaintiff classes in the aggregate are citizens of the state in which the action was originally filed;
2) at least one defendant is a defendant --
    a) from whom *significant relief* is sought by members of the plaintiff class;
    b) whose alleged conduct forms a *significant* basis for the claims asserted by the proposed plaintiff class; and
    c) who is a citizen of the state in which the action was originally filed; and
3) the *principal injuries* resulting from the alleged conduct or any related conduct of each defendant were incurred in the state in which the action was originally filed; and
4) during the three year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allega tions against any of the defendants by the same or other persons.

(28 U.S.C. § 1332(d)(4)(A).)

Discretionary Declination

CAFA also provides the district court with the discretion to decline jurisdiction where between one-third and two-thirds of all members of a class and the *primary defendants* are from the state where the action was originally filed. (28 U.S.C. § 1332(d)(3).) When making this decision, CAFA requires the court to consider six factors:

1) whether the claims asserted involve matters of national or interstate interest;
2) whether the claims asserted will be governed by laws of the state in which the action was originally filed or by the laws of other states;
3) whether the class action has been pleaded in a manner that seeks to avoid federal jurisdiction;
4) whether the action was brought in a forum with a *distinct nexus* with the class members, the alleged harm, or the defendants;

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5) whether the number of citizens of the state in which the action was originally filed in all proposed plaintiff classes in the aggregate is *substantially larger* than the number of citizens from any other state, and the citizenship of the other members of the proposed class is dispersed among a *substantial number* of states; and
6) whether, during the three-year period preceding the filing of that class action, one or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(28 U.S.C. § 1332(d)(3)(A)-(F).)

Critically, both CAFA's mandatory and discretionary declination provisions are riddled with undefined terms, including "primary defendants," "significant relief," "significant basis," "principal injuries," "distinct nexus," "substantially larger," and "substantial number." The legislative history attempts to give a few examples of how those terms should be interpreted, but does not do much to increase the clarity of those terms any more than might be intuitive. Defining and creating boundaries for those terms will be points of contention in CAFA's first months and years.

Counsel should anticipate the need to conduct preliminary discovery aimed at assessing whether mandatory or discretionary declination may be invoked, including (a) whether a home-state defendant's conduct is a significant basis of the claims, (b) identifying what the principal injuries are and where they occurred, and (c) assessing the nexus between the forum, the class members, the alleged harm, and the defendants.

CAFA also contains several exceptions to its general rule. First, if the total number of all members of all proposed plaintiffs classes is less than 100, then the new 28 U.S.C. § 1332 rules for class actions do not apply and the federal court cannot exercise jurisdiction over the class action. (28 U.S.C. § 1332(d)(5)(B).) Second, if the *primary defendants* are states, state officials, or other governmental entities against whom the district court may be foreclosed from ordering relief, then the federal court cannot exercise jurisdiction. (28 U.S.C. § 1332(d)(5)(A).) Finally, CAFA exempts certain class actions arising under the Securities Act of 1933 and the Securities Exchange Act of 1934 from the definition of class actions in 28 U.S.C. § 1332(d)(2). (28 U.S.C. § 1332(d)(9).)

Removal Procedure

CAFA also liberalizes removal jurisdiction and procedure. By expanding diversity jurisdiction over class actions, CAFA correspondingly expands removal jurisdiction. CAFA also creates certain rules unique to class actions. First, CAFA makes an exception for class actions to the so-called "home state" rule, 28 U.S.C. § 1441(b), which prohibits a defendant from removing a case filed in the defendant's home state. (28 U.S.C. § 1453(b).) Second, under CAFA, any one defendant may remove the case without the consent of the other defendants, 28 U.S.C. § 1453(b) making the standard rule of unanimity, *Hewitt v. Stanton*, 798 F. 2d 1230 (9th Cir. 1986), inapplicable to class actions. Third, while class actions are still subject to 28 U.S.C. § 1446(b)'s requirement that removal occur within 30 days from its receipt or 30 days from when the case becomes removable, CAFA makes 28 U.S.C. § 1446(b)'s one year limitation inapplicable to class actions. (28 U.S.C. § 1453(b).)

In addition to lowering the threshold for removal, CAFA also opens the door for the immediate appeal of remand of class actions and puts them on a fast track. Normally, an order granting remand for defective removal is not reviewable. (28 U.S.C. § 1447(d).) CAFA allows for immediate appeal of remand decisions for class actions. An appeal must be filed within 7 days[3] and if an appeals court accepts the appeal, it must be heard, ***and judgment must be rendered***, within 60 days (with the possibility of a 10 day extension for good cause with the agreement of both parties). 28 U.S.C. § 1453(c). If a decision is not rendered under that timeline, the appeal is automatically denied. (28 U.S.C. § 1453(c)(4).)

Counsel should also be aware that CAFA may switch the burden of proof on a motion for remand. Generally, the party advocating federal diversity jurisdiction carries the burden to prove it exists. (*Littlefield v. Continental Cas. Co.*, 475 F. Supp. 887, 889 (C.D. CA 1979).) Although the text of CAFA was silent on the burden, the legislative history indicates an intent for the plaintiff to carry this burden:

> If a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied)…Overall, new 28 U.S.C. § 1332(d) is intended to expand substantially federal court juris-

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3. In an apparent drafting error, the statute actually reads "not less than 7 days." (28 U.S.C. § 1453(c)(1).)

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> diction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.

S. Rep. No. 109-14, at 35 (2005).

It remains to be seen whether the federal courts will resort to, and follow, the legislative history.

Mass Actions

Not only does CAFA encompass what are traditionally thought of as class actions -- actions "filed under rule 23…or similar State statutes or rules of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action," 28 U.S.C. § 1332(d)(1)(B)--but it also classifies "mass actions" as class actions for purposes of 28 U.S.C. § 1332(d). (28 U.S.C. § 1332(d)(11)(A).) Mass actions are generally defined as civil actions where the monetary relief claims of 100 or more people are proposed to be tried jointly on the basis of common questions of law or fact. (28 U.S.C. § 1332(d)(11)(B)(i).) CAFA specifically excludes four types of cases from this definition:

1) cases where all of the claims arise from an occurrence in the state where the action was filed and where the alleged resulting injuries occurred in that state or in contiguous states;
2) cases where the claims are joined by motion of the defendant;
3) cases where all of the claims are asserted on behalf of the general public pursuant to a state statute; or
4) cases where the claims have been consolidated or coordinated solely for pretrial proceedings.

(28 U.S.C. § 1332(d)(11)(B)(ii).)

For mass actions, CAFA creates diversity jurisdiction only over those plaintiffs whose claims each exceed the $75,000 threshold, 28 U.S.C. § 1332(d)(11)(B)(ii); the claims of the plaintiffs are *not* aggregated. Further, any statute of limitations applying to claims asserted in a mass action are tolled while litigation is pending in federal court. (28 U.S.C. § 1332(d)(11)(D).) Moreover, mass actions removed to federal court under 28 U.S.C. § 1332(d) may not be transferred to any other court under 28 U.S.C. § 1407 (multidistrict litigation) unless a majority of the *plaintiffs* request that transfer. (28 U.S.C. § 1332(d)(11)(C)(i).)

Given the intent to drive more class actions into federal court, the federal judiciary is quite reasonably bracing for an initial influx of complex class actions. These cases are likely to require significant preliminary discovery and motion practice concerning jurisdictional issues, and therefore proceed at a slower pace. Counsel will need to proactively assess the information that they need to discover to bring and oppose such motions. Delays in class litigation should also be expected as district and appellate courts begin to interpret and flesh out the undefined provisions of CAFA.

CAFA may also have an unintended, multiplier effect. In place of one state or federal filing, the plaintiff's bar may break a case into smaller component cases across various states in order to avoid the jurisdictional thresholds of CAFA. These component cases could involve lesser amounts in controversy or largely limit the putative class to resident of a single state. Under such scenarios, collateral estoppel could take on a much larger role, and may effectively nationalize the result of the lead state case.

The enactment of CAFA marks the beginning of a new and dynamic period of change. Counsel must keep abreast of these developments and be prepared to think innovatively in a brave new world of class actions.

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otherwise appear to be a simple request for a recommendation letter or endorsement. Quite simply, a judge cannot lend the prestige of an office to a private venture. So, next time a judge politely declines such a "simple" request, know that he might actually be leveling with you.

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In *Chamberlan*, the court determined that review of class certification decisions will be "most appropriate" when:

- There is a "death knell" situation for either the plaintiff or the defendant that is independent of the merits of the underlying claims and is coupled with a "questionable" class certification decision by the district court;
- The certification decision presents an "unsettled and fundamental issue of law" relating to class actions that is important both to the specific litiga tion and to class actions generally, and that would likely evade end-of-the-case review; or
- The district court's certification decision is "manifestly erroneous."

(Id. at 959.) These three guidelines are the focus of this article.

I. Courts Of Appeals Have Discretion Under Rule 23(f) To Permit Interlocutory Appeals Of Class Certification Orders.

Rule 23(f), which became effective in 1998, provides that a "court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification . . . ." The drafters of Rule 23(f) intended that courts of appeals would have "unfettered discretion" to grant or deny permission to appeal class certification orders, *Chamberlan*, 402 F.3d at 957 (citing Fed. R. Civ. P. 23, Advisory Committee Notes to 1998 Amendments, Subdivision (f)), and that this discretion would be exercised based on "any consideration that the court of appeals finds persuasive." (*Id.*) Additionally, the drafters contemplated that the courts of appeals would develop "standards for granting review that reflect the changing areas of uncertainty in class litigation." (*Id.*)

Despite the grant of discretion, the drafters of Rule 23 (f) identified three situations likely warranting interlocutory review. (*Id.*) The first is when the class certification decision effectively ends the litigation for the plaintiff, which occurs when litigation costs exceed the value of a final judgment on the named plaintiff's individual claims. (*Id.*) The second instance likely warranting interlocutory review arises when a certification decision may "force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." (*Id.*) And the third instance is when the certification decision turns on a novel or unsettled question of law. (*Id.*)

II. Other Circuits Developed Criteria For Evaluating Requests To Appeal Class Certification Orders.

Just as the drafters of Rule 23(f) contemplated, courts of appeals developed standards for evaluating Rule 23(f) petitions to appeal. Not surprisingly, these standards initially followed the three situations identified by the drafters in the Advisory Committee Notes. (*See supra* § I.)

Blair v. Equifax Check Services, Inc., 181 F.3d 832 (7th Cir. 1999), became (and remains) an influential case addressing the situations when Rule 23(f) interlocutory review of class certification orders is most appropriate. In *Blair*, the Seventh Circuit rejected a bright-line rule for granting review and instead identified three general categories of cases in which review under Rule 23(f) would be appropriate. (*Id.* at 834-35.) These guidelines, which track those identified by the drafters, are: (i) cases where "denial of class status sounds the death knell of the litigation, because the representative plaintiff's claim is too small to justify the expense of litigation;" (ii) cases where certification sounds the death knell for the defendant because class certification can place "considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight;" and (iii) cases where interlocutory review may facilitate the development of the law of class actions. (*Id.*)

In the years since *Blair* was decided, several other circuits have essentially agreed that *Blair* identifies the key circumstances when interlocutory review is most appropriate. (*See, e.g.*, *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 104-05 (D.C. Cir. 2002); *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.* 262 F.3d 134, 139 (2d Cir. 2001); *Newton v. Merrill Lynch, Pierce, Fenner & Smith*, 259 F.3d 154, 165 (3d Cir. 2001); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 145-46 (4th Cir. 2001); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1273 (11th Cir. 2000); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000).) While these courts have agreed with *Blair*'s essential categories, some of them have also modified the three *Blair* guidelines.

Some courts have added a fourth guideline for evaluating whether to grant a petition for leave to appeal a class certification decision: the district court's decision is manifestly erroneous. (*See, e.g.*, *Prado-Steiman*, 221 F.3d at 1275 [adopting *Blair* guidelines and holding that interlocutory review under Rule 23(f) may also be warranted when certification decision is obviously wrong];

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Newton, 259 F.3d at 164 [Rule 23(f) petition may be granted if certification order is erroneous]; *Lienhart*, 255 F.3d at 145. Other courts have modified the third *Blair* guideline -- unsettled question of law -- to include that the legal issue be both important to the particular case "as well as important itself" and likely to evade end-of-the-case review. (*Mowbray*, 208 F.3d at 294; *Lorazepam*, 289 F.3d at 105.) The purpose of this modification to the third *Blair* guideline is to ensure that "interlocutory appeals [are] the exception, not the rule" because the "[l]aw is a seamless and evolving web, so a creative lawyer almost always will be able to argue that deciding her case would clarify some 'fundamental' issue." (*Mowbray*, 208 F.3d at 294.)

III. In *Chamberlan*, The Ninth Circuit Adopted Rule 23(f) Guidelines For The First Time.

Until *Chamberlan*, the Ninth Circuit had not addressed the criteria it would consider in evaluating whether to permit an interlocutory appeal under Rule 23 (f). As a result, Ninth Circuit litigants were left guessing: would the court adopt the three *Blair* guidelines, a more expansive or restrictive version of the guidelines, or other guidelines?

Chamberlan answered that question. In the Ninth Circuit, "[r]eview of class certification decisions will be most appropriate" when:

- There is a death-knell situation for either the plaintiff or the defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable;
- The certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; or
- The district court's class certification decision is manifestly erroneous.

Chamberlan, 402 F.3d at 959. The court referred to these three situations as "guidelines" and emphasized that they are "not a rigid test," do not constitute an exhaustive list of factors, and are not intended to circumscribe the broad discretion granted the courts of appeals by Rule 23 (f). (*Id.* at 960.) But, the court also stated that, ordinarily, a case warranting interlocutory review "must come within one or more of the specified categories." (*Id.*)

IV. The *Chamberlan* Guidelines.

The three guidelines adopted by the Ninth Circui t *Chamberlan* are an amalgamation of the guidelines identified in *Blair* and its progeny. In *Chamberlan*, the Ninth Circuit synthesized the previously identified instances likely warranting interlocutory review of class certification orders into a unique standard. The court then applied the guidelines to the defendant's petition and denied the defendant leave to appeal the district court's certification order.

A. The Death Knell Guideline.

The first *Chamberlan* guideline -- a "death knell" situation for either the plaintiff or the defendant independent of the merits of the underlying claims, coupled with a questionable class certification decision -- combines the first two *Blair* guidelines with the added provision that the class certification decision be "questionable." The court found that the Chamberlan defendant had not demonstrated that the "death knell" factor applied.

In *Chamberlan*, the defendant, Ford Motor Company ("Ford"), argued that the district court's class certification order put immense pressure on Ford to settle, and that the order forced Ford into an "all or nothing" class trial with more than one hundred million dollars at stake. (402 F.3d at 960.) The Ninth Circuit rejected Ford's argument, concluding that Ford had "made no showing that it lack[ed] the resources to defend this case to conclusion and appeal if necessary or that doing so would 'run the risk of ruinous liability.'" (*Id.* at 960 [citation omitted].) The court found it significant that Ford's claims of a death knell were "conclusory" and "not backed up by declarations, documents, or other evidence demonstrating potential liability or financial condition." (*Id.*) The argument that "the potential recovery . . . may be 'unpleasant to a behemoth' company" was insufficient. (*Id.*) Because Ford had not demonstrated that the class certification order would be the death of the case, the court did not address whether the district court's order was questionable under this guideline. (*Id.*)

B. The Unsettled And Fundamental Issue Of Law Guideline.

The second *Chamberlan* guideline -- an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review -- echoes the guideline adopted in *Mowbray* and *Lorazepam*, where the First Circuit (*Mowbray*) and the District of Columbia Circuit (*Lorazepam*) refined the third Blair category to apply

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when "an appeal will permit the resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself and likely to escape effective review if left hanging until the end of the case." (*Mowbray*, 208 F.3d at 294; *see also Lorazepam*, 289 F.3d at 105.)

In *Chamberlan*, Ford argued that its petition fell within the unsettled legal issue guideline because Ninth Circuit authority regarding the district court's scrutiny of class certification conflicted. (402 F.3d at 961.) Specifically, Ford argued that it was unclear whether *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir.1998), overruled *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir.1996), by allowing the district court to perform a cursory class certification analysis, rather than rigorous review. (*Id.*) After examining *Hanlon* and *Valentino*, the court rejected this argument and concluded that no split of authority existed. (*Id.*) As a result, the court found that the second guideline did not apply to Ford's petition.

C. The Manifest Error Guideline.

The third *Chamberlan* guideline -- the district court's class certification decision is manifestly erroneous -- aligns the Ninth Circuit with several other circuits, which also have adopted a manifest error guideline. (*See, e.g.*, *Prado-Steiman*, 221 F.3d at 1275 (11th Cir.); *Lorazepam*, 289 F.3d at 105 (D.C. Cir.); *Newton*, 259 F.3d at 164 (3d Cir.); *Lienhart*, 255 F.3d at 145 (4th Cir.).) The Ninth Circuit's rationale for adopting this guideline is simple and supportable: there is "[n]o reason for a party to endure the costs of litigation when a certification decision is erroneous and inevitably will be overturned." (*Chamberlan*, 402 F.3d at 959.) However, "[t]he error in the district court's decision must be significant; bare assertions of error will not suffice." (*Id.*) To be "manifest," an error should be "easily ascertainable from the petition itself." (*Id.*) The court also explained that errors of law are more likely to be viewed as manifest than errors resulting from the incorrect application of law to facts. (*Id.*)

Ford argued that the district court's certification decision was manifestly erroneous because the district court's analysis was too cursory. (*Id.* at 961.) The court rejected this argument, finding that, though "succinct," the order provided sufficient detail to comply with Rule 23. (*Id.*)

V. Petitions For Leave To Appeal Class Certification Decisions After *Chamberlan*.

At present, *Chamberlan* is the only Ninth Circuit case discussing the criteria the court will consider in evaluating petitions for leave to appeal under Rule 23(f). Accordingly, a litigant in the Ninth Circuit seeking permission to appeal under Rule 23(f) certainly should endeavor to demonstrate in her petition that her case fits within one or more of the *Chamberlan* guidelines.

However, the guidelines notwithstanding, litigants should be mindful that, at base, the decision whether to grant leave to appeal under Rule 23(f) remains within the court's broad discretion and the court may be disinclined to exercise that discretion to grant petitions for leave to appeal. Indeed, it may be that the Ninth Circuit relies on the *Chamberlan* guidelines more frequently to deny requests to appeal than to grant them. After all, as the court observed as a preface to setting out the guidelines, "many class certification decisions 'present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings.'" (*Chamberlan*, 402 F.3d at 959 [citing Fed. R. Civ. P. 23(f), Advisory Committee Notes to 1998 Amendments].)

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2. The court noted in *Chamberlan* that the framework it adopted most closely approximates the standard adopted in *Lorazepam*. (*Chamberlan*, 402 F.3d. at 959 [citing *Lorazepam*, 289 F.3d at 99-100, 105].)

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write better -- whether in a letter or a brief to the court -- and how to organize arguments; and the discipline of legal analysis. To be able to write well, you need to read good writing. So I urge people to read as much as they can, whether or not the material is law-related. They have to work hard to be successful lawyers. So, my message to new lawyers is: Go into this with your eyes wide open, learning as much as you can; then practice as intelligently and ethically as you should.

Q. Dean Zipser, our new OCBA President, has made mentoring an important focus. How important do you think it is for a lawyer to have mentors?

A. As usual, I agree with Dean. Lawyers learn from other lawyers, among others. You can learn from people in your own firm, as well as by watching other lawyers in court, even though you may be opposing them. To me, mentoring involves a close relationship where there is both give and take. People ask questions and get and analyze answers. Over the course of my career, I have had opportunities to work with many outstanding lawyers and I have learned something from each and every one of them. So, I think mentoring and learning from the examples of others are crucial for the development of a lawyer.

Q. You have had to make the transition you made from lawyer to trial judge, and from trial judge to the appellate bench. Which was the more difficult transition?

A. By far, the biggest transition was from lawyer to the trial bench. I was a lawyer with 30 years' experience in fairly complex business civil litigation, and I did that exclusively. When I became a judge, I was assigned a misdemeanor criminal calendar in North Justice Center in Fullerton. So, I literally had to ask what happens in an arraignment, and what are the judge's responsibilities? I would say for anyone with the kind of experience I had, becoming a criminal trial judge is a steep learning curve. In the first six weeks, the learning curve was straight up. Fortunately, CEB and CJER publish excellent resources and many talented judges in North Court helped me. There were also outstanding lawyers in the District Attorney's Office, the Public Defender's Office and the private criminal defense bar.

By comparison, the work on the Court of Appeal is actually very similar to my work in a large law firm, in the sense that over half our cases are civil. So already I was on more familiar ground. The way we get our work done is to have three lawyers and a judicial assistant. All three lawyers are very experienced, first-rate lawyers, and my judicial assistant is very knowledgeable.

In terms of putting an opinion together, I work with four people who are extraordinarily smart and dedicated. Three are former lawyers from well-known Orange County firms. My life here is reading, writing, thinking, analyzing, discussing the cases and deciding how to vote on a particular case. These are a lot of the same kinds of things you do when you are a lawyer, and you work with other lawyers. The biggest difference, of course, is as a lawyer you are an advocate for your client; and you are trying to find the best arguments that you can use to assist your client -- both in terms of presenting your case, and in trying to reach a good resolution for your client. As a Justice in the Court of Appeal, you are trying to reach the correct disposition through sound legal analysis. So, it is a very different role, but the process is very similar to lawyering.

Q. Do you think the time you spent as a trial judge allows for some empathy for the challenges faced by trial courts?

A. I hope the opinions that I author and sign onto reflect an understanding of the challenges the trial court judges face. Their job is a very difficult one. When we analyze issues of whether to affirm or reverse -- analyzing questions of error and harmless error -- we certainly apply the standards of review, and we recognize that trial judges have high volume and a limited amount of time to make important decisions.

Q. You have seen a trial from the complex business litigator's perspective, the trial judge's perspective, and now you are dealing with those types of issues on appeal. What advice would you have for the complex business litigators on how to preserve their win or reverse their loss at trial?

A. Step one is marshaling the facts and presenting the law in an organized and persuasive manner. Next, organize your case logically, so everyone at the trial court level and the Court of Appeal understands what it is you're trying to do. Next, make sure your transcript and the rest of the record are clear, showing whether evidence is introduced or not introduced. If there's an objection to the introduction of evidence, be sure that the objection is made and preserved. If there's a jury instruction that you want to propose, make a record of it. If it's a jury instruction that the other side has made and you disagree,

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object to it. The same points hold true with special verdicts and general verdicts. If there's a problem with the other side's proposal, make your the objection on the record.

Almost by definition, if an issue is on appeal, it involves a question of law. Appellate issues in civil cases after trial generally come up in the context of jury instructions, verdict forms, or motions in limine. So, you've got to pay special attention to make sure your record is clear. And, if you don't make an objection to something at the trial court level, it's generally going to constitute a waiver.

With regard to briefing an appeal, the first rule would be to know and apply your standard of review. Is it Substantial Evidence, Abuse of Discretion, or *De Novo* review? When you're drafting a brief, outline it; look at the outline, and make sure it is linear in the sense that it is logical. Follow the court rules and substantiate your citations with references to the record. Be honest in your evaluation of your opponent's case. In other words, take their best argument, meet it head on, and tell us why, on the merits, your side should prevail on that point. Take it the next level down, and tell us why you should still win the case even if you lose a particular point. Do not name call. Words like "disingenuous" and "misrepresentation" and other sorts of names that you can call opposing counsel detracts and distracts from what you're trying to accomplish.

We're looking at these briefs for analysis of the merits. Tell us why you should prevail, and we'll look at the record and research the law to see whether or not they support what you're saying. You have to be sure you've stated your case fairly, as an advocate, and presented your case completely, addressing the difficult issues on the merits without name calling.

Q. Do you see people raising too many issues and not being selective enough about which issues they're going to bring to your attention?

A. We see some of that in the following contexts: One, where someone decides they want to make a dozen arguments and, after consideration, we think that the most persuasive argument is number 10, made on page 25. You naturally wonder why they would wait so long to identify their strongest argument.

The other context that comes in is the string cite approach. There may be one or two cases that are really persuasive or dispositive. Yet, these cases are buried among a lot of others. We do our independent research, and many times we find cases that neither side cited. I suggest lawyers sit down and think about what their strongest arguments are, and what the most logical approach would be to present it. As you suggest, it may well be that some arguments are not worth making because they're so weak that it makes the reader ask whether their other arguments are as weak as that one.

Another problem we see, and it's all too frequent, is when there's a key document or a key fact, and you read a brief, and it's either nowhere to be found, or it's sort of lost among a lot of other facts. As a consequence, the other side has the opportunity to focus the court's attention on that key document or fact and criticize the other side for not addressing it. When I finish reading a brief, I would like to think: "Well they've completely given me their view of the case. They've been fair to the other side. They've presented their case in a very logical manner on the merits. And, although their case isn't perfect, on balance, it sounds reasonable to me."

Q. That brings us to the oral argument. The first question is, does it make a difference?

A. The answer is yes. In our court rules for this division, we alert the Bar to our method of distributing cases and preparing for oral argument. In a nutshell, what happens is that three justices are assigned to handle a case. When that assignment is made, one of the chambers is given responsibility for preparing a "summary" in preparation for oral argument. The summary is essentially in the form of an opinion. It advises the other two justices on the case what the tentative authoring justice thinks should be the opinion. So going into oral argument, one justice's chambers has read the record and the briefs and has authored the summary. The other two justices have read the summary and the briefs. When a lawyer goes to oral argument, the conventional wisdom among the Bar, I'm told, is the opinion is written. But, that's wrong. What's happened is one justice has a summary written, and some summaries are written in a very tentative way. Two of the justices on that panel are not committed at all to that summary at the time of oral argument. They're walking into oral argument with it and with their own thoughts -- based on the summary, the reading of the briefs, and their own experience and analysis. So, when you stand up in oral argument, no decision has been made by the panel.

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In many cases, especially complicated civil cases, after delivery of the summary, there is an exchange of emails or conferences between the justices preparing for oral argument. But, even then, we have what's called a hot bench. Justices do ask questions during oral argument, and we discuss the case after oral argument. Then, in many cases, there's another flurry of emails that goes on after oral argument and further discussions are held. Once a lawyer understands the process that we go through, I think it's easy to understand how oral argument can influence a case, and why it's important. The justices on this court use oral argument to ask tough questions. We sometimes use oral argument to help try to persuade another colleague on what we think the right answer is on certain issues. We're often trying to give the advocates an opportunity to respond to what's in the summary, without telling them what is in the summary. So, in this division, oral argument is crucial. It would be inexplicable to me why anybody in a civil case would waive oral argument in this division.

Q. With oral argument being so important, do you have any tips for the advocates appearing before you?

A. Let's, again, start from the beginning. When you appear before us, the appellant's counsel introduces himself or herself, argues first, and starts off with "May it please the Court." The respondent's counsel is seated, and only gets up when it's respondent's turn. So it's not like law-and-motion, where both sides are introducing themselves at the same time. We tape-record all our sessions, so you speak in front of the lectern into a microphone.

In terms of preparing for oral argument, once you understand our process, you can be better prepared. There are time limits. Each side has up to thirty minutes, although most lawyers take fifteen minutes or less. You have to analyze your own case to determine your time estimate. We do not want to hear a repetition of your briefs, but we do want to hear an emphasis of their important legal points. If you get up and start talking about the facts of your case or the procedural history, you will probably be interrupted by the Presiding Justice saying, we know about the facts, we know about the procedural history, get to the legal issues. You should be prepared to be interrupted. That is an opportunity for the practitioner, because once a justice starts asking questions, you will see what is of concern to that justice. So, the first rule of appellate advocacy is to respond to the justice's question. Unacceptable answers are: "I'll get to that in a minute," "I was planning on getting to that a little later," or "Let me say something first." What you want to do is answer the question. You can go from there, and segue into something else that you think is important. But first respond to the question. Also, you should make eye contact with the justices. Your goal is to have a conversation with the justices. You're not there to lecture us or to be lectured. You're here to have a conversation with the members of the Court -- that's your goal.

If I could get one thing across for oral argument it would be this: When you prepare for oral argument, think about the hardest questions you could be asked. Then, come up with logical arguments in answer to those questions. Many times, we ask a question which, to us, seems like the most basic question that could be asked about the strength of the other side's argument. The reaction is one of surprise that we would ask that question. It's like hearing, "I have my outline, and I have my points that are really good for me. I want to make those points, but I really don't want to respond to my weaknesses." In many respects, responding to your weak points is the most important thing for oral argument, because that's your chance, your precious opportunity, to address what we may regard as problems in your case.

The other points are practical and common sense. Among them: Don't interrupt the justices. Let the justices finish speaking, and then you can respond. Another point is making a concession does not mean your case is over. But, you have to think ahead and say, "Well even if that point goes the other way and my opponent wins on that point, we still prevail on this case because…" and give a reason. Sometimes, someone is up there arguing for five minutes on a point that everyone in the courtroom knows is a loser. We also know that, even if that's true, there's another point that means you still can win your case. So, understand the logic of your points, where your weaknesses are, and how to deal with them.

Q. What is the time now between the completion of briefing and oral argument in this division?

A. I'm pleased to report that this division is completely up to date. What that means is that, as soon as a reply brief is filed, and the record is complete, the case goes to a chamber. And in some cases, we're even sending cases to chambers when a reply brief is due within a week or two, so that people can start working on it. It usually takes us, from the time we get the record and briefing is completed, to the time of oral argument, a 60-90 day time period.

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Q. What accounts for that change? As I remember, not too long ago, there was a significant backlog.

A. There are several factors, and everyone will have their own reasons. I think one is that this division was created with a backlog. In other words, when the Orange County division was created, it was given an instant backlog and it was very difficult to work out of it. Divisions in San Diego and Riverside helped out in reducing the backlog. More recently, the increase in the number of justices has been a substantial factor. I can only speak to what I've observed in the last three-plus years here, and that is that all justices, members of their chambers and Central Staff are hardworking. The division is productive. We understand that the litigants deserve timely treatment of their cases, and we try to accomplish that. Finally, once you get up to date -- and we've been up to date for a few months now -- it's a lot easier to keep up to date.

Q. How many opinions are typically assigned to each justice annually?

A. Justices in this division typically author in excess of 100 opinions a year, and some historically file a lot more than that. The majority of opinions in this division are civil cases, with many of them having fairly sophisticated issues. About ten to fifteen percent of those opinions are published, and thus require some extra work. We also spend substantial time deciding on whether to concur or dissent on cases in which we are not the author. So while each justice is responsible for authoring in excess of a hundred opinions, we are also on panels where another justice authors the opinion. So, you multiply the total opinions by three in terms of how many briefs and opinions you're really reading and trying to make decisions on. There's a premium on the brief writer to get to the point, do it in a logical way, write your briefs on the merits, and don't call the other side names. When you have a justice who's responsible for authoring or voting on three to four hundred or more opinions in a year, you really have to present your issues in the best way possible for your client.

In addition to the opinions we file, we rotate sitting on writ conferences, dealing with emergency petitions for writ relief. Under the current system, we would each be on a writ panel for six months out of the year. We hear civil, criminal, and juvenile writ applications on a weekly basis. So, one morning a week is devoted to preparing for and attending a writ conference, and the number of writs each week that we rule on ranges from about ten to thirty.

Q. You mentioned published versus unpublished decisions. There's a continuing debate whether all decisions should be published opinions or citable. Where do you come out on that debate?

A. This is a question we could talk about for an hour. But, let me answer this way: We have a Rule of Court that is understandable and helpful in terms of trying to decide whether a case is publishable or not; and I think we do a good job of deciding which cases should be published and which should not be published. In addition, we seriously consider requests to publish a case. You don't even have to be a party to ask us to publish a case within the time period set forth in the Rules. For example, if someone says, "You just issued this case, and you made it a non-pub. But it's very important to our industry or the public that this question be answered, and it's the first time that anyone's really answered it and explain why it satisfies the publication requirements for specific reasons." In a normal course, we would publish that case. Even if you're not a party to a case, if you see a case that is non-pub'd, within a specific period of time, you can ask for that case to be published, and we take that very seriously.

Lawyers can research the non-pubs on-line. This is an excellent resource to learn principles of law and assist in your legal research. It's a very helpful process for analyzing an issue and deciding on published authorities to rely on. If we rely on particular published authorities, that's an important point to know. But, you cannot cite an unpublished opinion, either in an oral argument or in a brief. That's one sure way to get reprimanded by the Presiding Justice in oral argument, so you don't want to do that. I understand the arguments pro and con on the publication versus non-publication. I'm not out there in the forefront on either side.

Q. The court has a mediation program and encourages parties to discuss settlement while an appeal is pending. Do you have any statistics in terms of percentage of cases that settle as a result of the mediation program?

A. It's a very effective mediation program led by Robert Wolfe, who is an outstanding lawyer and mediator. The Program settles over half the cases that are referred to it. Mediation doesn't slow down the process here at all, and it's confidential. It's especially useful because sometimes parties need to understand that a mediation can ac-

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tually give them more than winning or losing a case. In other words, you may be on appeal on a very small issue. You may still have to try your case even if you win the appeal. So, through the mediation process, people can get valuable concessions from the other side, and resolve the case.

Q. You're Chair of the Supreme Court's Advisory Committee on Judicial Ethics. Maybe you could tell me a little bit about what that Committee is, and with which issues you have grappled.

A. The California Supreme Court is charged with the responsibility of promulgating the Code of Judicial Ethics that govern all the judges in the State. The Supreme Court has established a small committee to advise it on questions that the Supreme Court has on different issues. I'm honored to be the Chair of the Committee. We've advised the Court on issues of First Amendment rights with regard to campaigning in judicial elections, and on many other issues. As a Committee, we are charged with the responsibility of responding to questions from members of the Supreme Court regarding possible amendments to the Code of Judicial Ethics. It's a very rewarding Committee to be on.

Q. You're also an adjunct professor at Chapman Law School and teach a course there. Can you tell us a little bit about that?

A. For the Spring semester, I co-taught a class at Chapman Law School entitled "The Holocaust, Genocide and the Law." I taught it with Professor Michael Bazyler who is the world's expert on the subject. Our weekly two-hour classes included an analysis of the German legal system from 1933 to 1945, the Nuremberg trials, restitution for Holocaust claims, and current and past genocide issues, related to Yugoslavia, Rwanda, and Darfur. We had 23 students in our seminar and we just finished our semester. It's been a terrific experience. Any time you teach a class, you learn so much on the subject. I'm very grateful for the opportunity to have taught it and look forward to doing it again.

Q. You also remain very involved in the Bar, including the board of the ABTL. Now that you've made the transition to the judicial side, what causes you to continue to be involved in the ABTL, the Inns of Court, and other Bar organizations?

A. I'm very active in the Ferguson Inn of Court and in other Bar activities. I've been very fortunate in the practice of law, and I have a commitment to give back to the community and to try to contribute, especially to legal education, law students and lawyers. I feel a responsibility to do it. I think that the system we have will only succeed if people who are more experienced volunteer their time to help other people. And, when I go to the ABTL, the Ferguson Inn and other meetings, I learn something too. It's energizing and enjoyable to be with new lawyers, and to hear their questions, and get their perspectives on different issues.

Q. If you have any free time, what do you do with it?

A. I've been married to my wonderful wife Susan for almost 37 years. We have two terrific children, both married, and, as of last Friday, we have our first grandchild, Tessa. We spend a lot of family time together. They are items 1, 2 and 3. If you ask me what makes me the happiest, it would be just being with my family. And then, anybody you talk to about me will tell you I'm a big baseball fan. I enjoy the Angels, the Dodgers and baseball in general. I read for pleasure and we are active in University Synagogue in Irvine and the Holocaust Library at Chapman University.

Q. I want to conclude by asking the Dean Zipser question. When he was in my position, he always asked judicial interviewees the following question which is: If you couldn't be a lawyer or a judge, what would you be?

A. That's actually very easy. I would love to do anything connected to a baseball team, whether it's a general manager or a third base coach, or you name it. I managed teams in girls' softball for 7th and 8th graders for about ten years. That's as close as I'm ever going to get to the major leagues, I think.

▪ *Richard Grabowski is the managing partner of the Jones Day Irvine office.*

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"The buck stops here." He believed that while his underlings could "pass the buck" to avoid accountability, the President of the United States could not. As President, Truman believed he was ultimately responsible for whatever happened beneath him and there was no one to whom he could "pass the buck."

In several of the recent corporate scandal cases, senior executives contended they were not responsible for the wrongdoing everyone agrees occurred at their companies. Instead of accepting responsibility, they blamed underlings. This type of blame attribution understandably does not sit well with jurors who are often the underlings blamed (rightly or wrongly) by their supervisors for things that went wrong at their place of employment. Accordingly, one lesson learned from recent cases is refusing to acknowledge accountability is not likely to be a defense jurors will accept.

B. CEOs Must Not Insulate Themselves From the Truth.

The concept of "plausible deniability," so prominent in politics, does not appear to work in a business environment. Jurors seem unimpressed by CEOs who contend they were somehow insulated from critical knowledge at a company. The more important the information seems to be (even with only the benefit of hindsight), the more likely jurors will find the CEO must have known about the true facts. Accordingly, denying knowledge of events B whether true or not B will likely fall upon deaf ears.

C. Victims Matter.

Where jurors perceive a company has victimized people (especially when the victims number in the thousands), jurors seem more willing to hold the CEO accountable for the pain the company inflicted. The worse the victimization, the more likely the CEO will be blamed for the consequences of the company's actions.

D. The Best Defense May Be A Strong Offense.

Since denying knowledge and blaming others does not appear to be an effective defense to alleged CEO wrongdoing, the CEO's best plan of attack may be to defend the policy that was set by others. While in certain cases, for example where the fault is obvious, this strategy may not work; commercial disputes and product liability cases are rarely cut and dry. In the majority of cases, the CEO may do very well getting on the stand to defend a company's actions (and by doing so, defend his or her actions).

E. The CEO Must Be Prepared.

For whatever reason, jurors seem to believe CEOs are supermen and superwomen, who wear business suits rather than spandex. They seem to expect CEOs to remember details of events and be on top of facts and figures. As set forth above, the reality may be otherwise as many talented CEOs take a bird's-eye view to management rather than immerse themselves in the details. Nevertheless, because jurors seem to believe CEOs are extremely knowledgeable, CEOs must prepare diligently when they testify. Repeated assertions of "don't know" or "don't remember" are likely to come off as evasive. That being said, CEOs must avoid the temptation to testify about facts where their knowledge is flimsy at best, since they are likely to be proved wrong when their testimony is based upon speculation. In such a situation, jurors may perceive the erroneous CEO as a liar or incompetent.

F. CEOs Are Not Necessarily Viewed as the Darth Vader of the Boardroom.

Although most juries will not have CEOs on the panel, this does not mean there is a natural jury bias against CEOs. Certainly, there are jurors who will have a bias against the powerful. For some jurors, the deliberation room will be an avenue of retribution against CEOs who have harmed them in the past. Yet, most jurors seem to be open-minded about whether a CEO is a credible, decent person or not. In preparing to defend a CEO, lawyers must be ready to humanize the CEO as much as possible. In contrast, those attacking the CEO should depict that person in typical stereotypes of an undeserving, unappreciative and callous boss, who takes credit for successes and blames others for failures.

G. Know What Is in the Documents.

In many companies, the CEO may be copied on e-mails, memoranda, letters, etc. This is a dangerous situation as it creates the inference the CEO reads all the documents sent to him or her. While the reality may be the CEO is inundated every day with hundreds of scraps of paper and electronic documents no one would have time to read, jurors may well believe the CEO must have read the "smoking gun" memo, especially when it is an important document in the case. Corporate counsel and executives should be very careful to limit who is listed on distribution documents. However, once the documents are

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generated, it is essential the CEO become familiar with those documents he or she received so as not to be surprised in deposition or trial.

H. "I Am Sorry" Goes a Long Way.

Most lawyers cringe at the concept of a CEO admitting the company has done something wrong and apologizing for it. However, especially in a punitive damage case, jurors who perceive a company and its CEO are genuinely repentant about misconduct are more likely to minimize punitive damages or deny them altogether. In contrast, jurors are more likely to find a need to "end the message" to CEOs who "just don't get it" when a jury has already determined liability exists. This does not mean a CEO must always admit culpability. It may be enough to admit things could have been done better, so long as they genuinely express regret regarding the consequences of given conduct. However, the ostrich approach to culpability will often backfire.

Conclusion

As a result of the corporate scandals of the past several years, CEOs have become the boogeymen of the new millennium. The public, and, therefore, jurors, have had their psyches indelibly scarred with visions of CEOs doing "perp walks" on television. Lawyers attacking and defending CEOs must recognize the challenges CEOs face when they testify at trial. More than ever, the public's current perception of CEOs will have a tremendous impact upon how jurors view any CEO who testifies as well as the company he or she represents. Lawyers who understand the strengths and vulnerabilities of CEOs as witnesses will be in the best position to undermine CEO credibility at trial or, when defending the company, defend those CEOs and the companies they represent.

▪ *Gerald Klein is a partner at Klein & Wilson in Orange County.*

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dinosaur. The obvious choice for document management is electronic scanning. This is a good way to ensure that you have one set of uniform documents. If these scanned documents are loaded into a central database, no one is working on an island. Online databases are blind to geography. Attorneys and clients can log into their databases from anywhere in the world, anytime. As long as you have an internet connection, you can work on your database.

Central Location

The biggest hurdle recently with electronic databases was that each firm or office was operating their own database. Assuming that all the parties were working on the same program, there was still the issue of merging data. Without a single database, counsel would have to attempt to merge their data on a regular basis. This becomes a problem for several reasons: (1) all counsel need to be working in the same program to make merging easy, (2) technical knowledge of merging databases and, (3) data is being updated while firms are trying to merge data. If centrally located, there is no need to merge data ever. Also, as data is entered, it is updated in real-time.

Anywhere, Anytime

The ability to log into your database anywhere and anytime is one of the greatest advantages to using an online database. Online databases give counsel the ability to log into their database and work from anywhere. This advantage is most recognized when additional attorneys are needed on a matter. If more counsel is needed on a matter, a login and password are all that are needed to have them up and running. Another obvious advantage to being able to work from anywhere is travel. With an online database, you can work from an airport, hotel, home, co-counsel's office, etc. Even if you believe you will be in an area without internet connectivity, most online databases offer an offline solution. An offline solution is simply downloading the online database to your local hard drive and working as you would if you were online. When you return to your office, you simply upload your changes to the master online database.

Cost Savings

As litigation costs rise, attorneys and clients are always looking for ways to cut costs. Online databases usually save clients over 50% vs. paper reviews. Since documents will only need to be scanned once for an online database, there are tremendous document reproduction costs. There are also substantial savings in shipping, correspondence time, and logistics. Another cost advantage with online services is the fact that you only pay for the service when you need it. As soon as the litigation is over, the subscription can be cancelled. In litigation where multiple parties or firms are involved, the costs are usually split resulting in client savings. Lastly, since an online service is basically a subscription, it is usually an expense that can be passed through to your client. Not many clients are willing to buy servers and software for a

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- He does not like footnotes.
- He does like counsel to provide tables of contents and authorities, regardless of the length of the motion or opposition.
- He is a fan of the use of technology during trials. Judge Velasquez encouraged using electronic exhibits whenever possible and that our core functions of persuading and creating impact with the jury is made easier by technology.

Within reason, Judge Velasquez likes and allows attorneys to freely move around the courtroom during the trial. He offered the example that beginning a cross-examination at the podium but moving closer to the witness as the exam gets more intense can be effective. He will also allow counsel to place larger exhibits or pieces of evidence within the well. He wants to encourage dynamic trial presentations

I would like to again thank Judge Velasquez for giving us his lunch hour. He fostered a discussion that was both enjoyable and informative. As valuable as all of our time is, the time we spent with Judge Velasquez was very well spent.

▪ *Jay B. Freedman is an associate at the firm of Newmeyer & Dillion, LLP.*

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law firm but they are willing to pay for a subscription service that is used specifically for their litigation.

ASP's vs. Proprietary Databases

As you consider an online solution, you have choices. The two main options are ASP's (application service providers) or proprietary online databases. The main differences are simple, ASP's host "store bought applications", and proprietary databases use their own interface. ASP's are particularly popular because counsel can use programs they are familiar with and have the option to add other needed programs easily. An ASP simply takes an already established program and makes it available for all to use. Most companies that offer an ASP can host any Windows based program fairly easily. The benefit to an ASP is a low learning curve and the ability to add additional programs. Proprietary systems use their own interface. The advantages to a proprietary system are mainly that you don't have to purchase or own software to use the system. The drawbacks are that you have to learn a new system and cannot generally add "store bought" programs if needed.

Security

Security will always be a major concern with online databases. Many attorneys view anything on the web as vulnerable. Although nothing is 100%, online databases are very safe. Most reputable companies employ multiple firewalls, 128bit encryption, and multiple authentications and have been audited. Auditing is having your service tested by an outside security company to see if you have any flaws. Always ask any company you plan on using if they have been audited. Companies offering online databases should also offer full redundancy. Most companies backup data daily and some offer off-site backup in case of a catastrophic event. Security can also be setup for each individual user. Users can have different rights and permissions to levels in the database. Some users may have the right to view and edit data while others may have view only rights. In today's world, where everything is on the web, online databases are more secure than ever.

Final Thoughts

Online databases are safe and efficient ways to manage document intensive litigation. Utilizing online technology to manage your case not only saves time, but also makes discovery more manageable. Litigation involving multiple firms, offices, and clients will greatly benefit from an online central document database.

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expert witness capable of building a strong rapport with the jury as a competent, credible and likable witness. Now consider what a heady challenge you would face if a capable financial expert was designated to serve ***against you.*** How do you blunt the sting that can be inflicted by a competent financial expert?

This is probably a good segue back to 1974. In 1974, Rule 703 of the Federal Rules of Evidence was changed to allow an expert witness to rely on ***inadmissible evidence*** in reaching opinions to be presented to the jury. Before that time an expert could only rely on evidence

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admitted in the proceeding in reaching his opinions.

It is hard to imagine the logistical nightmare of orchestrating the presentation of evidence so completely as to gain admission of everything that an expert needed to support his opinions. This is especially true in a complicated technical case where the expert opinion implicates diverse statistical and research references as is the case in most high stakes commercial cases today. It was almost impossible to exploit all of the helpful nuances of the expert's opinions in court due to the highly restrictive nature of the pre-1974 expert testimony rules. These rules substantially limited the utility of expert witnesses prior to 1974.

The 1974 amendments to the Federal Rules of Evidence (and the corresponding changes to California Evidence Code Section 801) have dramatically expanded the power and persuasiveness of today's experienced expert witnesses. In fact, many modern high stakes business cases have become a virtual "battle of the experts." With these expanded expert witness rules at least one commentator has noted:

> "Thus the role of expert witnesses is now more akin to 'super 13th jurors' who consider evidence that the others cannot hear, and who advocate conclusions based on their personal credibility rather than the evidence formally admitted in the judicial proceeding."

While this assessment sounds harsh, it nevertheless fairly illustrates the power that a competent and experienced expert witness can wield. Based on my experiences in the courtroom, I agree that the personal credibility and demeanor of the expert in the eyes of the jury is as important as the substance of his opinions in persuading the jury to his way of thinking.

A competent financial expert will capture the hearts and minds of the jury by communicating with ideas and stories which appeal to the jury instead of with technical language and concepts that bore or even alienate them. The successful financial expert will be adept at engaging the jury with warmth and sincerity rather than with cold and sterile jargon.

For many of the reasons discussed above, controlling and discrediting a capable and likable financial expert witness in front of a jury is one of the toughest challenges encountered by the modern business litigator. Counsel can not be content merely to discredit the expert's opinions but must also be able to short circuit the expert's rapport-building with the jury. Don't underestimate the ability of a strong financial expert to trump a challenging and damaging cross-examination with his likeable and engaging style.

As daunting as the task may be, there are ways that counsel can enhance his or her ability to deal successfully with opposing financial experts. First and foremost, you should be sure to get one of your own. A competent financial expert can assist you in exposing weaknesses in the opposition's financial presentation. Often financial and damages issues delve into arcane and subtle accounting and financial concepts that are not readily apparent to counsel. An experienced CPA will be able to identify the hidden flaws in your opponent's case. A competent CPA can also assist you to develop areas of fruitful inquiry for deposition or fashion discovery requests.

Based on my experiences in deposition and trial testimony, I have developed 2 general observations of the manner in which counsel deals with opposing financial experts.

First, in deposition, counsel asks ***too few good questions*** and second, in cross-examination, counsel ***asks too many bad questions***. These key observations bear repeating. In deposition counsel asks too few good questions and during cross-examination counsel asks too many bad or clumsy questions.

Let me explain. In deposition, counsel should conduct a deep, even invasive inquisition into the opinions and thought processes of the expert. Counsel should be interrogating the expert with penetrating and incisive questioning designed to expose the flaws and weaknesses in the expert's presentation. In my experience counsel typically fails to pursue enough of this deep piercing inquiry to uncover the telling "chinks" in the expert's opinions.

During cross-examination on the other hand, counsel should limit questioning to a highly choreographed and tightly delivered colloquy of leading questions for which counsel knows the expert's expected answers. If the expert departs from the designated script, counsel should be quick to launch into his pre-planned impeachment material. Unfortunately (fortunately for me), counsel inevitably is compelled to try to make that one last point which was not rehearsed. Its almost as if counsel cannot help himself as he resorts to the infamous "one question too many."

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Like any good expert, I will use this opportunity to rehabilitate myself or rehash my direct testimony. This can substantially dilute the power of your all-important cross of the financial expert. Don't ask too many bad or clumsy questions on cross. While I can't get into all the reasons in these abbreviated remarks, I truly believe that I win more jurors to my way of thinking during a clumsy cross-examination than I do during a stunningly perfect direct. Don't let your opposing expert do this to you… *stay the course*.

Here are my 10 suggestions for dealing successfully with opposing financial experts:

Suggestion No. 1 - The expert deposition and cross-examination are two parts of the same apple.

They are not independent and distinct actions. You must treat them as one and the same process aimed at discrediting the expert and/or his opinions. Incredibly some attorneys don't bother to depose the financial expert. The deposition provides the substance for your cross-examination. The deposition brackets or limits what the expert will likely say at trial. If you want to win your case, always depose the damages' expert. It is absolutely imperative that you know what the expert is going to say at trial and discover impeaching information. In fact, with a well orchestrated expert deposition you can have a significant impact on what the expert will be able to say at trial.

Suggestion No. 2 - Cross-examine at deposition and lead at trial.

I believe that the term *"cross-examination"* at trial is a misnomer. Cross-examination should be an intense, tenacious and even invasive inquiry into the opinions and thought processes of the expert. This is not something you should be doing at trial. This is what the expert deposition is all about. At trial, you should be presenting in a simple and professional manner, the impeaching material that you developed in the cross-examination at the deposition. This should be done swiftly and concisely, almost surgically and deftly, with leading questions for which you know the answer.

Some attorneys are content to treat the deposition as a mere fact-finding chore aimed at discovering the expert's opinions. Some commentators suggest that at the expert deposition the questioner's goal should not be to impeach or impugn the expert but rather to concentrate on learning everything the expert thinks about the case, has been told or learned about the case, and has done or plans to do in connection with the case. This is not enough. You should go much further.

The expert deposition is the time for you to ***safely*** explore, test, probe, prod and even intimidate, in a professional and respectful way of course, to make the expert feel uncertain, uncomfortable, off-balance and off-guard. If you probe hard enough in the deposition you will create opportunities to gain admissions or helpful statements from the expert. Often when prodded, an expert will launch into a long narrative where clumsy statements may be made that could be used to discredit the expert at trial.

The expert's weaknesses that you expose at deposition should then be presented and exploited at trial through the use of leading questions. Remember cross-examination at trial is not a fishing expedition in which you discover new facts or new material.

Suggestion No. 3 - The expert will be pleased to tell you what he did do; but you need to find out what he did <u>not</u> do.

As trial lawyers you are intimately familiar with the nature of litigation. It seems that often there is not enough time, money, resources or information to put together the perfect case. This is also true of the financial expert. In many cases some things don't get done. You need to find out what those things are. Once you do, you can develop a powerful colloquy on cross-examination. For instance:

Did you perform an audit of these numbers? ***no***
Did you perform a technical review of these numbers? ***no***
Did you perform any substantive testing? ***no***
Did you perform any compliance testing? ***no***
Did you verify costs to invoices? ***no***
Did you verify revenues to billings? ***no***
Do you know what inventory valuation method was used? ***no***
Did you analyze the standard cost variance accounts for the company? ***no***
Etc., etc., etc; you get the picture.

On cross-examination be brief; no more than three or four points should be developed. Use leading questions; remember, don't let the expert rehash his opinions on cross. Don't ask questions for which you don't know the

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answer.

Suggestion No. 4 - Drill down, find the flaw. In almost every case there is a flaw. Your job is to find it.

No presentation is perfect. Even in our best cases, there may be weaknesses. As attorneys you know this best. After all if you're case is so perfect why doesn't it settle. Cases go to trial because neither side has a perfect case. Every case has its imperfections. The same often applies to an expert's presentation.

Remember in the movie "My Cousin Vinny" when Joe Pesci was describing the trial process to his cousin, the defendant. He explained that the prosecution would present an *apparently* strong and solid case. However, Vinny explained, in *reality* the prosecution's case will necessarily be very thin and flimsy. Cousin Vinny went on to point out that he simply needs to discover and exploit the inevitable weaknesses in the prosecution's case; which of course he did in grand theatrical fashion. This is what you must do with the financial expert.

In order to discover the weaknesses in the financial expert's opinions you should have a strong substantive background in accounting or valuation concepts or have a good financial expert helping you. Don't let the opposing expert pull the wool over your eyes because you're unfamiliar with the subtleties and fine nuances of accounting or valuation practice.

Drill down to the "*lowest common denominator"* of each of the expert's opinions with penetrating and incisive questioning. Be relentless, keep drilling. Most attorneys give up and let the expert off the hook prematurely. Each opinion is based on one or more of the following factors:

- Intellectual support such as treatises and other authoritative material;
- Facts whether disputed or undisputed;
- Assumptions made or obtained from counsel; and/or
- Logic and judgment/experience.

Find out which of these items support each of the expert's opinions with piercing cross-examination at the deposition.

Suggestion No. 5 - Get expert's file and reports a few days before the deposition so you can prepare.

Then prepare, prepare, prepare. There is no substitute for preparation. In order to be successful you need to be more prepared for the deposition than the expert. You should have a rough script of your inquiries and copies of all exhibits that you would like to question the expert about. Be sure to go over the anticipated questioning with your own expert prior to the deposition in order to identify the areas of potential weakness in the opposing expert's presentation. In a federal case you will have the expert's Rule 26 report. In a state case you will have to get counsel to agree to produce an advance copy of the expert's file and reports.

Suggestion No. 6 - Discover the expert's relevant prior cases and articles.

If you can, you should use your own expert to help identify and locate these items before you take the opposing expert's deposition. However, in any case, question the expert about relevant prior cases and articles. A federal Rule 26 report will include some of this information. Various research tools are available to assist in your search for an expert's prior cases and articles. It goes without saying that you can help your case immensely if you can find that the expert has rendered inconsistent opinions in other relevant matters.

Suggestion No. 7 - Issue a comprehensive and detailed subpoena, and have it personally served on opposing expert at home immediately on designation.

By using an appropriately worded subpoena you can be assured of getting the expert's entire file. Receiving a subpoena in this way has a tendency to catch the expert off guard; and has some intimidation power. It conveys the importance and severity of the expert's involvement in the matter and that you will be holding the expert to a high degree of professional responsibility in the proceedings.

Once the subpoena is served, the expert and his staff can no longer discard or destroy any of their file materials that are responsive to the subpoena. Receiving such a subpoena actually changes how we do business as experts. The file is immediately labeled and nothing gets destroyed or discarded thereafter. In addition we are very cautious in the preparation of notes or drafts for the file and we are careful with the handling and management of internal work papers.

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Suggestion No. 8 - Videotape every deposition of a financial expert. Impeaching testimony presented on the big screen at trial can be very powerful.

If you can manage it, try to use the video for impeachment early in the expert's cross-examination at trial. The expert will definitely be somewhat cautious in his testimony thereafter. Also, some experts continue to be uncomfortable in a video deposition setting.

Suggestion No. 9 - Most attorneys start the deposition with preliminaries. They then proceed to get tangled up and spend too much time on these extrinsic matters. Instead go directly to the expert's opinions. Develop them properly and then deal with the preliminaries later.

In this way you will not run out of time on the most important part of the deposition. Also, this will catch the expert off guard and put him off balance early in the deposition. Most experts are comfortable with preliminaries such as their credentials. Don't start the deposition by making the expert comfortable and allowing him to warm up with often innocuous matters.

During the deposition be sure to test the expert's demeanor. Your examination at deposition should be such that you make the expert feel uncomfortable and put the expert off-balance. Try to make him defensive. Discover how he responds under pressure. Battle-test him. Use the loop back method. An expert that becomes overly defensive at trial may be perceived by the jury as a biased advocate rather than as a dispassionate independent observer. ***But remember that the expert will be testing your demeanor as well.***

Suggestion No. 10 - Save it for Summation.

After exhausting your best efforts in an attempt to probe and prod and battle test the expert and his opinions at deposition, sometimes you're just not going to get what you want out of the expert. If this happens, don't give up. Make sure your own expert does a good job of presenting and defending his countervailing opinions, conclusions and critique of the opposing expert. Then argue like heck in summation.

▪ ***Jim Skorheim has presented an MCLE program for the OCBA and numerous law firms on this topic. Jim's live presentation is a lively and somewhat light-hearted look at this essential litigation skill. Jim weaves into his presentation his real-life experiences and "war stories" gleaned from his assignments in over 200 business litigation cases. He has been deposed over 100 times and is credited with over 50 courtroom appearances. Jim has been described by the Orange County Bar Association as one of the top financial experts in Orange County. He has been the prevailing financial expert in over 85% of his assignments and was the plaintiff's damages expert in the Beckman case that yielded the largest jury verdict in Orange County history. By necessity this article is a highly summarized version of Jim's live presentation. If you or your firm would like to have Jim deliver his live presentation on this topic in a one hour MCLE program approved by the State Bar of California, please contact him at 949-221-4000.***

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