

## How to Keep Out of the In-House's Doghouse

**A**fter three years as an in-house lawyer, here is what I would do differently as a litigator in private practice.

### Provide an Early Projection of Costs and Likely Outcome

Although projections of litigation costs and results are, of course, highly speculative, I have been surprised in the past not by how far off I was in my projections, but rather by how close most projections come. In many cases, just assessing the costs of the legal effort involved will result in a settlement of the matter. Many grudge matches, which end up in litigation, disappear when the parties realize what it is going to cost them to continue. Moreover, when the fees do mount, you are in a far better position to defend against client's complaints if the client knows from the beginning that large fees are likely to be involved.

### Get Business Representatives of Both Sides to Attempt to Settle the Case at the Earliest Possible Moment

In the vast majority of disputes — those not threatening the essence of the business — the legal fees involved are large with respect to the amount in dispute. Typically, the differences between the parties are not as great as the costs of litigating the dispute to a conclusion.

Frequently, the case can be settled for an amount otherwise lost as legal fees. This should be attempted at the earliest possible moment before fees mount and the parties have a vested interest in continuing the dispute.



**Thomas M. Fortuin**

Often, the parties have engaged in business in the past. Thus, possible business resolutions — e.g., a reduction in charges for services or products rather than a cash settlement — may appeal to both sides. Such business resolutions are not generally apparent to the outside lawyer who is not familiar with the businesses of the client or the opposing party, and must be addressed by in-house counsel or in-house business representatives.

Accordingly, as soon as you have given a preliminary assessment of the case, make a genuine effort to get business representatives to sit down and discuss settlement.

Many litigators say that attempts at early settlement give the opposition — and worse, the client — the impression they

*Continued on Page 6*

## Back to 1976 and Forward to the Future

**C**hange: how we resist it. How we revel in it. Nineteen seventy-six was a vintage year. The now prestigious Association of Business Trial Lawyers was founded by some farsighted business trial litigators. Judge Robert A. Wenke was Presiding Judge of the Los Angeles Superior Court, and Judge William P. Hogoboom was Assistant Presiding Judge at the helm in Department One. Arnold Pena had just replaced Joe Kavanaugh as Civil Courts Coordinator.

Department One had a trailing calendar, with about 10 cases trailing. The electronic beeper system had not yet arrived on the scene; that money-making scheme went into effect in September of 1977.

Compatible meant something you were or were not with your spouse, sweetheart or best friend, instead of indicating an ability to interface with software designed to run on an IBM PC. Having a telex machine and a Pitney-Bowes postage machine was a big deal in office automation: in 1986, even an optical character reader [OCR] is approaching old hat.



**Hon. Lester E. Olson**

Mandatory arbitration for cases likely to result in a recovery of less than \$15,000.00 had not yet arrived. Mandatory arbitration, as we know it now, commenced on July 1, 1979.

Nor had the invasion of eastern law firms begun. A check of Parker's Directory for 1976 reveals no Rogers & Wells; no Skadden, Arps, Slate, Meagher & Flom; no Sidley & Austin; no Mendes & Mount; no Proskauer, Rose, Goetz & Mendelsohn; no Shea & Gould; no Mudge, Rose, Guthrie, Alexander & Ferdon; no Cravath & Swaine; no Shearman & Sterling; no Mayer, Brown & Platt; no Finley, Kumble, Wagner, Heine, Underberg, Manley & Casey; no Pepper, Hamilton & Sheetz. What a small town Los Angeles was in 1976!

Class actions had hit the streets running a few years before 1976, when the flow of class action litigation began to decline. In 1976, there were about 250 class actions filed; in 1985, there were 58.

By 1976, inflation continued to spiral into double-digit rates. This brought the new phenomenon of the truly reluctant seller of real estate. The story became a pattern. Seller "agreed" to sell his real estate at a fantastic price on Monday, only to find that by Saturday it had become a low price.

*Continued on Page 2*

The number of specific performance actions filed in Los Angeles County increased significantly. Ironically, because of the trial delay caused by growing backlog, most of these cases were not tried until after 1981, when real estate inflation had significantly declined or stopped. Specific performance cases, by 1986, had returned to the rarity of the depression days.

In another area, the number of private antitrust cases has steadily dropped in the last ten years, due to a great extent to the lack of the prosecution of public antitrust cases upon which the private cases can piggyback.

Not to worry: new litigation rushes in to fill any known gap. By 1986, bad faith, employer discrimination and wrongful discharge had filled the void.

The ingenuity of the litigator has no bounds. It appears that a new business morality is stalking the halls of the courthouse in the robe of *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*, (1984) 36 Cal. 3d 752, and its progeny. And, as lawyers are quickly learning, if Seaman's won't get you where you want to go, RICO may do it!

Nineteen seventy-six was the year that Judge Wenke commissioned Judge Schauer to prepare the Civil Trials Manual, much in the way Pope Julius II commissioned Michelangelo to paint the Sistine Chapel. Judge Schauer labored long and hard, on his rear instead of his back, but not quite as long as Michelangelo. By 1977, the first edition of the Civil Trials Manual was adopted by the Los Angeles Superior Court as the basic guideline for the trial of civil cases. As with all things American, a committee took over and brought forth the revised edition in 1985. The main thrust of the revising editors' changes was to make most of Judge Schauer's "shoulds" of the 70's into the "shalls" of the 80's. The Civil Trials Manual has gone a long way toward standardizing and making more efficient the trial of business cases in Los Angeles. It has become a model for use in other counties.

Although trial training had been available through the National Institute for Trial Advocacy before 1976, "in-house" law firm training of trial lawyers was not yet common in Los Angeles. By 1986, such "in-house" training programs have become popular and very important training tools. Many are patterned on the "mock case" televised approach used by NITA. Trial lawyers have always recognized the problem of having the younger associates gain meaningful trial experience, without inappropriate risk to the client. Such televised mock trial programs do a great deal to solve that problem.

Meanwhile, the Los Angeles Superior Court has made significant efforts to assist in the trial training of newer lawyers. Under the inspired leadership of Judge Jack W. Crickard, the Los Angeles Superior Court Walk Thru program commenced in 1980. On Saturday, April 12, 1980, six skilled trial judges conducted programs all day in their courtrooms. Obviously, time limitations required a gloss approach. However, over 400 attorneys moved forward that day in the difficult process of becoming skilled in trial tactics.

Since then Judge Crickard, and the many judges participating in the program, have added special days for law and motion, settlement conference procedures, and criminal trials. For instance, the special law and motion session held in October 1985 was attended by over 300 attorneys.

In 1976, on occasion, the civil litigating partners still interviewed witnesses. They sometimes relied on paralegal support, and they never used a personal computer. By 1986, the civil litigation partner had become a manager or conductor of a team that consisted of associate lawyers, paralegal support staff, and computer-assisted legal research and data

management. He or she had become somewhat like the surgeon that meets the patient a few moments before scrubbing for the operation.

The trial attorney, at least in some part, has lost contact with the subtle nuances of witnesses and parties — their warts, blemishes and highlights.

The process of delegation by the trial lawyer of the pretrial discovery and trial preparation process has contributed to the growth in excessive pretrial discovery. The associate lawyer wants to cover all the bases, whether necessary or not. Disaster falls to the associate that misses a point uncovered by hindsight at the trial. Better the pretrial research memoranda cover thirteen sub-issues, even though only three are relevant, than one sub-issue be overlooked.

The team approach has great advantages over a more personal "trial lawyer to client" approach. However, it is an area where improvement in methods must follow in the decade to come. The efficiency gained by the use of associate lawyers and paralegals in the preparation of a complex case for trial must be tempered by a renewed effort to interject, at an early stage of the preparation process, the "overview" judgment and filtering of the more experienced trial lawyer. If this seasoning technique does not develop, the litigation process threatens to run amok in the land.

In the last ten years, litigation support has become a cottage industry. The increased use of experts in business litigation is almost overwhelming. For instance, if the questioned document examiner cannot completely address the issues relating to a questioned document, possibly a linguistic expert can. Where authorship is a disputed issue, the linguistic expert's knowledge of unique writing and syntax habits may shed light on the disputed authorship of various drafts of a contract. The use of such expert witnesses was unlikely a decade ago.

The use of actuaries, statisticians, computer program analysts and economists, to name a few, has become more frequent.

Except in family law litigation, it was rare in 1976 to encounter a forensic accountant. By 1986, forensic accounting had become a recognized sub-speciality. Counsel should be aware that the accountant regularly familiar with the business problems of the subject litigation may not be the appropriate witness to use for the trial. Such accountant may not be an effective communicator, and may be confronted by a forensic accountant on the other side, better equipped to explain to the trier of fact the complicated issues in a simplified manner.

Thus, in 1986, trial counsel should consider the use of a special forensic accountant to accomplish better articulation of complex accounting concepts, especially if the opposition is using such experts.

With the advent of the personal computer at the reach of every litigator, the ability to obtain instant graphic support for use in the courtroom is at hand. For instance, a "phone-in" graphics service bureau is now operating in Los Angeles. Statistical information, graphs, and other complicated demonstrative evidence can be created using "off-the-shelf" computer application programs in the lawyer's office. These can be converted overnight into overhead projection slides.

The attorney or the support staff dials the service bureau. The user, using a modem, can log-on to the service bureau equipment and download the material created on the personal computer. Equipment at the service bureau processes this data and creates projection slides. The slides are sent within 24 hours to the trial lawyer for use as demonstrative evidence in court. Such capability could be of tremendous help when a "surprise" occurs during a trial. The "smoking

gun" financial information could be turned overnight into something easily demonstrable.

By 1985, the personal computer had entered the courtroom in another active way. A recent court trial involved issues concerning the use by one of the parties of a massive data base for the management of investment funds. The application used by the party was operated on an IBM mainframe.

Rather than request that the court make a visit to the computer center where the operation was conducted, an IBM PC was brought into court. Modifications were made to the PC so that it would "emulate" [talk to] the mainframe computer.

One of the telephone lines in the courtroom was temporarily disconnected, and a modem was hardwired to the telephone line. An investment counselor skilled in the daily use of the data base program was then brought in to "walk through" the computer application. A small printer capable of printing from the PC screen was brought in, and the most relevant computer screen presentations were printed on the spot and were received in evidence.

The demonstration was similar to a "view" of the scene but was accomplished in a more effective and timesaving way. It permitted the court to observe the actual process in operation, thus permitting better insight as to how the party handled the management of investment funds.

Other visual aides to assist in presentation of complicated material are now available, even in the smaller case. Through the use of digitized information processing, the graphic techniques used for several years in the creation of children's stories for Saturday morning television are now available to the trial lawyer.

No lawyer ever lost a case by making it simpler. As business problems have grown more complex, I see a need to continue to simplify the presentation of such information in the litigation process.

The greater the mass of information to be presented to achieve an appropriate result in the trial, the greater the responsibility of the trial lawyer to organize, select and sort the material into a manageable format.

Therefore, it is still important to organize exhibits. Multiple copies should be prepared so that they are readily available for the court, the witness and opposing counsel. Every case is different. It cannot be said that in every case, counsel should prepare a spiral binder with the exhibits. In some cases, that is a very good method. Other cases, because of the size or format of the exhibits, would not lend themselves to that type of organization. The important point, however, is for trial counsel to think about the problem and then resolve it in the most simplified way for the particular case.

As advances in information technology were occurring, some other changes affected the business trial lawyer.

In 1981, changes in the Code of Civil Procedure abolished the requirement that the court make findings of fact and conclusions of law in a court trial. In its place came a new procedure for a statement of decision.

For a few years after the changes in 1981, it was not completely clear that the change had accomplished the intended simplification. However, as appellate decisions have begun to come down giving guidance to the new procedure, it does appear to have been a meaningful remedial change.

At least the silly finding that the XYZ Corporation, plaintiff herein, is a corporation duly formed under the laws of the state of Delaware and authorized to do business in the State of California no longer requires the use of anyone's time. The requirement of a specification of the issues on which a statement of decision is requested permits the court to make a statement on less than all of the material issues in the case.

The change, in 1981, in Code of Civil Procedure section 632

*Continued on Page 4*

## Letter from the President

*To advance the science of jurisprudence as it relates to trial advocacy; to promote judicial procedural reforms; to educate practitioners and to disseminate information of interest to those members of the legal profession practicing business litigation through a continuing legal education program; to maintain the honor and integrity of the legal profession; to promote high ethical standards of professional conduct; and to cultivate social fellowship among its members.*

*ABTL Articles of Incorporation*

Now in its thirteenth year, the Association of Business Trial Lawyers can proudly state that it has been faithful to its founding principles.



**Elihu M. Berle**

The ABTL was established in 1973 at a gathering of some of the most prominent Los Angeles business litigators from a group of the leading law firms in Southern California. At that time many business trial lawyers were concerned that the unique experiences, requirements and nature of practice of business trial lawyers were given only cursory consideration by other trial lawyer organizations, most of which were dominated by the personal injury bar.

This concern was the catalyst for the formation of an enduring organization with a broad range of goals for serving the business litigator as well as all Southern California lawyers and the public.

Over the years ABTL has been involved in discussing and dealing with such issues as court consolidation, certification of trial lawyers as specialists, improvement of the efficiency of the judicial system, tort reform, alternative dispute resolution, selection and discovery of expert witnesses, form pleadings and promulgation of standard jury instructions for business cases.

In its early years, ABTL was very much concerned with attempts made by certain state and federal bar groups to certify trial lawyers as "specialists" under a set of standards and guidelines which, although related to a personal injury practice, had no applicability to a business trial lawyer.

ABTL and other similarly minded groups undertook efforts to educate members of the bar and the public about the true nature of the business trial practice and the importance of any certification process, recognizing the unique characteristics of such practice and the differences between the business and personal injury trial experience. These activities led to a rethinking of the entire certification effort, which was ultimately abandoned.

In 1976, the Board of Governors, responding to the need of members to be kept well informed of organizational activities as well as current controversial subjects of interest to business litigators, began publishing the *ABTL Report*. This issue marks the 10th anniversary of the *ABTL Report*. The publication has appeared several times a year since its founding (with the exception of one year), always containing interesting and provocative articles regarding substantive legal issues and providing a forum for discussion of developments affecting commercial trial practice.

Under the tutelage of a succession of talented and com-

*Continued on Page 7*

did introduce one unfortunate semantic change. It is not of earthshaking importance, but personal privilege forces a comment.

Under the former law, when the court announced a decision after having taken a matter under submission, the code required the court to issue a Notice of Intended Decision. This procedure then set into motion the creation of the findings of fact and conclusions of law. Somehow, the new code section was changed to require the court to issue a Notice of Tentative Decision.

The change from "intended" to "tentative" is a bit unfortunate — for clients, if not for lawyers. Lawyers are used to sick humor. But when a client receives a copy of a Notice of Tentative Decision stating that the court has found that he has breached an agreement, and must pay \$543,987.00 in damages, it is a bit cruel to have hope spring eternal from the judge's required use of the word "tentative." It is the likes of "tentative" that causes the public to wonder about lawyers and judges — but that has not changed between 1976 and 1986!

The 1983 changes in the substance and procedure for summary judgments are even more significant than those relating to findings of fact and conclusions of law. The legislature made important changes in the provisions affecting notice, the content of supporting and opposing papers, summary adjudication of issues, and the specificity of orders denying a motion for summary judgment.

Time limits for the filing of the motions as well as opposing and reply papers were imposed. The trial judge must specify in writing at least one material fact involving a triable issue, if the motion is denied. Oral testimony, always thought to be inadmissible, is now specifically excluded. Ordinarily, motions for summary judgment must be heard no less than 30 days before the date of trial.

The new language states that the motion *shall* [emphasis added] be granted if all the papers submitted show that there is no triable issue as to any material fact. This new language may indicate that more motions will be granted.

It is too early to get a real handle on the impact of the changes on the appellate process. It certainly takes more documentation to present a meaningful summary judgment motion under the new procedure. It is still difficult to prevent a reversal of the granting of summary judgments at the appellate level. Already, many observers believe that ultimately the changes will increase the number of summary judgments granted and affirmed on appeal. Tune in for a review in 1996.

This decade has seen a spectacular increase in the amount of private dispute resolution activity. The first noted case, in 1977, involved the designation of then recently retired Judge Kenneth N. Chantry to try a complicated business case privately. Counsel agreed that the case cried out for early resolution and that a four-year trial delay was economically unacceptable. Yet they did not want arbitration and wanted to preserve their record.

Since 1977, the practice of taking cases out of the public system pursuant to the judge pro tem and reference procedure has become commonplace.

The system has the tremendous advantage of flexibility. It can be used for a case ready to go to trial that has festered on the trailing calendar for days or weeks. All it takes is the agreement of all trial counsel on the selection of a retired judge to be appointed a temporary judge pursuant to Article VI, Section 21, of the California Constitution.

The procedure can also be used to obtain a "rent-a-judge"

for all purposes at the commencement of the litigation. Even the following has occurred: a contract problem between two major corporations developed into major proportions. Settlement at the corporate management level was attempted but failed. Complaints were prepared for filing and courtesy copies supplied to the opposition. Answers and cross-complaints were prepared and exchanged. Agreement was reached that the economics of the situation required an early resolution of the problem. Agreement was also reached that the parties did not want the assembly line treatment inevitable in a monstrous trial court such as the Los Angeles Superior Court. And finally, agreement was reached on the selection of a retired judge to serve as a judge pro tem for the entire litigation.

On one day, with all the arrangements in place, the complaint, cross-complaint, answers, and a stipulation for the appointment of a judge pro tem were filed. Nine months later, with a planned, fast track for discovery, with all schedules for management and counsel accommodated, the case was tried, decided, and a judgment entered. A full and complete record was maintained, and all of the parties had preserved their rights of appeal.

Of course, the system is expensive. But when the time of management and trial counsel is considered, together with the incalculable economic loss sometimes caused by a delay in the resolution of a business problem, the system is a money-saver.

The list maintained by the Presiding Judge and available through the Civil Courts coordinator now contains some 67 retired judges and commissioners available for selection.

Certainly, it is hoped that the backlog of cases awaiting trial can be cut by improving methods for the trial of cases. Until such improvements do shorten the waiting time to get a case to trial in the public system, the use of retired judges in private dispute resolution will continue to be a viable alternative.

A definite change in the attitude toward sanctions for frivolous conduct and conduct in bad faith has developed in the last ten years.

In 1981, the legislature enacted Code of Civil Procedure 128.5. As we all know, this section specifically empowers a trial court to impose sanctions on a party or the party's attorney as a result of bad faith conduct, or tactics that are frivolous or solely intended to cause unnecessary delay. Both trial courts and counsel, however, must be careful to avoid a misuse of this appropriate power.

Overzealous requests for sanctions under Code of Civil Procedure Section 128.5 can endanger a fair advocacy trial system. An example of what not to do can be seen in *Lesser v. Huntington Harbor Corp.* (1985) 173 Cal. App. 3d 922. This decision reversed the imposition of sanctions in the sum of \$59,148.10 by the trial court. (It was the last 10 pennies that apparently created the problem.)

Section 177.5 of the Code of Civil Procedure was enacted in 1982, granting the power to impose monetary sanctions payable to the county for the violation of a lawful order without good cause or substantial justification.

The trend in connection with frivolous appeals has been more marked. A review of Witkin (Third Edition), Procedure, Appeal, Sections 532-534, indicates that before 1976, sanctions of \$100.00 and \$1,000.00 were considered significant. Such small amounts, even considering inflation, were usually coupled with stern language in the opinion excoriating counsel or the party.

*Marriage of Flaherty* (1982), 31 Cal. 3d 637 is one benchmark in the trend to put some real teeth in the power of the appellate courts to assure that appeals are not frivolous or

for the purpose of delay. By 1984, for instance, the profession saw the \$20,000.00 sanction imposed in *Maple Properties v. Harris* (1984) 158 Cal. App 3d 997.

This trend is one more recognition that the litigation process is seriously endangered. It is in danger of defeating the very purpose for which it was intended, to wit, the peaceful and efficient resolution of legal disputes economically and without undue delay.

The subject of sanctions is not a good place to end an article that has been fun for me to prepare. But it is as good a place to end as any other place. Hopefully, when a review of the first twenty years of history of the Association of Business Trial Lawyers is written, such matters will be of little importance.

The last ten years have been exciting and full of change. ABTL has made great strides in the improvement of professional practice in the trial of business cases.

HAPPY BIRTHDAY, ABTL!

—Hon. Lester E. Olson

## abtl REPORT

P.O. Box 67C46  
Los Angeles, California 90067

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## Taking a Writ

**E**very now and then

you cannot wait several years for a final judgment so that you can appeal. That motion you just lost was too crucial to the whole case. So you "take a writ."

But seeking appellate review prior to a final judgment is rarely successful. Here are some ways to increase your odds.

The first problem you face is what kind of writ to seek. The solution is simple: In general, most petitions may be denominated, "Petition for Writ of Mandate, Prohibition, or Other Extraordinary Relief." The court will ensure that the proper writ, whether mandate or prohibition, will issue. This general rule applies, unless the matter involves contempt, in which case you should seek a "Petition for Writ of Review" or "Petition for Writ of Habeas Corpus." Of course, if a stay of further proceedings is sought, then the notation, "Stay Requested," must appear on the cover.



Sharon Baumgold

The next hurdle often missed is filing the petition timely.

The appellate court may have no jurisdiction to act in case where the applicable code section sets forth a time limit that counsel misses. The accompanying table sets forth the time limits governing most of the petitions. When no time limit is set forth in the applicable code section, the general rule is that a petition must be filed within 60 days after entry of the order, unless counsel can show a good reason for the late filing. It is extremely rare that a petition is granted after the 60-day period; the reason for the 60-day rule is that, as the court loses jurisdiction over an appeal when the appeal is not filed within 60 days after judgment, then the court should not exercise its jurisdiction after 60 days has passed since the entry of an order.

Be aware that some time limits run from the entry of the order, while some run from mailing of notice of ruling. When the time limits commence upon the mailing of notice, usually you may add five days to the time limit for mailing. If you represent the party that is ordered to give notice, do not use the mailing period in calculating the length of time in which to file the petition. Rather, file the petition within the minimum number of days permitted.

Summary judgments present even more traps. After partial or complete denial of a summary judgment motion, a motion to adjudicate issues, the court "loses jurisdiction" to determine the matter; the time limit is "mandatory." (*Sturm Ruger & Company v. Superior Court* (1985) 164 Cal. App 3d 579, 581.)

Far more common but not quite so dangerous is the filing of an incomplete record. If a petition is denied without prejudice with a citation to *Sherwood v. Superior Court* (1979) 24 Cal. 3d 183, then counsel should realize that the court is giving a clue; the record is incomplete. The court is also giving you the opportunity to file a new petition (and pay the filing fee, again) with the complete record. Unlike an appeal where the record is designated by counsel but put together and delivered by the superior court clerk, a petitioner must prepare and submit the record on a writ petition. It is vital

Continued on Page 6

## *The In-House's Doghouse*

*Continued from Page 1*

are cream puffs. It is true clients want their litigators to be, above all else, tough. Toughness, however, can be demonstrated in the courtroom, at depositions or in court papers. I never view attempts at settlement as confessions of weakness.

Another approach to this problem is for a different, non-litigating lawyer to handle settlement discussions. I like this approach. Psychologically I have trouble talking settlement and gearing up for major warfare with the opposition at the same time. Either way, settlement should be attempted soon and often. The toughest litigators are also the first to recognize a settlement opportunity.

### **Provide a Regular Report to the Client**

A regular report of developments to the client is a necessity and should be done monthly. The bulk of the report can be prepared by a paralegal and should list the incurred legal fees, recent developments, a projection of the likely course of the litigation and a projection of fees and expenses to come.

When I was in private practice, our firm represented certain eastern European shipping companies that required a monthly litigation report on each case. When we began to compile this report each month, we were startled.

Many things had been left hanging from the month before. We were forced to jump back into the litigation and attempt to show some progress. We talked to the representatives of the parties. That resulted in our pressing matters to a quicker conclusion. It also required us to reevaluate the case each month. Very often, this process, along with the listing of incurred and anticipated fees, educated us to the necessity of a quick settlement of a matter which otherwise might have gone on.

### **Advise In-House Counsel of Ways to Reduce Litigation Costs**

One way to convince the client that you have his interest rather than your own income at heart is to initiate ways that litigation costs can be reduced. Most factual investigation — the answering of interrogatories and the location and duplication of documents — can be handled more efficiently in-house. If the client does not have the resources to do this, perhaps it should acquire a paralegal or a clerk. The benefits are several fold: one lawsuit often begets another. When the next lawsuit is filed, the in-house paralegal knows the record-keeping system and can very quickly identify relevant documents, persons and can answer interrogatories. Otherwise, the corporation is forced to train outside paralegals and lawyers, paying for the education process all over again. The efficiencies of having the fact-gathering process handled in-house are enormous.

There are, of course, perils here. Typically, the in-house lawyer may not be as assiduous in digging out facts or documents which may be embarrassing to the company. But if properly supervised, the benefits of handling the bulk of the fact-gathering in-house far outweigh these risks.

### **Find Ways to Control Disbursements**

All corporations routinely and regularly review their expenses in search of reductions. Amazingly, and to the annoyance of in-house counsel, law firms, with rare exceptions, do *not* engage in any such process. For example, it would be unthinkable for most law firms to negotiate for readily available corporate room rates when attending out-of-town depositions. I have never known a lawyer who negotiated for the least expensive stenographic reporter or booked airline reservations in the hopes of taking advantage of discounted fares. The savings can be substantial. More importantly, you

will convince the client that you are looking out for his interests.

Disbursements are usually broken out in some detail. Unnecessary disbursements can become a point of constant annoyance to inside counsel. The friction is, of course, heightened because many outside lawyers travel, eat and spend at a level absolutely impermissible to in-house counsel. You know you are in trouble when you board the first class section of an airplane and wave to the house counsel in the coach.

I am well aware of the law firm culture which requires that traveling lawyers, even newly-hired associates, lead the life styles of Louis the Fourteenth. Nonetheless, survival requires that you learn what standards apply to client executives and attempt to conform to them.

### **Do Not Consult with Employees without the Prior Clearance of In-House Counsel**

This rule, which I view as inviolable, surprises many lawyers. There are two essential points here. First, you are unlikely to get very much cooperation from in-house personnel until they have been advised by the general counsel that they should cooperate with you. More importantly, the in-house lawyer wants to coordinate these activities to make sure that his control over the litigation is not compromised by outside counsel.

Remember that all in-house counsel suffer from one major insecurity: they have only one client. Accordingly, they are supersensitive that relations with that client run smoothly, and they do not want outside counsel to interfere with their general oversight of the legal function.

### **Review Bills with Care**

I get the impression that bills from many firms are generated by a computer and not reviewed by a partner. This is a mistake for two reasons: First, sometimes the bills contain absolutely idiotic entries. For example, in one case a major downtown Los Angeles firm sent us a bill containing four different entries from two different lawyers relating to "research" and "office conferences" involved in the filing of a notice of withdrawal of appearance. This is a matter that should have been handled by a secretary, with one phone call to the clerk. Rather than complain, we merely suggested that the firm, in view of their vast experience gained at our expense, file a notice of withdrawal of appearance in several additional cases.

The second reason to review bills is even more fundamental. In many cases young associates are left without much guidance to do research and prepare papers. They may invest, largely out of insecurity, inordinate amounts of time preparing papers that are not of great significance to the progress of the litigation.

In one case I found an associate had devoted literally hundreds of hours responding to requests for admissions which, in view of the state of the discovery, could have been answered by admitting the authenticity of documents obtained from the client's files and by denying everything else.

### *Contributors to this Issue:*

*The Hon. Lester E. Olson*, who retired from the Superior Court last year after serving on the bench for 20 years, currently acts as an arbitrator in private dispute resolution.

*Sharon Baumgold* is a senior writs attorney for the California Court of Appeal, Second District.

*Thomas M. Fortuin* is Vice President for Legal Affairs of Technicolor, Inc. and General Counsel and Secretary of Four Star International, Inc.

*Elihu M. Berle*, President of ABTL, is a partner in the firm of Buchalter, Nemer, Fields, Chrystie & Younger.

But the only way the partner who is managing the case could discover this type of case mismanagement is to review the bills with care. Otherwise, the costs will become disproportionate to the amount involved in the litigation, and an unhappy client is inevitable.

I have failed miserably to control a firm's legal fees charged by attempting to direct and supervise its associates. I have even installed myself in an office in one of the outside firms. That does not work. The firms and the associates resent it, the associates pay no attention to you and the results are, predictably, a disaster. Accordingly, if the outside firm is not successful in controlling its fees and costs, the only remedy for the inside counsel is to find a different firm.

#### Give Affirmative Advice

As lawyers, we are trained to identify legal problems. This training almost always results, particularly in young lawyers, in giving the wrong kind of advice to clients. We tell clients all the reasons that they cannot do what they propose. One client put it to me succinctly: "If I had wanted to know what the law was, I would have hired a policeman."

In general, the client wants to know how he can accomplish what he wants to accomplish without subjecting himself to an unacceptable risk of incurring liability. He does not particularly care to know all of the legal restrictions that might come into play. Accordingly, legal advice should always be constructive; what the client wants to be accomplished can be accomplished this way but not that way.

#### The Economic Threat

There are fundamental changes affecting the law firm/client relationship which are beyond the scope of this article. Most importantly, the major increase in associates' salaries will badly serve everyone: partner, law firm, client and the associates themselves. The only result will be in increased litigation fees, already viewed by businessmen as too high. The trend is that it will get worse: major law firms will only get very large cases; there will be no smaller cases on which associates can gain experience. There will be a larger and larger pool of litigators who cannot litigate. The primacy of the large firms in litigation will almost certainly be undermined. Competition among law firms will increase and, in my view, small litigation firms will receive more of the business. Good relations with in-house counsel will become more important.

Studies show that the most important client consideration in selecting counsel is whether the counsel is perceived as loyal to the client. All of my suggestions are ways to convince the in-house counsel that you place his interest above your own. That inevitably will involve some sacrifice on your part. If you can do it, however, you will enjoy long, constructive, happy and remunerative relationships with your corporate clients.

—Thomas M. Fortuin

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#### *The President's Letter*

*Continued from Page 3*

mitted editors — Tom McDermott, Tom King and Mark Neubauer — *ABTL Report* has achieved great respect among the judiciary law school faculties, law libraries and members of the bar.

Periodically, through the *Report*, ABTL has conducted plebiscites on controversial issues of concern to the business litigator. These polls give members an opportunity to express themselves and in turn provide guidance to the Board for taking public positions. The publicity engendered by the plebiscites affords the ABTL the opportunity to bring the

results of the members' voting to the attention of judges, bar leaders, and public officials.

Fulfilling one of the mandates of the organization, ABTL members have actively participated in efforts to improve the efficiency of the judicial system and reduce the costs of litigation. ABTL representatives have served on various superior court, county supervisorial and bar committees dealing with the operation of the court system. Additionally, numerous ABTL members have volunteered their time and efforts to help implement the superior court mandatory judicial arbitration and municipal court pro tem programs. Such response by the membership has not only brought individual satisfaction for contribution to the legal community but has also enhanced the reputation of the ABTL.

Most significantly, however, the ABTL has served an important educational function for lawyers, novice as well as seasoned.

The bi-monthly dinner meetings, with the customary panel discussion and syllabus on various legal subjects, have been uniformly successful in attracting hundreds of lawyers and numerous federal and state trial and appellate judges.

The annual ABTL three-day seminar has allowed a more in-depth review of a broad general subject of interest to the trial lawyers. The extensive materials prepared for the seminars have always contained a wealth of information and have served as a reference tool for further legal research and analysis.

Aside from serving as a platform for discussion of current issues affecting the practice of business litigation and presentation of educational programs, one of the most important and enduring attributes developed by the ABTL is the camaraderie established among members of the business trial bar.

From personal experience and from observation of attitudes, decorum and conversation among members at dinner meetings and seminars, one can sense good fellowship growing not only between bar and bench and among colleagues, but even among trial adversaries — everyone extending an extra effort to try to make the stressful and sometimes aggravating practice of business litigation more humane and even sometimes enjoyable. Within the informal context of the social meetings of the ABTL it is possible to "let one's hair down" and find out what opposing counsel is really like, try to understand a judge's or another lawyer's point of view, in an attempt to make the litigation process, in and out of court, more tolerable and free flowing.

A unique aspect of the ABTL is bringing together lawyers of different generations and different levels of experience. The founding fathers of the ABTL, who laid the cornerstone for the building of such a fine organization, are still very much active in contributing to dinner and seminar programs. Through the example set by these ABTL elder statesmen, the organization has never been calcified through self-perpetuation which sometimes exists in other associations. The philosophy of injecting new blood into the leadership of ABTL has been consistently followed through the years by limiting the terms of governors and electing new members to the Board of Governors each year. This philosophy, I believe, is the key to the organization's being a vibrant active force in the legal community.

Members of the association should take advantage of the opportunities available in the ABTL for active participation in programs, committee work and the Board of Governors. A business trial lawyer need not be reticent about proposing him/herself for an active role. The rewards for working closely with other lawyers and contributing to the legal community are enormous.

—Elihu M. Berle

## Taking a Writ

Continued from Page 5

that all relevant documents be submitted: the subject minute order, the moving and opposing papers, the notice of ruling, the transcript (if any) and any other papers relevant to the order. For example, in seeking review of the overruling of a demurrer, the moving and opposing papers, the minute orders and the complaint must be submitted.

Submitting the notice of ruling itself is never sufficient; the minute order must also be supplied because the court is not reviewing one party's interpretation of the superior court's order but, rather, the order itself. While in general the minute order is sufficient, the notice of ruling must be submitted when the time in which to file the petition is based on the date that notice is served. The notice (and the proof of service) is reviewed to determine whether the petition is timely filed. Petitioner must demonstrate that the petition is timely filed; the court does not assume it.

When reporters' transcripts or other exhibits are not available within the filing period, the petition should be timely filed and should include a statement that the transcripts or exhibits will be filed as soon as possible. Counsel should include a declaration of what the transcripts or exhibits contain.

Be aware that the court handles great numbers of matters every day. The easier you make review, the more efficiently the court operates. Exhibits should be numbered (or lettered) and be placed in chronological order, with each page numbered consecutively. It is most helpful to tab the exhibits so that the justices can easily review them. If containing the petition and the exhibits in one cover would be unwieldy, then it is an accepted (and often welcomed) practice to submit the exhibits under separate cover.

Then the petition cover should include the notation that the exhibits are submitted separately.

Make it clear when you need a stay of a superior court order. First, however, you must have applied for a stay in the court below. If the relief sought is not granted or not granted to the extent which counsel feels is necessary, you can apply for a stay to the appellate court.

When the stay request, ancillary to the petition, is made, you must so indicate on the cover of the petition and in the prayer. The petition must indicate what is to be stayed (i.e., a foreclosure sale, a deposition, or the production of documents) as well as the time and date the matter that is the subject of the requested stay is set. The petition must explain why and to what extent petitioner would be harmed without the stay, and whether and to what extent other parties would not be prejudiced. Fairness requires that service of a petition that requests an immediate stay should be personal service, rather than service by mail.

As with petitions in general, stay requests require that counsel maintain credibility. Stay requests should be made as soon as possible. It is only reasonable to assume that, if petitioner truly anticipates irreparable and extensive harm, that petitioner would move as swiftly as possible to avoid any possible harm. A request for a stay filed at the latest possible moment, especially if filed late in the day, may be interpreted as only a tactical move.

Many attorneys get so caught up in the technicalities of procedure that they forget to be advocates, attempting to convince the appellate court to reverse a lower court decision presumed to be correct.

A writ petition may be considered as an expedited appeal; the petitioner is requesting that the court interrupt its other business and review the petition, while appeals proceed in a slower fashion. You must demonstrate that the petition should be considered.

## FILE THE WRIT PETITION WITHIN:

10 DAYS after service of written notice of entry of an order: on a motion for judicial disqualification; on a denial of a motion to quash service of process; on a denial of a motion for summary judgment.

20 DAYS after service of written notice of an order: on a motion to expunge a *lis pendens*; on a motion to determine whether a settlement is in good faith.

30 DAYS after service of written notice of entry of an order: on a motion to change the place of trial.

60 DAYS after entry of an order not enumerated above.

*NOTE: In certain cases, the trial court can extend the time to file your petition.*

There are many writ petitions filed daily, and each justice works on appeals and other matters. A short statement is necessary in order to grab the court's attention and to give it an easy handle to understand the matter according to your client's point of view. The best approach is to start by setting forth a brief, perhaps two-paragraph statement, with the following: the substance of the subject order, the relief petitioner seeks, and the reasons that the order is in error. That statement should also set forth any need for stay or threat of irreparable injury.

By experience, I have discovered one rule of thumb: If counsel cannot explain what is wrong with the respondent court's ruling, then counsel should review the law and facts and re-evaluate whether petition should be filed.

Candor and credibility are your most important assets. If you have a regular practice of appearing before the appellate court, it is most important to guard these assets carefully. You achieve little by slanting the facts or excluding exhibits detrimental to the client's case. While on an incomplete record the court may decide to issue a temporary stay, review of the opposing papers or a more complete file may not only result in denial of a petition, but may lead to the lack of confidence in counsel's representations in future matters.

Just as in any other legal writing, it is important to set forth the facts clearly and plainly.

While you should attempt to persuade, never mislead the court, either by commission or omission.

As with other legal writing, it is not the number of cases cited, but their relevance to the facts of the petition that counts. Use the latest cases with the facts most similar to the subject case. It is best when the procedural stance of a case cited is similar to the subject case. Use cases that involve writ petitions; it is easy to tell which cases those are; they are always (Name) v. Superior Court. If the procedural posture is the same, so much the better; if your case involves the overruling of a demurrer, cite a case also involving the overruling of a demurrer. If that case is also based on a writ petition, it would be the most persuasive authority.

Your function is often informational: The court knows the law; it is the facts the court does not know. It is important to remember that, while you have great familiarity with your case's facts, the appellate court does not. When complicated scientific, medical or engineering matters are involved, it is good to give a clear and understandable background explanation.

The hardest obstacle to overcome is demonstrating that appeal is not an adequate remedy. Code of Civil Procedure sections 1108 and 1082 require that a writ issue only when there is no adequate remedy at law.

A practical hint: If a petition does not make sense to you, it will not make sense to the court. Rewrite it.

—Sharon Baumgold