ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

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Letter from the President

ABTL has submitted comments to presiding Judge Robert M. Mallano on proposed rule changes of concern to all of us. In particular, proposed Rule 9.68 would limit the circumstances under which stipulated protective orders could be approved. Members of the Association are concerned about this proposed rule, both as to its effect on settlements and discovery.

Bruce A. Friedman

With respect to settlements, it is extremely important to our business clients that amounts paid in settlement of lawsuits remain confidential. Confidentiality is often the primary reason for settlement and facilitates the resolution of numerous lawsuits. A rule discouraging courts from approving the confidentiality of settlements will discourage cases from being settled and have a detrimental impact on the court's case load.

With respect to discovery, the proposed rule would limit the court's ability to approve agreements between parties to produce documents subject to a confidentiality agreement. The imposition of such a limitation would make no sense so long as the documents can be used for purposes of the lawsuit. It could only vastly multiply litigation costs and increase the burden on already over-taxed courts.

Businesses involved in civil litigation are often asked to produce documents and information that are commercially sensitive. California's liberal discovery standards contemplate production of a broad range of documents pertaining to finances, marketing, business strategy, and the like, even where such documents appear irrelevant or inadmissible.

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INSIDE

The Expert Witness: Avoiding Conflicts or Poisoning the Well

Business litigators often face the question of whether they can retain an expert witness who was first informally contacted by opposing counsel. It is an area that can be a minefield, fraught with unexpected dangers, as the firm of Latham & Watkins recently discovered. That firm was disqualified as defense counsel due to allegations that it hired an accounting expert who had been interviewed by the other side. *L.A. Daily Journal*, Sept. 14, 1993, p. 1.

Scott A. Edelman

The ruling regarding Latham & Watkins, by Los Angeles Superior Court Judge Lillian M. Stevens in *Metro Traffic Control v. Shadow Traffic Network*, BC044460, has introduced new uncertainty into an already uncertain area. Plaintiff's counsel, James Hicks, had argued that Latham infringed on privileges for work product and attorney-client communications by speaking with the expert, Deloitte & Touche, after plaintiff's counsel discussed his theories of the case in what was reported to be a one-hour interview.

Hicks contended that Latham & Watkins failed to rebut a presumption of access to plaintiff's strategy. The ruling suggests the troubling proposition that some courts may find a presumption of access to confidential information arising in the context of an informal interview.

The Ninth Circuit and the Applicability of F.R.C.P. 26(b)(4)(B)

There is very little Ninth Circuit authority dealing with the question of the propriety of retaining an expert witness who was first informally contacted or employed by the other side in the same litigation. Indeed, the only case in the Ninth Circuit which has discussed the issue is *Riley v. Dow Co.*, 123 F.R.D. 639, 649 (N.D. Cal. 1989).

In *Riley*, the plaintiffs moved to disqualify an expert retained as a trial witness by the defendants because the plaintiffs claimed to have previously consulted him. The expert denied ever having been retained by plaintiffs. In addition, the defendants claimed they were not seeking to conduct discovery of the expert or the work product of opposing counsel.

In rejecting the plaintiffs' motion, Judge Schwarzer discussed the applicability of Federal Rule of Civil Procedure 26(b)(4)(B)

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to the issue of whether to retain a trial expert first informally contacted by the other side. Rule 26(b)(4)(B) provides that discovery of non-testifying expert witnesses (commonly called "consultants"), who have been "retained or specially employed by another party in anticipation of litigation or preparation for trial," may only be obtained upon a showing of "exceptional circumstances under which it is impracticable for the party to obtain [the information] elsewhere."

> Judge Schwarzer stated: "[Rule 26(b)(4)] controls discovery directed at experts. *Nothing in that section, however, limits the right of a party to call as its witness at trial a person who might have been consulted by the opponent.* Plaintiffs have come forward with no showing that they retained [the expert], and he specifically denies having been retained by them and has no recollection of even discussing this action with plaintiffs' counsel. But even if he had consulted with plaintiffs, there is nothing before the Court to preclude defendants from consulting with or calling him at trial.
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> *Riley v. Dow Chemical Co.*, 123 F.R.D. at 640 [emphasis added]. *See also Granger v. Wisner*, 134 Ariz. 377, 656 P.2d 1238, 1242 (1982) ("Rule 26(b)(4)(B) deals with the ability of a party to discover information about or from an adversary's nonwitness expert consultants. The rule does not address itself to the admissibility at trial of the testimony of such an expert which is elicited by the opponent"). *But see Healy v. Counts*, 100 F.R.D. 493 (D. Colo. 1984) (using Rule 26(b)(4)(B) to determine whether the defendants' expert, who was first retained by the plaintiff and had disclosed to the defendants the opinion he had provided the plaintiff, could testify for the defendants at trial).

Vivienne A. Vella

Outside the Ninth Circuit: The Two-Step Approach to the Problem of Retention

While the court in *Riley, supra*, found no basis to disqualify an expert who denied having been retained by the other side, it did not articulate a workable standard for deciding the propriety of retaining an expert who was first informally contacted or employed by the other side. Guidance, however, can be found in cases outside the Ninth Circuit, which have applied a two-step approach to the problem. According to several courts, the propriety of retaining an expert turns on whether (1) "it was objectively reasonable for the first party, who claims to have retained the consultant...to conclude that a confidential relationship existed," and (2) whether "any confidential or privileged information was disclosed by the first party to the consultant." *Wang Laboratories, Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1249 (E.D. Va. 1991); *accord Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271, 278 (S.D. Ohio 1988).

Affirmative answers to both inquiries compel disqualification of the expert. *Wang*, 762 F. Supp. at 1249. "But disqualification is likely inappropriate if *either* inquiry yields a negative response." *Id.*

> Thus, even if counsel reasonably assumed the existence of a confidential relationship, disqualification does not seem warranted *where no privileged or confidential communication passed.* [Citations omitted]. Were this not so, lawyers could then disable potentially troublesome experts merely by retaining them, without intending to use them as consultants. [¶] Similarly, *disqualification should not occur in the absence of a confidential relationship even though some confidential information may be disclosed.* [Citation omitted.] In this event, the disclosure is essentially a waiver of any existing privilege. Lawyers bear the burden to make clear to consultants that retention and a confidential relationship are desired and intended. Fairness requires this.

Id. [emphasis added]. *Accord Paul v. Rawlings, supra*, 123 F.R.D. at 278; *Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.*, 734 F. Supp. 334, 337 (N.D. Ill. 1990).

Applying the *Wang* two-step analysis, the court in *Paul v. Rawlings*, 123 F.R.D. at 278-279, refused to disqualify an expert whose testimony plaintiffs proposed to use, even though such expert had been previously contacted and paid by the defendant's counsel to provide general consultation services in the matter at issue. The court reasoned that the discussion of specific matters relating to the litigated case was secondary, and there was some doubt that defense counsel could reasonably assume that a confidential relationship existed because counsel never informed the expert after the expert provided his initial services that the defendant had a continuing interest in using him as an expert in the case. *Id. See also Nikkal Industries, Ltd. v. Salton, Inc.*, 689 F. Supp. 187, 190 (S.D. N.Y. 1988) (refusing to disqualify an expert where the party's meeting, at which materials relevant to the matter were provided to the expert, "amounted to no more than a comprehensive employment interview" lasting approximately 90 minutes and where the party never formally retained the expert). *Compare Wang Laboratories, Inc., supra*, 762 F. Supp. at 1249 (expert witness engaged first by plaintiff in patent infringement suit and then by defendant to furnish an opinion on the validity of the same patents was disqualified, where plaintiff's attorney disclosed confidential work product material to the expert and was objectively reasonable in assuming that he had retained the expert and that a confidential relationship existed).

The *Rawlings* court further found that there was a "lack of communication of any information of either particular significance or which can be readily identified as either attorney work product or within the scope of the attorney-client privilege." *Id.* at 279. *Compare Marvin Lumber & Cedar Co. v. Norton Co.*, 113 F.R.D. 588 (D. Minn. 1986) (defendant's retained expert disqualified where the expert previously had been employed by plaintiff in matters "substantially related" to the litigation, had long-term access to confidential information of plaintiff and had a basic understanding of plaintiff's modus operandi, patterns of operation and decision-making).

In so holding, the *Rawlings* court rejected the defendant's argument, in keeping with a number of attorney-client privilege cases, that he should not have to prove actual confidential communications, but only the existence of a confidential relationship, because he should be entitled to a *presumption* that confidential communications were made and would be used to his detriment. *Id.* at 281. In dismissing this argument, the court reasoned that, in the context of an expert witness, "there are many communications between client and expert witness which are not privileged [and there is] less stigma attached to an expert 'changing sides' in the midst of the litigation than an attorney who occupies a position of higher trust, with concomitant fiduciary duties to a client than does an expert consultant." *Id. Accord Great Lakes Dredge & Doc. Co., supra*, 734 F. Supp. 334, 338 (N.D. Ill. 1990) (relying on *Rawlings* to reject application of the attorney disqualification presumption to the expert witness situation). *But see Marvin Lumber, supra*, 113 F.R.D. at 591 (relying on *Conforti & Eisele v. Division of Bldg., Etc.*, 170 N.J. Super. 64, 405 A.2d 487 (1979), to apply presumption to

expert witness situation); *Peat, Marwick, Mitchell & Co. v. Superior Court*, 200 Cal.App.3d 272, 290 (1988) (discussed *infra*).

In addition, the *Rawlings* court stated that, even if it were to be presumed that matters covered by work product privilege were communicated by defense counsel to the witness, any such presumption would be overcome by the fact that none of the presumably communicated matters appeared to have leaked into the witness' report or affected in any significant way his conclusions about the matter. 123 F.R.D. at 281. Rather, the court found that, because it was likely that the expert would have produced the same report and drawn the same conclusions even if he had never spoken to defense counsel, it would be unfair to disqualify him from serving as an expert on behalf of plaintiffs. 123 F.R.D. at 280.

Finally, the *Rawlings* court stressed that, of the two parties to the attorney-client relationship, the attorney as an expert in legal matters should be more aware of the potential for privileged information finding its way to an adversary. 123 F.R.D. at 279. For this reason, the court held that it was appropriate in the first instance to place the burden upon the attorney of making sure an expert understands the nature of the relationship and the need to protect certain information disclosed in that relationship. *Id. Accord, Wang*, 762 F.Supp. at 1249 ("Lawyers bear the burden to make clear to consultants that retention and a confidential relationship are desired and intended. Fairness requires this").

California Law

The law in California regarding this issue is at best unclear. The only two published California cases dealing with the issue involved fairly egregious circumstances in which the decision not to retain the expert should have been evident.

In the most recent California case on the subject, *County of Los Angeles v. Superior Court*, 222 Cal.App. 3d 647 (1990), *review denied*, 1990 Cal. LEXIS 4578 (1990), the court held that an expert, who had been previously designated and withdrawn as a designated witness for the defendant, and the attorney who retained him, should be disqualified where the expert still was retained by defense counsel as a consultant and had discussed the report he had prepared for defense counsel with plaintiff's counsel. *Id.* at 657-658.

Rather than relying on any of the principles articulated by the courts above, the court in *County of Los Angeles* decided the case entirely on the basis of the attorney work product privilege and the discovery provisions regarding designation of expert witnesses. The court held that, until it appears the expert will testify as a witness, the work of an expert-consultant is protected by the attorney's work product privilege under California Code of Civil Procedure § 2018, which requires a showing of "good cause" (i.e., no adequate substitute for the material generated by the expert) to permit suspension of the privilege. Because the plaintiff in that case had failed to make such a showing, the court held that the expert's knowledge and opinions were not subject to discovery and disclosure. 222 Cal.App. 3d at 655.

The only other California case dealing with the subject is *Peat, Marwick, Mitchell & Co. v. Superior Court*, 200 Cal.App.3d 272 (1988), *cert. dismissed*, 490 U.S. 1086 (1989), a professional malpractice action brought by the People against an accounting firm, in which the defendant accounting firm engaged in a secret corporate merger with the accounting firm retained

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Interview with Judge Tevrizian: The Dos and Don'ts of Trial

ABTL Associate Editor Joel Mark interviewed Federal District Judge Dickran Tevrizian for his views regarding the dos and don'ts of trying commercial cases in the Central District. He provided several tips of interest, from the basic admonition to be sure you are in the correct forum from the start, to more subtle advice: Don't ask a witness stupid questions. Be civil to opposing counsel. Watch for innovative ways to reduce trial time.

Joel Mark

What are three most important things a trial lawyer can do to get off on the right foot in trial in federal court?

Getting off on the right foot in trial starts well before trial. Actually, it starts before the action is filed. The first thing counsel should do is to make sure that the case really belongs in federal court in the first place. Jurisdiction should be based upon actual facts and supportable claims, not upon creative pleading.

Also, by the time trial starts, counsel usually will have been before the court on several occasions and impressions will have been formed already. So, always come prepared. Preparation is the key to success in any courtroom.

Finally, know the local rules, and pay special attention to the standing orders of each individual judge.

What is the most common mistake trial lawyers make in trial in federal court? How can it be prevented?

The most common mistakes lawyers make in federal court again often can occur before trial starts. The most common mistakes are underestimating the cost of prosecuting or defending the action and not exploring Alternative Dispute Resolution. Litigation always seems to end up costing much more than anticipated. It is a real mistake for counsel not to take an active role in trying to spare the client the cost of litigation by early settlement efforts and by pursuing ADR.

I try to take a very active role in settling cases in my courtroom at an early stage in the proceedings. Where counsel are reluctant to have the trial judge actively supervise and take part in settlement discussions, then I recommend that ADR be pursued. But, I encourage counsel to involve me in settlement first because then they won't have to pay for it. More lawyers should take advantage of this kind of judicial involvement in the settlement process.

What other mistakes do you see trial lawyers make and how can they be avoided?

Another mistake practitioners not familiar with federal rules and procedures often make is that they assume that deadline dates will be continued based upon the stipulation of the parties through their counsel. This is a bad assumption to make in federal court.

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Interview with Judge Tevrizian

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A big mistake trial lawyers make repeatedly is to ask a witness stupid questions. With painful frequency, the stupidity of the question will become apparent all too late.

Another mistake is not being civil with opposing counsel. I like to let experienced trial lawyers try their cases without a lot of intervention from the court. But, where lawyers make the mistake of demonstrating a lot of rancor in the courtroom, that will pull the trial judge more and more into the case, thus restricting counsel's freedom to control the order of proof or other aspects of their cases.

What are the biggest differences between a bench trial and a jury trial in federal court?

The atmosphere is quite different. In a jury case, the atmosphere must be more formal and the pace will be a little slower. In a bench trial, the atmosphere is more relaxed; but, the trial will be much more rigorous for counsel. The trial judge will demand more in a bench trial, usually with a longer trial day. Often, in the bench trial, the trial judge will isolate specific issues of concern as opposed to allowing counsel to determine the order of proof.

Also, in a bench trial, the court will explore innovative methods of reducing the trial time, such as summaries of expert testimony and the presentation of direct testimony by declaration.

In our last several bench trials in federal court, all direct testimony was presented by declaration. Is this the wave of the future?

Yes. I believe that you will see more and more trial courts requiring declarations for the presentation of direct testimony and many other innovations to reduce the time for bench trials in federal court.

What techniques do you believe are most persuasive before juries?

A trial lawyer must be a combination of a teacher, a salesperson, an entertainer and a communicator. If you have all of these qualities, plus a pleasant personality, you will be a successful trial lawyer. I believe mostly, however, that trial lawyers are born and not made. Either they have these qualities or they don't. But these are the qualities which I would emphasize are required.

What turns juries off?

Being a jerk; bickering; wasting time; bumbling. Mostly being a jerk. Also, juries don't seem to like trial lawyers who try to take the case away from the clients by becoming personally involved, or who try to take the courtroom away from the trial judge.

What advice can you give to practitioners about picking a jury in federal court?

Well, in federal court, the judge for the most part handles the voir dire. Most successful trial lawyers seem to pick juries as much by instinct and feelings as by anything else. They pay attention to the jurors' body language, demeanor and attention span during voir dire, and how the jurors approach answering the questions which the judge puts to them.

What do you think about jury consultants? Are they worth the expense?

To my way of thinking, jury consultants are a total waste of money. They are almost like fortune tellers. If they were really that good, they could do better at the race track. I don't let jury consultants sit at counsel table in my courtroom during voir dire.

What is the biggest time-waster you see in trial?

Unfortunately, there are a number of things which are time-wasters in trial. The worst time-waster is unnecessary and repetitive questioning of witnesses. Overkill with evidence and witnesses also wastes too much time. Improper marking and use of exhibits is an unnecessary waste of time as well. And, junk science experts waste a lot of time.

In light of the recent rulings regarding junk science experts, do you think that you will have to admit more of that kind of testimony?

Absolutely not. It is the function and responsibility of the trial judge to run the courtroom. It is the function and responsibility of the jury to decide the ultimate issues of fact. Too many attorneys are of the opinion that they can hire a "so-called" expert to comment and give opinions on matters that have historically been delegated to the jury to find. I believe that trial judges should restrict rather than expand the use of non-percipient expert witnesses.

What tips do you have for trial lawyers regarding preparation for trial? What types of preparation reap the best results in trial?

Be sure to get in your jury instructions when you are supposed to or you will find that you have waived the jury and that you are having a bench trial instead. Also, submit proposed verdict forms, special verdict forms and special interrogatories in advance of trial.

It is also very important to prepare a short, concise trial brief in all trials, both bench and jury trials. They should be no longer than ten pages. The longer the trial brief, the less likely that it will be read (as opposed to being "skimmed") by the trial judge.

If you anticipate having scheduling problems with experts, it is best to videotape their deposition and plan to use that at trial rather than expect the trial to stop or be delayed for your expert.

Also, it is important to pre-mark all exhibits and be familiar with them so you won't fumble or bumble with them. I require that, on both direct and cross, counsel must give the clerk (but not opposing counsel on cross) a list of all exhibits that counsel anticipates will be used during the examination so that the clerk will be prepared to hand them to the witness quickly.

Are there any traps for the unwary in Rule 9 which show up at trial and how can they be avoided?

Too many lawyers do not understand that, in federal court, the pre-trial order supersedes all other pleadings. If an important issue hasn't been clearly set forth in the Rule 9 order, evidence on that issue won't be relevant at the trial and no decision on that issue will be made by the trier of fact.

What is the best way to prepare and handle documents for trial in federal court?

As I said, be familiar with them and be prepared to use them quickly without fumbling or bumbling. I would recommend that they be put in three-ring binders, each one not too thick, with big holes punched in them so they turn in the binders quickly and easily. You will need three sets of the binders—one for the court, one for the witness and one for opposing counsel.

What about demonstrative evidence, video depositions and other "high-tech" evidence?

This kind of evidence is becoming more and more important. It is a must in longer trials involving complicated business transactions where the case otherwise is likely to get dull. In these cases, the use of laser discs with bar code retrieval of exhibits and television monitors for the jury is extremely important.

Juries bring with them to the courtroom the expectations they develop from their exposure to commercial television. They expect to be entertained somewhat. High-tech evidence can be a big advantage in longer cases. The jury will pay better attention to the evidence.

Juries also like evidence they can see, feel and touch. Video is

very powerful also. Sometimes, it is more persuasive than more conventional evidence. Improvements are being made all the time in this area. Computer software programs you now can buy off the shelf allow the presentation of documents, blowups and other exhibits in an extremely effective way. This is one area where creativity really can pay off. Can you imagine how good a Steven Spielberg or a George Lucas would be as a trial lawyer?

What do you think about computer simulations? Can too much drama be a bad thing?

Computer simulations must be considered on a case by case basis. You have to be careful. This is one area where a deep pocket can obtain a real and sometimes unfair advantage. The trial judge therefore will have to scrutinize the simulation carefully. It probably is best for counsel to test the thinking of the court with a motion in limine before too much time and money is expended on a simulation which won't be admitted later.

Can the trial lawyer receive sanctions for conduct at trial? For what? How can they be avoided?

Yes, but only as a last resort. It is the function and duty of the trial judge to control the courtroom. I like to maintain control without the imposition of sanctions. I believe that most good trial judges will take action well before conduct is so out of hand that it would merit sanctions. But, don't take too much comfort in these remarks. I have imposed sanctions for abusive conduct where I feel it is warranted.

What would you most like to see trial lawyers do differently or better when they appear before you?

I would like to see practitioners be much more cost conscious both in the interests of the client and of the judicial system. When multiple attorneys show up at trial for the same party, it can be a tremendous waste of resources. One good trial attorney at counsel table is almost always all that is necessary to adequately represent the interests of the client. I am offended by the client who shows up with an army of attorneys.

I also would like to see less filing of motions that are not truly dispositive of the case, such as Rule 12 motions. These usually just serve to educate the opposition because the Ninth Circuit is very liberal concerning the opportunity to amend. The better approach is to conduct discovery and then bring a motion for summary judgment if it is warranted and appropriate.

Motions to reconsider magistrates' discovery orders—that is certainly something I would like to see a lot less of.

I also would like to see much less hostility with opposing counsel. Hardball litigation is a dinosaur which, hopefully, also soon will be extinct.

In general, what I have heard from clients, and from business people in general, is that they absolutely abhor the waste and needless expense of litigation. Lawyers who protract litigation with extra motions, abusive discovery and the like are turning the clients off. Clients are demanding litigation budgets in advance to control costs. More and more clients are refusing to pay for the cost of litigation which exceeds these budgets.

Before litigation is commenced, or before the answer is filed, all counsel should engage in a serious cost/risk/reward analysis with the client, especially in commercial cases. In personal injury cases, 95% settle; they are easy to settle. Commercial cases should be approached in the same way, at least as far as settlement goes. Go to ADR. Call the other side and try to settle the case early on before the war begins. You are not required to wait until the courthouse steps to settle a case. Sophisticated business people will appreciate getting to the bottom line early. I believe that all trial lawyers have an obligation to explore settlement early and often. ♦

The *Shell* Decision: Rejection of Extrinsic Evidence

Long trials on insurance policy interpretation have become commonplace in the last decade. In cases involving liability coverage for asbestos and pollution claims, judges have listened to months of extrinsic evidence on form policy provisions to determine whether those provisions are ambiguous. The appellate courts are now rejecting this approach, as evidenced by the recent decision in *Shell Oil Co. v. Winterthur Swiss Insurance Company*, 12 Cal. App. 4th 715 (1993), *modif.*, 13 Cal. App. 4th 1066d.

Charles R. Hartman

In *Shell*, the Court of Appeal ignored virtually all of four months of extrinsic evidence and thousands of exhibits presented to the trial court on insurance policy interpretation, choosing to interpret the policies based on their "plain meaning." The parties and numerous other insureds requested that the Supreme Court accept the *Shell* case for review because the policy provisions at issue are central to dozens of pollution coverage cases pending around the State. The Supreme Court denied review and did not depublish the decision. The *Shell* "plain meaning" approach to insurance policy interpretation is likely to be the standard for future coverage actions.

Shell involved claims by Shell against hundreds of liability insurers (as a practical matter, the liability insurance industry) from the 1940's to the 1980's for more than one billion dollars to pay for environmental cleanup at the Rocky Mountain Arsenal in Colorado and the McColl Dump near Fullerton. The California Supreme Court has held that many such cleanup costs may be covered under liability policies in *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807 (1990).

The key rulings in *Shell* concern limitations on insurance coverage for pollution cleanup: the standard for determining whether the insured "expected" property damage and what constitutes a "sudden" release of pollutants, as those terms are used in insurance policies.

If the insured "expects" or "intends" that its acts will cause property damage, there is no coverage under general liability policies. The issue which *Shell* resolved was whether the standard for determining that the insured "expected" property damage is objective, based on what a "reasonable insured" would have expected, or subjective, based on what the insured actually expected. Proving what an insured actually expected is typically done by inference from circumstantial evidence, and is therefore more uncertain than applying a "reasonable insured" standard to the same circumstantial evidence. No extrinsic evidence was offered at trial on the issue of whether the word "expected" had a subjective or objective standard. The trial court in *Shell* adopted the objective standard and instructed the jury accordingly.

The Court of Appeal reversed, holding that "the ordinary and popular meaning of 'expected' in the context of Shell's [liability] policies, is not ambiguous.... the ordinary and popular meaning of 'expect' connotes subjective knowledge of or belief in an

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event's probability." 12 Cal. App.4th at 746. The Court noted that the meaning of "expected" did not include "should have known," because a person at most "should have expected," rather than "expected," the event. The Court further held that "expected" is not limited to absolute certainties, but includes a belief that an event is "highly likely" to result from the insureds' actions. *Id.*

In contrast to interpretation of "expected," extrinsic evidence was presented on the meaning of a "sudden" release of pollutants. Starting in 1970, many domestic insurance policies have excluded coverage for pollution unless the release of the pollutants is "sudden and accidental." *Shell* contended that "sudden" was ambiguous and could mean an "unexpected" release. The insurers contended that the "sudden" necessarily includes a temporal component and the release must therefore be abrupt. Curiously, only a small number of the liability policies actually issued to Shell contained "sudden and accidental" pollution exclusions; most policies either used or followed form similar to pollution exclusions in policies issued by Lloyds of London which generally require a "sudden, unexpected and unintended happening" for coverage.


Charles E. Wheeler

The trial court held that "sudden" means abrupt. Not even mentioning the existence of extrinsic evidence, the Court of Appeal affirmed. The Court interpreted the policy language in its ordinary and popular sense and interpreted "sudden" in the context of its use in the policy. The Court noted that dictionary definitions of "sudden" include "unexpected" as a definition. The Court then held that limiting sudden to unexpected "strips the word of a significant facet of its ordinary meaning...'sudden' necessarily contains a temporal component..." 12 Cal. App.4th at 754. The Court further noted that the term, "accidental," includes both "unexpected" and "unintended," and that, when read in context with "accidental," "sudden" would be superfluous if its meaning was limited to "unexpected." 12 Cal. App.4th at 755.

The *Shell* decision does not resolve all insurance policy interpretation issues concerning pollution claims. In particular, the issue of when property damage occurs, referred to as the trigger of coverage, was not addressed. Many of the remaining policy interpretation issues, however, will turn on individual facts of each pollution claim.

What *Shell* does represent is the decisive judicial rejection of virtually all extrinsic evidence on policy interpretation issues in favor of judicial interpretation of policy provisions. The decision should mark the end of lengthy court trials on insurance policy interpretation which threaten to consume unacceptable amounts of judicial resources. In retrospect, this development was inevitable.

The advent of long trials on insurance policy interpretation was the result of two forces. The first was the Supreme Court's statement in *Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 39 (1968), that "[t]he fact that the terms of an instrument appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms. That possibility...exists whenever the parties' understanding of the words used may have differed from the judge's understanding." If the trial court follows PG&E, the judge is virtually forced to listen to whatever extrinsic evidence the parties present to show their understanding of the insurance policies.

The second force was the changing nature of the insurance claims being litigated in the courts. Most appellate law on insurance policy interpretation historically has been made in cases involving coverage for individuals. For example, the "classic" case on the duty to defend is *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263 (1966), which arose out of a suit against the insured for assault. The classic "bad faith" cases typically involve denial of benefits under first party coverages such as medical or disability insurance, *e.g., Silberg v. California Life Ins. Co.*, 11 Cal. 3d 452 (1974). These cases usually involved relatively small amounts of money, except the threat of punitive damages.

In contrast, many of the cases now reaching the appellate courts are brought by Fortune 500 companies against their insurers. Millions of dollars of insurance coverage are often at stake. Business insureds hire sophisticated law firms who bombard the trial courts with novel arguments and extrinsic evidence in an attempt to show ambiguities in their clients' insurance policies which should be construed against the insurers to provide coverage.

Extrinsic evidence on policy interpretation is very appealing to the insureds' lawyers because it is essentially one-sided. Ambiguities are ordinarily construed against the insurer, so the insurer has little incentive to introduce any extrinsic evidence. In addition, the insured's attorneys can always argue that extrinsic evidence shows that a provision is ambiguous, even if the appellate courts have already interpreted the provision as a matter of law. This very argument was made, and emphatically rejected by the Fourth Appellate District, with respect to the *Shell* interpretation of the "sudden and accidental" pollution exclusion. *ACL Technologies, Inc. v. Northbrook Property & Casualty Insurance Co.*, 93 Daily Journal D.A.R. 10877, Cal. App. 4th (August 24, 1993).

The use of extrinsic evidence to distinguish existing appellate decisions on insurance policy interpretation threatens the functioning of a judicial system based on precedent. If ambiguities in the interpretation of the same insurance policy provisions must be litigated in every case, appellate law becomes meaningless and the trial courts will be swamped with endless, repetitive trials simply because of the amount of money at stake.

Starting in 1990, the California Supreme Court has attempted to restore order by establishing rules of insurance policy interpretation. The *Shell* decision follows the Supreme Court approach closely. Leaving the *Shell* decision "on the books" is a strong signal from the Supreme Court that the *Shell* method of judicial interpretation is the proper approach for trial and appellate courts alike.

The key Supreme Court decision is *AIU Insurance Co. v. Superior Court*, 51 Cal. 3d 807 (1990). There, the Supreme Court set forth the rules of insurance policy interpretation:

> "[T]he mutual intention of the parties at the time the contract is formed governs interpretation. [Civ. Code § 1636.] Such intent is to be inferred, if possible, solely from the written provisions of the contract. [Civ. Code § 1639.] The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular,' sense unless 'used by the parties in a technical sense or a special meaning is given to them by usage' [Civ. Code § 1644], controls judicial interpretation. [Civ. Code § 1638.] Thus, if the meaning a layperson would ascribe to the contract language is not ambiguous, we apply that meaning."

51 Cal.3d at 821-22

The Court then addressed the extrinsic evidence issue:

> "In the absence of evidence that the parties, at the time they entered into the policies, intended the provisions at issue here to carry technical meanings and implemented this intention by specially crafting policy language, however, we see little reason to depart from ordinary principals of interpretation."

Id. at 823. Such evidence virtually never exists for form insurance policy language.

The Supreme Court specifically rejected extrinsic evidence of "unilateral" admissions of the insured (an internal memorandum) and the insurers (briefs filed in other cases) as "immaterial" to the intent of the parties at the time of contracting. (*Id.* at 823, n.9.)

In *Bank of the West v. Superior Court*, 2 Cal.4th 1254 (1992), the Supreme Court further refined the interpretive process by requiring that insurance language be read in context and by application of the policy to the circumstances of the case. At issue was whether the term "unfair competition," as used in general liability policies, included statutory "unfair competition" as defined in Business & Professions Code § 17200. At stake was whether general liability coverage would extend to misrepresentations by financial institutions such as failed savings and loan associations.

The Supreme Court held that, as used in the context of the policy as a whole, the term "unfair competition" was limited to common law claims. 4 Cal. 4th at 1265. The Court noted that, in the abstract, the term could include statutory unfair competition. However, because the insurance policy covered only "damages" that the insured was liable to pay, the policy could not be construed as embracing statutory unfair competition, for which the remedy would be restitution, not monetary damages.

The *Shell* decision strictly follows the policy interpretation approach used in *AIU* and *Bank of the West*. The decision of the Supreme Court not to disturb this policy when it declined to accept *Shell* must be seen as implicit approval of the approach taken by the Court of Appeal in *Shell*.

—Charles R. Hartman and Charles E. Wheeler

ABTL's 1994 Seminar Slated for October

Mark your calendars for ABTL's 1994 seminar. It will be held in Hawaii from October 13 to October 18. Details will be announced next year.

This year's seminar will focus on business litigation from the judicial perspective. Scheduled for October 15-17 at the La Quinta Resort in Palm Springs, the program will focus on bench trials with an emphasis on the differences between state and federal approaches to case management.

For further information, contact Kim Wardlaw, this year's Program Chair, at (213) 669-6380.

The Impact of *Daubert v. Merrell Dow Pharmaceuticals*

The U.S. Supreme Court has signalled a significant change in the standard governing admissibility of expert evidence. In *Daubert v. Merrell Dow Pharmaceuticals*, U.S. Supreme Court, No. 92-102 (June 28, 1993), the Court rejected the long-established rule of *Frye v. United States*, requiring that expert scientific testimony be based on scientific principles that had gained "general acceptance" in the relevant scientific community.

Finding that the Federal Rules of Evidence supplanted the rigid standard established in *Frye*, the Court adopted a "flexible approach" requiring consideration of several factors, of which "general acceptance" is only one. The Court assigned to district court judges the "gatekeeping" responsibility to ensure that expert scientific testimony is not only relevant but reliable. The standard enunciated in *Daubert* is more consistent with the current approach of California state courts which, although purporting to follow the *Frye* rule, actually employ a more flexible approach.

Michele G. Wein

The plaintiffs in *Daubert* were born with serious birth defects which they alleged were caused by their mothers' ingestion of an anti-nausea drug, Bendectin, marketed by Merrell Dow. Merrell Dow removed the case to federal court on diversity grounds and then moved for summary judgment contending that plaintiffs could not establish causation. In support of its motion, Merrell Dow submitted an affidavit from a well-credentialed epidemiologist and physician who stated that he had reviewed all of the scientific literature on Bendectin and birth defects (more than 30 published studies involving more than 130,000 patients) and that no study had found Bendectin to be a teratogen (a substance capable of causing malformations in fetuses). The expert concluded that maternal use of Bendectin had not been shown to be a risk factor for human birth defects.

Plaintiffs opposed Merrell Dow's motion with the testimony of eight experts who concluded that Bendectin could cause birth defects. Plaintiffs' experts based their conclusions on "in vitro" (test tube) and "in vivo" (live) animal studies; chemical structure analysis (showing that Bendectin has a similar structure to other teratogens); and a "reanalysis" of the previously published epidemiological studies that had been reviewed by Merrell Dow's expert.

The district court granted summary judgment for Merrell Dow, finding that plaintiffs' experts' testimony was inadmissible because it was not based upon principles that were generally accepted. The district court reasoned that, because there was a vast body of epidemiological data concerning Bendectin, expert opinion that was not based on that epidemiological evidence was not admissible to establish causation.

The district court held, moreover, that the epidemiological "reanalysis" was not admissible because it had neither been published nor subject to peer review. The Ninth Circuit, citing *Frye*, upheld summary judgment. The court concluded that plaintiffs' experts' opinions were based on methodology that

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Daubert v. Merrell Dow Pharmaceuticals

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diverged significantly from the procedures accepted by recognized authorities in the field and, as such, could not be shown to be generally accepted as a reliable technique. The Ninth Circuit further noted that the reanalyses were unpublished, not subjected to peer review and were generated solely for use in litigation.

The U.S. Supreme Court granted certiorari and held that *Frye's* "general acceptance" test was an austere standard at odds with the "liberal thrust" of the Federal Rules of Evidence. The Court observed, however, that the Federal Rules of Evidence, particularly Rule 702, place limits on the admissibility of purportedly scientific evidence. Rule 702 provides, "If scientific, technical or other specialized knowledge will assist the trier of fact..., a witness qualified as an expert...may testify thereto in the form of an opinion or otherwise."

Justice Blackmun, writing for the majority, held that it is the responsibility of the trial judge to ensure that any and all scientific testimony or evidence admitted is not only relevant but reliable. The Court, at footnote 9 of its opinion, observed that "reliability" does not have the same meaning in science and law. The Court pointed out that scientists distinguish reliability (i.e., does application of the principle produce consistent results?) from validity (i.e., does application of the principle support what it purports to show?); whereas evidentiary 'reliability' (in a case involving scientific evidence) will be based on scientific validity.

The Court identified the task of the trial judge when faced with a proffer of expert scientific testimony: At the outset, pursuant to Rule 104(a), the trial judge must determine whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. According to Justice Blackmun, "scientific" implies a grounding in the methods and procedures of science. "Knowledge" connotes more than subjective belief or unsupported speculation—it applies to any body of known facts, or ideas inferred from such facts or accepted as truths on good grounds.

The Court concluded that the trial judge must make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue." Then, while declining to set out a definitive checklist or test, the Court offered the following general observations that the district court should consider in making its preliminary assessment:

- Whether the theory or technique can or has been tested;
- Whether the theory or technique has been subjected to peer review and publication (noting that the fact or lack of publication in a peer-reviewed journal is relevant but not dispositive);
- The known or potential rate of error of the technique and the existence and maintenance of standards controlling the technique's operation; and
- "General acceptance" can have a bearing—widespread acceptance can be an important factor because a known technique that attracts only minimal support from the relevant community may properly be viewed with skepticism.

The Court emphasized that the inquiry under Rule 702 is a "flexible one" and that its "overarching subject is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission." The Court directed that the focus must "be solely on principles and methodology, not on the conclusions they generate." The Court concluded by advising the district courts that, in assessing a proffer of expert testimony under Rule 702, they should also be mindful of other applicable rules: Rule 703 (expert must rely on data or facts that are of a type reasonably relied upon by experts in that field); Rule 706 (court has discretion to choose its ow expert); and Rule 403 (evidence can be excluded where its probative value is outweighed by unfair prejudice or confusion).

Thus, while expressly declining to establish a definitive test and urging that the trial court's inquiry under Rule 702 is a "flexible one," the Court's "general observations" will no doubt emerge as a four-factor test with litigation ensuing over the meaning of and weight to be accorded the various factors.

The impact of *Daubert*, of course, has yet to be seen but confusion appears certain. Indeed, Justice Rehnquist, in his dissent, expressed concern that requiring district judges to determine whether the proffered testimony is "scientific knowledge" and concomitantly whether "it can be tested," unfairly imposed upon them the role of "amateur scientist."

Nonetheless, what is clear is that litigators will have to grapple with the fact that they must assist the trial judge in his or her gatekeeping role. The following are some strategies to consider:

- Request an *in limine* hearing to decide the issue of admissibility;
- Prepare your expert, including preparation of the expert's written reports if applicable, with *Daubert's* "general observations" in mind;
- Remember, even if the testimony meets the newly articulated *Daubert* standard, other evidentiary rules may als prove useful.

The impact of *Daubert* in California state court practice may be less dramatic. The California Supreme Court in *People v. Kelly*, 17 Cal.3d 24 (1976), explicitly relied on *Frye* in ruling on the standards of admissibility of expert voice-print evidence in a criminal case. In *Kelly*, the court established a three-prong approach: (1) the technique or method must be reliable (i.e., the technique must be sufficiently established to have gained "general acceptance" in the particular field in which it belongs); (2) the expert must be qualified as an expert on the particular topic; and (3) a showing must be made that the correct scientific procedures were used.

The *Kelly-Frye* rule, like the new *Daubert* standard, focused on reliability, and a factor in the reliability equation is the notion of "general acceptance." It should be noted, however, that the validity of *Frye* has not gone unquestioned in California. The validity of "*Kelly-Frye*" outside the criminal context has been questioned as has whether it is limited to "new" scientific methods of proof. *Daubert* may provide some guidance to the California state courts in their resolution of these issues.

In sum, given the increasing impact of technology in our lives, courts continue to be confronted with issues such as those reflected by the fact that exposure to certain drugs cause cancer, whether DNA testing can identify fingerprints and the like. Scientific evidence will be an important component of many trial lawyers' practice.

While the standard established by the *Frye* court may now be considered rigid and archaic, that same court's recognition of the issue is perhaps truer today than it was in 1923: "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable is difficult to define. Somewhere in the twilight zone the evidential force of the principle must be recognized...."

—Michele G. Wein

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by the People as their expert in the litigation. Relying on the court's inherent power to curb abuse and promote fair process, the Court of Appeal held that the trial court's order precluding the defendant from controverting the People's expert evidence was not an abuse of discretion, since, by entering into the merger during the pendency of the litigation, the confidentiality of the People's relationship with its expert was irreparably compromised. *Id.* at 288-292.

The *Peat, Marwick* court found "ample support" for the preclusion order in cases where law firms and/or experts were disqualified to prevent unfair advantage or to avoid "the appearance of impropriety." 200 Cal.App.3d at 289. It seems the court essentially presumed that, because of the expert's continuing and long-standing relationship with the other side, it was "inconceivable" that confidential information had not been exchanged. 200 Cal.App.3d at 292. Whether, however, the "appearance of impropriety" standard would be applied in cases where the expert does not have a long-standing relationship is unclear.

When seeking to retain an expert who has been informally contacted by the other side, you should ascertain the circumstances of the prior contact before you retain the expert. In particular, focus on whether the expert was formally retained, or was privy to confidential information. Attempt to ensure that the expert's past relationship with opposing counsel will not present any problems (including requiring that the expert not discuss any of the opinions he provided to the other side), and consider promptly disclosing his retention to opposing counsel. That way, opposing counsel will have no excuse for delaying in bringing a motion to disqualify the expert, and if such a motion is brought, the issue will be resolved before you invest substantial resources in the expert.

As for the attorney who seeks in good faith to consult with an expert and to establish a permanent confidential relationship, even if the expert is not subsequently used as an expert witness at trial, the decisions make clear that the attorney should first make this intention unmistakably clear and confirm it in writing. Second, counsel should include in the writing an explanation of the consultant's confidentiality obligation as well as confirmation of payment and all terms and conditions. Third, work product communications to the expert should be prominently labeled as such.

—Scott A. Edelman and Vivienne A. Vella

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Sexual Harassment Litigation: The Best Defense is a Pre-Existing Offense

The best way for an employer to avoid liability in sexual harassment litigation is often a strong offense taken well before a complaint is ever filed. That type of "offensive defense" includes both general measures to prevent the occurrence of illegal conduct and staunch corrective action as soon as any specific problem arises.

In California, this approach is reflected in recent legislation, effective January 1, 1993, aimed at strengthening the Government Code § 12940(h) prohibition against sexual harassment in the workplace. New Government Code § 12950 requires employers to inform their employees as to what constitutes illegal sexual harassment, to establish and publish a policy containing an effective internal complaint procedure, and to explain the possibility of seeking remedies by filing a complaint with the California Department of Fair Employment and Housing ("DFEH"). Employers must now display a revised DFEH poster and distribute to each employee either a DFEH fact sheet concerning sexual harassment or the employer's own version containing information specified in the new law.

Edith N. Dinneen

While some employers may think that the DFEH publication goes beyond what is technically required by the statute, the underlying requirement of establishing and announcing a policy against sexual harassment, along with an explanation of how an employee may seek the employer's help in correcting any problems, should assist employers in avoiding, or, if necessary, defeating a sexual harassment claim in litigation.

There are two types of sexual harassment claims: (1) *quid pro quo* and (2) hostile environment. With the first type, submission to sexual demands is made a requirement for obtaining a job benefit such as promotion, salary increase, or even just job retention. In the second type, unwelcome verbal, visual or physical conduct of a sexual nature unreasonably interferes with an employee's ability to perform the job or otherwise creates an intimidating or offensive work environment.

It should be noted that non-sexual harassment of employees because of their gender is technically not sexual harassment. Nevertheless, it may be actionable as plain gender discrimination prohibited by federal and state law. *See Hall v. Gus Construction Co.*, 842 F.2d 1010 (8th Cir. 1988) (intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances).

While most complaints are made by female employees concerning conduct by heterosexual males, the law's protections are not so limited. Unwelcome sexual behavior is prohibited regardless of whether it is heterosexual in nature. In fact, Labor Code § 1102.1 expressly prohibits discrimination

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against employees on grounds of actual or perceived sexual orientation. It is also irrelevant whether the victim is the boss or the subordinate. *See Cronin v. United Service Stations, Inc.*, 809 F. Supp. 922 (M.D. Ala. 1992).

Moreover, the culprit can be male or female. In May, 1993, a Los Angeles County Superior Court jury of ten women and two men unanimously awarded more than $1 million in damages and lost wages to a male employee who alleged that the employer's chief financial officer and director of personnel, who was female, had persistently sexually harassed him and the employer failed to respond to his complaints. *Gutierrez v. California Acrylic Indus. d/b/a/ Cal-Spas*, Case No. BC 055641.

To prevail on a hostile environment claim, a plaintiff must now meet a "reasonable victim" standard set forth in California Government Code § 12940(h)(1). This standard requires a determination that a reasonable person of the same gender as the plaintiff would have considered the disputed conduct to be sufficiently severe or pervasive as to create a hostile working environment. *See also Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (same standard under federal law).

Although in some jurisdictions plaintiffs must prove they suffered specific psychological injury, there is no such requirement under California law or federal law in the Ninth Circuit. *See Ellison, supra*, 924 F.2d at 878, n.1. Government Code § 12940 also expressly states that the plaintiff does not need to prove the actual "loss of tangible job benefits."

Numerous cases highlight the importance of presenting evidence of an employer's pre-existing and well publicized policy confirming its commitment to a workplace free of sexual harassment, explaining an employee's right to complain to appropriate officials and to have the complaint investigated promptly and effectively, and warning that appropriate discipline (up to and including possible termination of employment) would be imposed for any proven act of sexual harassment.

The existence of such a policy is especially critical in cases involving claims based on the conduct of the plaintiff's peers or co-workers where the employer would normally be held liable if it had direct or circumstantial knowledge of the conduct and failed to take necessary corrective measures. Gov. Code § 12940(h)(1); 2 Cal.Code Regs. § 7287.6(b)(3). In California, even if the employer was not aware of the co-worker's conduct, it may be charged with notice, and thus held liable, unless it can prove that it took reasonable steps to prevent the harassment by means of publishing its policy, providing sensitivity training, and other prophylactic measures. 2 Cal. Code Regs. § 7287.6(b)(3).

With respect to harassment by managers and supervisors, the existence of a sexual harassment policy would not directly affect California's strict liability standard. 2 Cal. Code Regs. § 7287.6(b)(2). However, it would presumably improve the employer's trial posture for purposes of avoiding or minimizing punitive damages with regard to related common law tort claims such as assault, battery, intentional infliction of emotional distress or wrongful discharge in violation of public policy.

In addition to evidence of a pre-existing policy, a successful defense should include proof that the employer's response to the specific incident or situation of sexual harassment met certain standards. Any complaint must be investigated promptly, thoroughly, impartially and as discretely and confidentially as possible. Once the relevant information has been obtained, the employer must decide whether there has been sexual harassment and, if so, what to do about it.

An employer may find that a claim is either not supported by the evidence or that the evidence is inconclusive, such as whe the alleged conduct occurred without witnesses and there is no circumstantial or other evidence which would tip the scale or create suspicions about either party's motivations. In such situations, the employer should explain the outcome to both accuser and accused. Aggrieved employees who are made to believe that an employer took their concerns seriously and did what it could for them are less likely to insist upon pursuing litigation. A complainant should have at least the satisfaction of knowing that the employer reaffirms its commitment to having a workplace free of sexual harassment and has reminded the accused of that commitment and the importance of strict adherence to company policies.

If the investigation reveals that there has been sexual harassment, the employer must take appropriate action to provide a remedy for the victim and punish the wrongdoer. The remedy should go as far as possible to make the victim whole. If a boss withheld a salary increase because the employee rejected sexual advances, the employee should receive the increase retroactively. And while it may not be possible to bump an innocent employee out of a specific promotional position, every effort should be made as soon as possible to find another appropriate opportunity for a victim who was wrongfully denied a promotion. The victim should be consulted as to whether a transfer is advisable to separate the accuser and accused, and any suc separation should be made without penalty to the victim.

In terms of punishing the accused, the Ninth Circuit requires that an employer's response be "reasonably calculated to end the harassment." *Ellison, supra*, 924 F.2d at 882. It must also be of "disciplinary nature." *Intlekofer v. Turnage*, 973 F.2d 773, 779 (9th Cir. 1992). While the employer should aim to make the punishment fit the offense, if it later appears that the imposed discipline has not succeeded in eliminating the illegal conduct, the employer must institute more severe disciplinary measures commensurate with the duration of the harassment. *Id.* at 780. Unless there is a compelling need to publicize the details of the punishment, they should be kept as confidential as possible to minimize the risk of a defamation action by the accused, whose rights as a potential plaintiff should always be kept in mind. *See, e.g., Garziano v. E. I. DuPont de Nemours & Co.*, 818 F.2d 380 (5th Cir. 1987).

Efforts to avoid litigation should not end with imposition of the punishment, however. A prudent employer will check periodically to confirm that the resolution has been effective. It will also be mindful of the prohibition against retaliation in federal and state law. 42 U.S.C. § 2000e-3; Cal. Gov. Code § 12940(f); 2 Cal. Code Regs. § 7287.8.

The benefits from successfully handling an incident of sexual harassment could be significantly diminished if the accuser is thereafter demoted, denied promotions, ostracized, or adversel treated in other ways not based on job performance or other legitimate business reasons. Such conduct could embroil the employer in litigation involving not only the initial sexual harassment but also statutory retaliation and related common law claims. *See, e.g., Davis v. Tri-State Mack Distributors, Inc.*, 981 F.2d 340 (8th Cir. 1992).

—Edith N. Dinneen

Cases of Note

Class Actions

In the long-awaited *Mirkin v. Wasserman*, 5 Cal. 4th 1082 (Sept. 9, 1993), the Supreme Court ruled that the fraud-on-the-market doctrine cannot be applied to satisfy the reliance element of an action for deceit. The decision was a significant defeat for class action plaintiffs. As a practical matter, each member of a large plaintiff class likely could not establish the requisite individual reliance. The court found that defrauded investors were adequately protected through remedies available under federal law.

Insurance

In *ACL Technologies, Inc. v. Northbrook Property & Cas. Ins. Co.*, 93 Daily Journal D.A.R. 10877 (Aug. 24, 1993), the California Court of Appeal, Fourth Appellate District, held that the 'pollution exclusion' in general liability insurance policies unambiguously bars coverage for gradual discharges of hazardous waste. The court held that an exception to the exclusion, applicable to 'sudden and accidental' discharges, did not apply to gradual discharges. Significantly, in so holding, the Court refused to consider evidence of the drafting history of the policy. This portion of the decision may have far-reaching implications as litigation regarding the construction of insurance policies frequently focuses on industry statements and other evidence of drafting history. (*See, e.g., Maryland Cas. Co. v. Reeder*, 221 Cal.App.3d 961 (1990).)

Denise M. Parga

Insurance

In *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins.*, 5 Cal. 4th 854 (Aug. 12, 1993), the State Supreme Court sharply narrowed the potential for contending that multiple wrongful acts by an insured give rise to multiple claims—and thus multiple policy limits. Overturning a decision by a California Court of Appeal, the Court held that, for purposes of an attorney malpractice insurance policy, only one claim was presented where a lawsuit was filed against an attorney who committed multiple errors in representing a client. The attorney had been representing a general contractor who was owed money for its work on a construction project. He recorded a mechanic's lien, but failed to serve a stop notice on the project's construction lenders and failed to file a complaint to foreclose on the lien. As a result of these two separate errors, the contractor was unable to collect the money that it was owed. The attorney's professional liability insurance policy provided coverage up to policy limits of $250,000 per claim.

The Court held that there was only one claim where the policy provided that, "Two or more claims arising out of a single act, error or omission or a series of related acts, errors or omissions shall be treated as a single claim." The court concluded that the contractor's suit against his attorney asserted "one primary right—the right to be free of negligence by its attorney in connection with the particular debt collection for which he was retained." Further, the Court held that the errors at issue were related in many respects, as they arose with respect to the same client, they were committed by the same attorney and resulted in the same injury, loss of the debt.

Employment Law

A California Court of Appeal held that a whistle blower can sue for wrongful termination in violation of public policy, even if he never tries to report his employer's wrongful conduct to authorities. *Holmes v. General Dynamics Corporation*, 17 Cal.App. 4th 1418 (Aug. 18, 1993). The court held that the employee's communications with his supervisor concerning the company's violations of law were sufficient to support his claim, even though he never reported the conduct to government officials. It was enough that the employee conveyed the information in a form which would reasonably alert his employer of the nature of the problem and the need for corrective action.

Insurance

The Court of Appeal granted a rehearing in *County Sanitation District No. 2 v. Harbor Ins.*, 1993 Cal.App. LEXIS 947 (Sept. 16, 1993). The original opinion of August 20, 1993 held that, where there is continuing, progressive property damage, such as a landslide or other soil subsidence, the correct trigger of liability in a third party liability case is not the time of occurrence but the "manifestation" of property damage. Thus, insurers on the risk before damages were manifest had no duty to defend.

Vivian R. Bloomberg

Civil Procedure

In *Houghtaling v. Superior Court*, 17 Cal.App. 4th 1128 (1993), the Fourth Appellate District held that, in a proceeding conducted under the Small Claims Act (Code of Civil Procedure Sections 116.110 et seq.), including a trial de novo in superior court, relevant hearsay evidence is admissible subject only to the limitations of Evidence Code Section 352 and the law of testimonial privileges.

Insurance

In *Slottow v. American Cas. Co.*, 93 Daily Journal D.A.R. 10024 (Aug. 16, 1993), the Ninth Circuit provided guidance regarding the allocation of the costs of defense an indemnity under a directors and officers liability insurance policy. The litigation arose from an agreement settling litigation against a bank and one of its officers under an agreement allocating 96% of the liability to the officer, who was insured, and only 4% to a holding company, which was not insured. The court held that the appropriateness of the relative liability of the defendants should be determined in accordance with their proportional share of the comparative liability under *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal.3d 488, 499 (1985). Under this standard, it is necessary to ascertain whether the allocation reflects a good-faith estimate of the relative liabilities of the parties at the time of the settlement. 93 D.A.R. at p. 10026.

Civil Procedure

Johnson-Stovall v. Superior Court, 17 Cal.App. 4th 808 (1993). The Fourth Appellate District Court of Appeal held that, where a litigant fails to post jury fees in a timely manner, a motion for relief from waiver should be granted unless there is a showing of prejudice to the party opposing the jury trial.

Civil Procedure

In *Campisi v. Superior Court*, 93 Daily Journal D.A.R. 10941

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Letter from the President

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To protect the litigant's legitimate business concerns while fostering liberal discovery, stipulated protective orders are often entered into so that the party producing documents or providing information can have some assurance that sensitive documents and information will not be widely distributed. These orders have been filed for many years in civil litigation, and they appear to have done more good than harm. They allow for the relatively speedy production of documents without stopping to litigate the "confidentiality" of each and every document before it is produced.

California law expressly contemplates that commercially sensitive information may be provided subject to the entry of an appropriate protective order. The fabric of the discovery process would be strained if the court adopted a local rule creating a high standard for entry of protective orders, without changing broad rules of discoverability.

Given that a variety of documents and data subject to discovery merit protection from redisclosure, it is simply impractical in many large and even medium-sized cases for the parties to present to the court for review on a "document by document" basis (as the proposed Rule suggests) the documents that the producing parties think should be designated "confidential" under the order. I doubt that the Superior Court judges will have the time to review numerous documents or make the particularized evaluations that the proposed rule seems to require. It is not a satisfactory solution for the Superior Court judge who is too busy to undertake this review to refer the parties out to expensive referees for this purpose.

It is not only defendants in civil litigation who are concerned about the distribution of their documents and information outside of the case. Occasionally, plaintiffs, including plaintiffs in personal injury cases where medical records are produced, seek to limit the redisclosure of private information regarding individuals. This is also a legitimate aim that should not be thwarted by an unworkable and overly stringent rule.

Finally, it should be noted that the present procedure does not render all documents secret without recourse. Consistent with California law, stipulated protective orders generally provide that parties may challenge a litigant's designation of a document as "confidential." Once such a challenge is raised, the party resisting disclosure has the burden of persuading the court that it merits protection.

The Court's News Release announcing proposed Rule 9.68 states that its purpose is "to discourage secret settlements." Obviously, the rule goes far beyond addressing secret settlements. It attacks the use of protective orders that limit the redisclosure of commercially sensitive information. If the Court intended to discourage secret settlements, suitable language could be drafted for that purpose that would not inhibit appropriate protective orders limiting redisclosure of commercially sensitive information sought in discovery.

By joining ABTL, the readers of *ABTL Report* have demonstrated their dedication to providing the best possible representation to business clients. To further the interests of these clients, I urge you to provide comments on this controversial rule to the Honorable Robert M. Mallano, Chief Judge of the Los Angeles Superior Court, although the formal comment period has ended.

—Bruce A. Friedman

Cases of Note

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(Aug. 25, 1993), the Court of Appeal held that a trial court may rely on information disclosed during settlement discussions to determine whether a case should be transferred from Superic to Municipal Court.

Bankruptcy

The Ninth Circuit held in *In re Suffola, Inc.*, 93 Daily Journal D.A.R. 10795 (Aug. 23, 1993) that transfers to an outside creditor within one year before a bankruptcy petition is filed are avoidable under 11 U.S.C. § 547(b) if they benefit an insider-guarantor. In so holding, the Ninth Circuit affirmed the District Court's finding that a transfer was preferential.

Insurance

In *Searles v. Cincinnati Insurance Company*, 998 F. 2d 728 (9th Cir. 1993), the Ninth Circuit held that a bad faith action brought by an insured against the insurer is not a "direct action" within the meaning of 28 U.S.C. § 1332(c)(1). Thus, an insured can sue an insurer in federal court on the basis of diversity jurisdiction.

—Denise M. Parga and Vivian R. Bloomberg

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