As ABTL enters its nineteenth year, the time is ripe for assessing our organization, its accomplishments, and its goals for the future. That this assessment takes place at an unsettled time for our profession is an understatement.

In this election year, one party's national convention has seen lawyer bashing elevated to an art form (and business trial lawyers can take little solace that much of the ammunition was directed at “tort” lawyers — we practice tort law too!). At the same time, we face a funding crisis on the state and local levels which threatens, in a way not within recent memory, the very operation of our judicial system. And if that were not enough, we face major challenges on how to conduct our litigation practices in the face of a troubled economy and increasing client demands for higher quality services at lower costs.

Before considering how ABTL can best serve its members in light of these legal/political storms and storm warnings, it is essential to remember the growth and present strength of ABTL. Founded by a small group of foresighted litigators in 1973, the Association has grown into one of the preeminent trial lawyers associations in the state. The central idea of ABTL's founders was sound: that business trial lawyers have interests and concerns unique to their practices, separate and distinct from lawyers engaged in other kinds of trial work, and that our business trial practices are enhanced by participation in an organization devoted exclusively to concerns of the business litigator.

(Continued on page 4)

Getting Visual Information Before the Jury in the Opening Statement

Your goal is simple: to make your opening statement as credible and persuasive as possible. To do so, you plan to integrate visual material with your oral statement. But what will your trial judge allow?

Twelve local judges answered that question (their views are summarized on page 3). This article provides a summary of the applicable law, together with steps you can take to improve your ability to get visual information before the jury.

A Valuable Persuasive Aid

You can place persuasive and credible information before the jurors at their most impressionable moment by using visual aids in the opening statement. The importance of the opening statement has been documented repeatedly by studies finding that 80 to 90 percent of jurors reach their final decision by the conclusion of the opening statement. (Donald E. Vinson & Robert F. Hanley, Do Not Ignore This Opening Statement, Litigation, Winter 1989, at 1, 2, 54 and 55.) Jury researchers have found that jurors are inclined to reach a view on the case as quickly as possible. The opening statement is generally the first opportunity to create that view. Jurors then try to fit the evidence presented into the view they have already formed and will resist changing their overall view. Consequently, persuading the jurors in the opening statement can give your client an important advantage.

Visual information in the opening statement can be invaluable in building credibility, simplifying positions, and communicating facts. There can be no better way to build the credibility of your statement of your opposing party’s position than to show the jury that position in a blow-up of a letter signed by your opponent.

Jury research has shown that jurors tend to view statements in documents as facts, not as mere evidence of a fact.

Visual aids can simplify your message as well. A graph showing profits turning to losses contemporaneously with the defendants’ tortious conduct communicates in one glance causation and damage arguments that could only be conveyed orally with much more effort and attention.

Finally, an oral statement combined with visual aids can be expected to communicate more effectively than an opening state-
The Law — Good News and Bad

The first step in planning exhibits is to consider the law that the judge will rely on in deciding whether to allow the visual presentation. The good news is that all reported decisions, both California and Federal, have upheld the trial court's decision to permit the use of a visual presentation in opening statement.

The bad news is that the issue is very much in the discretion of the trial judge. Consequently, it is impossible to predict with certainty whether a particular visual aid will be usable.

The California Code of Civil Procedure specifies the right of both litigants to make an opening statement in Section 607, but does not delineate what is permissible in an opening statement. No California Rule of Court addresses the issue.

Only two reported California decisions have dealt with the use of visual aids in opening statement. In both People v. Groom, 47 Cal.2d 209, 215 (1956), and People v. Kirk, 43 Cal.App.3d 921, 929 (1974), the trial court permitted the use in the opening statements of diagrams and maps that were not admitted into evidence at the time of the opening statement. In both cases, the visual aids were received in evidence during the trial.

On appeal, the California Supreme Court and Court of Appeal found no error in the trial court's decision to allow use of the visual presentations in the opening statements. Neither court had to reach the issue of whether it would have been reversible error to have allowed the use of a visual aid that never came into evidence. Nonetheless, the California Supreme Court commented that "even where a map or sketch is not independently admissible in evidence it may, within the discretion of the trial court, if it fairly serves a proper purpose, be used as an aid in opening statements." 47 Cal.2d at 215.

On the other hand, in the California Judge's Benchbook, Civil Trials, § 3.10(8), judges are advised that visual or demonstrative evidence should not be permitted in opening statement unless it has been pre-admitted into evidence.

The Los Angeles Superior Court Civil Trials Manual § 37.1 prohibits use of charts, photos and other graphic devices in opening statements except when the device has been pre-admitted into evidence, stipulated to, or "when leave of court has first been obtained." No further standard is set forth for when leave should be granted. Blackboards and paper for illustrative purposes may be used in opening statements with prior approval of the court (§ 37.2).

T

Additional steps to overcoming objections include early preparation of visuals and early disclosure to opposing counsel with supporting information. This information should be designed to eliminate foundation objections or make them appear to the judge to be weak objections. Despite the position taken in the California Judge's Benchbook, a number of judges are willing to allow visuals in opening statement in the face of unresolved foundation objections. Consequently, minimizing the force of foundation objections should enhance your chances of being able to use the visual in opening statement.

Finally, consideration should be given to preparing in advance multiple versions of visuals. This may avoid the problem of the court sustaining an objection to one aspect of a visual immediately before the opening statement starts and then barring any use of the entire visual because that one aspect cannot be removed before the opening statement must be given.

—Laurence D. Jackson
Closing Argument In Perspective

A theme is one of the most important elements of the presentation of your case at trial. It is a thread of logic and motivation that is introduced in your opening statement, drawn through the evidence and confirmed in your closing argument. It is the product of the application of an understanding of human nature to your analysis of the issues and evidence and should be chosen carefully to appeal to the logic and instincts of the jury. Properly selected and presented, it can cause the jury, however carefully it abides by the continuing admonition to form no opinions until the conclusion of the case, to want to accept your side of the issues. Juries, and judges as well, want to be fair and won't be particularly impressed by arguments and evidence that don't cause them to feel that the conclusion you are urging is fair. Nevertheless, too many attorneys forget this very human decision-making process and focus on issues and details that fail to appeal to a sense of fairness.

Use your opening statement and use it effectively. It is not limited to a sterile recitation of expected testimony but may be a full discussion of the evidence and the issues and, thus, can be an effective introduction to your theme which, in turn, should be the beginning of a process that can predispose the jury to your position.

Advance your theme through the evidence. Admittedly, most cases are adventures in which the evidence will sometimes alternately disappoint and surprise you but the consistency of your theme should never be an adventure. It's not always possible to present your evidence chronologically, or in an uninterrupted and narrative manner, because of conflicts in the schedules of witnesses and the court. The facts are often complex and the documentary evidence voluminous and the latter is often presented, either by stipulation or by testimony, without sufficient explanation of its relevance. The sheer volume and length of documents may obscure their relevance and importance, but your theme is the lifeline you've given the jury, and if you remain focused in relating your evidence to it, the jury will have a much greater opportunity to progress with you to the desired conclusion.

It may have been at one time that closing arguments were a distinct, and nearly separate, part of the trial process — a show of brilliance by the orators of the day. In today's world of complex litigation, the opportunities for oratory may be less, but the opportunities for persuasion are perhaps greater because the knowledge gained through discovery permits greater predictability in the evidence and the opportunity to begin selling the logic and appeal of your theme to the audience from the beginning.

If you believe that juries really do not form any opinions on the merits of the case until it has finally been submitted to them, your closing argument may still represent an isolated and last opportunity to persuade. If you believe, as many do, that juries have at least some, if not all, of these attributes, the outcome they seek, the closing argument becomes the last, albeit highly important, step in the process of persuasion.
Closing Argument in Perspective
Continued from Page 3

persuasion. It is the opportunity for you to provide the logic to the jury which will help it justify what you have caused it to want to do, to assure that the evidence has been received in the proper perspective and to confirm your credibility for having delivered what you promised.

To accomplish this, remember that you must retain the jurors' interest in your case and in what you say. To the extent that you failed to do so in the presentation of the evidence, your client's chances of success are diminished, and to the extent you fail to do so in your closing argument, any chance of success could be lost.

Such lost opportunities are often due to a lack of focus in the argument, a failure to limit the details, and a simple failure to entertain. Don't let the other side cause you to lose the impact of your case — bring the theme to a conclusion. In doing so, remember that juries can't possibly retain the details that you've spent several years mastering. Concentrate on the points important to your theme and the evidence that is important to those points. A few clear and concise well-documented arguments will be far more effective than multiple points that drown in detail.

Above all, however, understand that you have an audience to sell. Attorneys are so often eager for the fight, and driven by the need to prevail over their opponent, that they forget to communicate on levels that have meaning to the jury. As a group, they perform a most difficult function, spending day after day listening, but not participating, and often listening to evidence that is repetitive and not readily understandable. No wonder a jury's collective attention span deteriorates. If your closing argument is more of the same, you lose the effect of what you attempted to build by the evidence.

Talk with them, not at, or to, them. Entertain while you make your points, and the points will often make themselves. Remember the story of Peck, employed as a cook. Floating by. The cook testified that he told his captain about it a day later.

In his closing argument, the attorney for the insurance carrier, knowing that the outcome of the case rested on the cook's credibility, directed against mere argument to attack the veracity of the person who didn't bother to report the mysteriously missing Peck until a day later. Instead, the attorney set out a trash can in front of the jury, took out a potato from his pocket and began to peel it as he whistled a tune. Looking out of an imaginary porthole he exclaimed, "What is this? If it isn't my old friend Peck. I must tell the Captain about that tomorrow. For now, I'll just peel my potatoes." No further argument was necessary.

At least in general terms, you should have prepared and rehearsed your closing argument before trial as it will assist you in developing the focus on where you're going and how you're going to get there. Throughout the trial, continue to rehearse in your mind the changes and refinements that are necessary to reflect the record so that you make the adjustments necessary to arrive at the conclusions that you gave the jury at the beginning. As you do this, your argument takes its final form at the conclusion of the evidence, remember that the best argument rarely takes as long as the lawyer thinks it should as your case should have sold itself. Confirm your theme, polish it to give the jury logical reasons to do what you have caused them to want to do, and sit down. Your job is done.

— Hon. William A. MacLaughlin

Letter from the President
Continued from Page 1

Building on this central idea (and long before MCLE) ABTL put its main focus on educational programs, which have expanded to bimonthly dinner meetings and multi-day annual seminars. Our educational programs continue to draw first-rate attorneys and judges as faculty and attract larger crowds than ever. These programs justifiably enjoy a reputation as the best of their kind anywhere.

We have also succeeded in fostering a collegial atmosphere in which our members, both junior and senior, can exchange views and experiences with each other, and with judicial officers from the state and federal bench. Speaking for myself, these personal, informal interchanges stand out in my memory as some of the best experiences with ABTL. And we continue, of course, to serve our members and the legal community by publication of ABTL Report, now a well-recognized publication celebrating its 15th Anniversary, presently under the superb leadership of its editor, Vivian Bloomberg, and other able volunteers.

ABTL has also been active in supporting the justice system, particularly those programs impacting business litigators and their clients. From the outset of the Trial Delay Reduction program in Los Angeles County, ABTL has supported the efforts of "fast track" judges to make the program work, and has actively participated in a Bench-Bar Committee that meets regularly to address concerns of both judges and trial lawyers over operation of this program. ABTL members also serve regularly as settlement officers in the highly successful Joint Association Settlement Officer program (JASOP). The Association's support of the judiciary has been reciprocated, with judges serving on our Board, participating actively in our legal education programs, and attending our dinner meetings.

These core activities of ABTL have made our organization successful. Surely the most telling affirmation of the "ABTL idea" was the founding of the hugely successful Northern California ABTL in 1991, to be followed by a San Diego ABTL this year. But in these tumultuous times, are the traditional ABTL activities enough? Or, immediate past President, Mark Neubauer, thought not, and put new emphasis on ABTL Committees, covering subjects such as Legislative Analysis, Trial Delay Reduction, Alternative Dispute Resolution, Experts, Federal Courts, Insurance and In-House Counsel Relations. These Committees give more of our members an opportunity to participate actively in ABTL and I will strongly support their work this year.

Looking at the history of ABTL, however, it must be said that the Association has had little impact on one major area affecting our members' practices: legislation and rule-making affecting business litigation. Significant legislative developments have been enacted, virtually without input from — and sometimes without the knowledge of — ABTL as an organization or its members individually. The Curius legislation (Civil Code Section 2860) enacted in 1987, the 1983 summary judgment statute amendments, and the major changes in California's discovery statute are just a few examples that come to mind. Even more recently, ABTL had little voice in the 1991-92 effort to enact major legislation mandating certain Alternative Dispute Resolution procedures in all state court actions. (Although the legislation failed to pass, it is sure to reappear in modified form.) And, California Rules of Court continue to be proposed and promulgated, affecting matters of concern to us all, such as private-judging and ADR, without meaningful input from ABTL.

My own view is that ABTL must become more involved in legislative and rule-making process. But we must approach this involvement with recognition of the diversity of our membership. ABTL has never been a close-knit group of like-minded lawyers, as perhaps we imagine the plaintiff's personal injury bar to be. Diversity is one of ABTL's strengths, with active members from large
firms, small firms, and sole practitioners, from lawyers who sue insurance companies and those who defend them, from plaintiffs' class action lawyers and members of the business defense bar. In short, there is no "profile" of a "typical" ABTL member other than "business trial lawyer."

At the same time, I believe ABTL does represent a membership that has much in common. Our clients, whether plaintiffs or defendants, want their days in court. They want prompt adjudication. They want qualified, motivated judges who care. And they want judges with the time and energy to deal with complex cases of critical importance to the business community. Moreover, many of our clients, while favoring voluntary ADR techniques for quick and cost-effective dispute resolution, resent being pressured — subtly or not so subtly — into a parallel justice system where their cases are decided, but at the litigants' expense.

Major forces are at work in today's society that directly impact our professional lives and the interests of our clients, and I believe that ABTL should no longer treat these developments — particularly those in the legislature and the Judicial Counsel — with benign neglect. The need for an ABTL voice is perhaps most dramatically illustrated by the current crisis in the funding of our judicial system. While ABTL's voice may be small when compared with larger, better financed bar associations, I believe it should be heard in support of a system which, with its faults, remains essential to our economy and our system of government.

By this column I would ask for the views of our members on the role ABTL should play in this important arena. Let me have your thoughts!

—Richard R. Mainland


discuss the issues that can arise in designing and conducting ADR. The faculty of distinguished jurists and trial lawyers will include the Hon. Malcolm M. Lucas, Chief Justice of the California Supreme Court, as well as the Hon. H. Walter Croskey, 2d District Court of Appeal; Eli Chernow, Los Angeles Superior Court; Edward Stern, San Francisco Superior Court; and John J. Zebrowski, Los Angeles Superior Court.

Three teams of trial lawyers will conduct a mini-trial. Before the trial begins, each team will reveal its strategy and a panel of experts will discuss ways to maximize insurance benefits for your client. After the trial concludes, it will be used as the foundation for a settlement conference.

For further information, contact Chrystal Council at (310) 839-3954 or Rose Korkos at (213) 626-3399.

Making Things Stick in Arbitration: Res Judicata and Collateral Estoppel

Res judicata precludes relitigation of claims or causes of action which were actually raised, or which could have been raised, in a prior proceeding. Collateral estoppel precludes relitigation of specific issues actually decided in a prior proceeding. Both present unique problems in the arbitration context.

First, it is often difficult to determine the exact nature of the claims and issues decided in arbitration proceedings. Arbitration rules typically require that the parties file only limited, "bare bones" claims describing the underlying dispute. Hearings and testimony are not transcribed unless one or more of the parties undertakes to pay for a reporter. Arbitrators are permitted, and sometimes encouraged, to decide cases without making specific findings of fact. Res judicata and collateral estoppel will apply to an arbitration award, however, only if it is possible to determine which claims were before the arbitrator and which issues he or she decided.

Second, it is often not possible to resolve an entire dispute in a single arbitration proceeding. Parties to the dispute may not be parties to the arbitration agreement. Though they may be joined as parties in related court proceedings, they cannot be compelled to arbitrate. Furthermore, some arbitration agreements may provide for separate arbitration of different parts of a dispute, or arbitration of some parts but not others. Since the decision in the first proceeding to become final may be given res judicata or collateral estoppel effect in later or concurrent proceedings, the choice of where that first decision is made, and the identity of the parties that will be directly bound by that decision, becomes critical.

This article discusses practical ways to make the theories of res judicata and collateral estoppel actually work in the arbitration context.

General Principles


Both doctrines also apply to state judicial arbitrations, where no trial de novo is requested and, as a result, the judicial arbitration award becomes final. State Farm Mutual Automobile Insurance Co. v. Superior Court, 211 Cal. App. 3d. 5, 12-15 (1989).

Finally, both apply to arbitrations under federal law. E.g., C. D. Anderson & Co., Inc. v. Lemos, 832 F.2d 1097, 1100 (9th Cir. 1987). However, federal courts, including bankruptcy courts, have discretion in determining the preclusive effect of arbitration proceedings and may refuse to apply res judicata or collateral estoppel where necessary to "directly and effectively protect federal interests." Hays and Co. v. Merrill Lynch, 885 F.2d 1149, 1158-59 (3d
Strangers to an arbitration proceeding may not assert the res judicata effect of the arbitration award in later litigation brought by or against parties to the arbitration (or persons in privity with such parties). Res judicata prevents relitigation of a claim or cause of action that is "the same" as one already litigated, or one which could have been litigated, in an earlier proceeding. Claims or causes of action involving different parties are necessarily not "the same."" 7 Witkin, Cal. Proc. (3d ed.) "Judgment," §§ 287-297 for a discussion of the meaning of "privity."

Making a Record

If no adequate record exists of the issues and claims litigated in arbitration, relitigation is always a possibility. Res judicata and collateral estoppel apply to arbitration, but only if it is possible to determine which claims and issues the arbitrator decided. Clark v. Bear Stearns & Co., Inc., 92 Daily Journal D.A.R. 7917, 7918 (9th Cir. 1992). Therefore, to make things stick in arbitration, make a record. The best way to accomplish this is to go beyond the minimum requirements of the rules. For example:

- If the rules require only "bare bones" claims, file a more detailed statement of the claim instead.
- In your claim, go beyond a prayer for general monetary relief to request a determination of specific, key factual or legal points (in a manner akin to declaratory relief). An arbitrator's award must "include a determination of all the questions submitted to the arbitrator the decision of which is necessary in order to determine the controversy." Cal. Code Civ. Proc. § 1283.4.
- Request a preliminary hearing or conference with the arbitrator to clarify the issues before trial and memorialize the results in an order or other writing.
- If the stakes justify the expense, pay for a reporter.
- Even though specific findings of fact are not required, explain your need for such findings to the arbitrator and request them anyway. E.g., Clark v. Bear Stearns & Co., supra, 92 Daily Journal D.A.R. at 7919, n.4.
- After the award is handed down, request clarification of the award if necessary. Cal. Code Civ. Proc. § 1284 (sets a 30 day time limit for such motions); Sandoz v. Casale, 125 Cal. App. 3d 707, 713 (1981) (regarding clarification of an award); 9 U.S.C. § 11.
- If all else fails, obtain a post-award declaration from the arbitrator if he or she will provide one. Extrinsic evidence, including the affidavit of the arbitrator, is admissible to show what matters were submitted for decision and were considered by the arbitrator. Sapp v. Barenfeld, 34 Cal. 2d 515, 523 (1949); Santor v. Superior Court, 136 Cal. App. 3d 322, 327 (1982).

Procedural Strategies

A final decision reached in one forum may be given res judicata or collateral estoppel effect in later litigation in another forum. Therefore, it is sometimes good strategy to seek a stay of litigation in one forum until an issue or claim is resolved in another.

To utilize a favorable arbitrator's decision in a court proceeding seek a stay of the related court litigation pending the final outcome of arbitration proceedings (permitted under Cal. Code Civ. Proc. § 1281.4; 9 U.S.C. § 3).

Similarly, to utilize a judicial decision in a related court arbitration, seek a stay of the arbitration pending the final court decision.
Because arbitration is preferred, however, an arbitration rarely will be stayed. California Code of Civil Procedure § 1281.2 allows such a stay, but only where the other court litigation involves issues that are not subject to arbitration, and the resolution of those issues may make arbitration unnecessary. Federal law does not have a similar statute, but such stays have been granted. E.g., Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) (federal court may order stay of federal suit seeking in deference to parallel state court litigation, but only if there are exceptional circumstances justifying surrender of federal jurisdiction).

Note, however, that a state court’s order staying arbitration may be preempted by the Federal Arbitration Act if the dispute involves interstate commerce or some other ground for federal jurisdiction. The Energy Group v. Liddington, 192 Cal. App. 3d 1520, 1526 (1987); Cf Volt Information Sciences, Inc. v. Board of Trustees, 489 U. S. 468, 478-79 (1989) (no preemption, however, where parties contracted that their arbitration agreement would be governed by law of state where stay is issued).

To make things stick in arbitration, if possible, join all parties who should be bound by the decision. In order to obtain a single final decision which will be given preclusive effect, separate arbitrations may also be coordinated through consolidation or even class action procedures. Cal. Code Civ. Proc. § 1281.3 (consolidation). Keating v. Superior Court, 31 Cal. 3d 584, 606-614 (1982) (class arbitrations) (partially reversed on unrelated grounds in Southland Corporation v. Keating, 465 U.S. 1 (1984)).

Finally, potential indemnitors may be bound to the terms of an arbitration award if they received notice and had an opportunity to appear and defend. Cal. Civ. Code § 2778(5) and (6); 14 Cal. Jur. 3d. (3d ed. 1985) “Contribution and Indemnification,” §§ 70 and 71. See also Universal American Barge Corp. v. J. Jhem, Inc., 946 F. 2d 1131, 1138-1140 (5th Cir. 1991) (the common law practice of “vouching” a potential indemnitor into an arbitration, by giving notice and an opportunity to defend in order to bind the indemnitor to the terms of the award).

Conclusion

Arbitration does not have to become a process “so convoluted in the course of time that no man or woman alive could hope to sort it out,” as the Ninth Circuit recently described its potential. Clark v. Bear Stearns & Co., Inc., supra, 92 Daily Journal D.A.R. at 7917. With some careful planning and quick scrambling, you can make things stick in arbitration through the application of res judicata and collateral estoppel.

—Joseph S. Dzida

Factors Relevant to Evaluating
Current Employee Discharge Claims

With the current state of the economy, many employers find it necessary to cut operating costs by eliminating unnecessary expenses. Because the largest expense found in the budget of most businesses is personnel and payroll expenses, it is not surprising that employers are choosing to reduce costs by eliminating unnecessary positions or, in some cases, implementing company wide reductions in force (“RIFs”). Such staff reductions are generally accepted as lawful and permissible exercises of managerial discretion. See, e.g., Schneider v. TRW, 839 F.2d 886 (9th Cir. 1988); Malstrom v. Kaiser Alum. & Chem. Corp., 187 Cal.App.3d 299, 314-15 (1986).

However, even economically motivated discharge decisions are not immune from potential “wrongful termination” liability. There are a number of factors which experienced labor attorneys often look to in evaluating whether the decision to lay off or discharge an employee is subject to successful challenge:

1. Replacement of the Discharged Employee: Courts generally do not view it as within their province to second guess how employers spend their money. For this reason, legitimate decisions to eliminate staff through layoffs and RIFs are generally not subject to challenge. However, if there are temporary fluctuations in demand for the employer’s product or services such that the employer hires a replacement to perform the same (or substantially similar) duties as those that were performed by the laid off employee, the issue arises as to whether the layoff/discharge decision was truly appropriate and necessary.

In such circumstances, the plaintiff-employee’s lawyer may argue that hiring a new employee to perform the duties that were supposedly unnecessary is flatly contrary to the articulated justification for the discharge — to save money by cutting payroll costs. Hiring a replacement also creates a “fairness” (or, conversely, “bad faith”) argument which generally manifests itself in the question, “Why didn’t the employer offer to re-hire the laid off employee?”

Lawyers representing plaintiff-employees should also look to whether the employer merely “shuffled the deck” at the time of the layoff by, for example, transferring existing employees to take over the duties performed by the laid off employee, and hiring new employees to replace the “transferred” or “promoted” existing employee.

2. Number of Affected Employees: The current recession provides most employers with an easy to understand justification for terminating employees — the need to “reorganize” through elimination and consolidation of positions. As noted above, the courts generally find this entirely lawful. Thus, if the prospective client is one of a large number of employees who has been selected for layoff, the burden of establishing “pretext” may be so insurmountable that it makes no practical sense to pursue a “wrongful discharge” claim. On the other hand, if the prospective client is the

(Continued on page 8)
only employee who was selected for layoff, the reasons for that
subjective determination may be scrutinized and challenged (i.e.,
why was that employee selected to be laid off as opposed to some
other employee with less experience, qualifications or seniority?).
When such triable issues of fact exist, the case becomes one that
can withstand summary judgment which, of course, gives it en-
hanced value.

courts look to the written policies and handbooks of the employer
and construe the promises and representations contained in them
to be contractual in nature. See, e.g., Foley v. Interactive Data
Corp., 47 Cal. 3d 654, 681-82 (1988) (stating that an agreement to
limit the grounds for termination may be inferred from the employer's
personal manual or policies); Hejmadi v. AMFAC, Inc., 202 Cal.
App. 3d 525, 541 (1988); Burton v. Security Pacific Nat. Bank,

Surprisingly, very few employers have written policies
regarding layoffs and reductions in work force. If such
written policies are contained either in employee handbooks or in
general operating policies (even those not actually distributed to
employees), an issue regarding breach of "express" or "implied"
contract may arise if the employer fails to satisfy the standards
articulated in those policies. Such provisions when excerpted from
the employer's handbook make wonderful jury exhibits. The plain-
tiff can have them blown up on 4' by 6' posters with highlighting to
mark the promises that were not fulfilled.

4. Existence of a Protected Classification: Various state and
Federal statutes protect employees from discrimination on the
basis of protected classifications such as race, ancestry, religion,
national origin, physical handicap, gender, age, medical condition or
marital status. In light of the elimination of tort damages to remedy
routine employment discharges (see Foley v. Interactive Data
Corp., supra, 47 Cal. 3d at 663, 700), lawyers representing the
plaintiff-employee should examine whether potential statutory
discrimination liability may be present. Such claims may add substan-
tial value to the case through the availability of emotional distress
damages and punitive damages under the newly-enacted Civil Rights
See Commodore Home Systems Inc. v. Superior Court,
32 Cal. 3d 211, 220-21 (1985).

5. Length of Employment: Obviously, the longer an employee's
tenure, the more likely it is that termination may be viewed as
unfair. Juries are often sympathetic to the 15-year or 20-year
employee who, despite years of dedicated service, suddenly finds
himself or herself unemployed and faced with the prospect of
locating a new job in this economy.

6. Employee's Performance History: The Foley decision reaf-
irmed the principle codified in Labor Code Section 2922 that all
employment in California is presumed to be "at will" unless the
parties have reached some other agreement. In practice, an "at will"
defense has not provided much protection for employers from
wrongful discharge suits ever since the 1981 decision in Pugh v.
See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917
(1981). There, the court articulated several factors from which the
existence of an implied contractual obligation to not terminate
without "good cause" may be found to modify the original terms of
the employment agreement. Plaintiff's lawyers may rely on Pugh in
arguing that, even though the original employment may have been
"at will," there subsequently arose an implied "good cause"
requirement.

As noted above, economic layoffs and RIFs generally satisfy a
"good cause" standard. However, most businesses typically suffer
from the inability of their supervisory and managerial level employ-
ees to document cases of non-performance by their subordinates.
This often creates disputes about whether the plaintiff-employee
was ever counseled or warned about the "performance problems"
which the employer claims were the reasons for (or a factor in)
the decision to select that particular employee for layoff or discharge.

7. What Did the Employee Sign? If an employee signed an
express "at will" acknowledgment during the course of his or her
employment providing that the employment could be terminated
"at any time, for any reason," and that no contrary arrangement
could be entered into "without an express written agreement signed
by an authorized officer of the company," any breach of contract
claim may be precluded by the parol evidence rule. This issue
often depends on whether the writing signed by the employee was
an "integrated" document. See, e.g., Malstrom v. Kaiser Alumni &
Chem. Corp., supra. Such "at will" acknowledgments provide no
defense, however, to claims for statutory discrimination or "wrong-
ful termination in violation of public policy."

8. What Did the Employer Say? To the extent that the employee
was promised certain things at his initial employment interview or
during the course of his employment which turn out to be untrue,
the employee may assert a claim against the employer for fraud,
negligent misrepresentation and, of course, breach of contract.

What management tells the discharged employee when
he or she is informed of that decision may also influence
the potential exposure of the employer. If a supervisor tells the
employee that he or she is being terminated because the position is
being "eliminated," it is natural to expect that no one else will
occupy that position now or in the future. However, if someone else
is hired to fill the same position a few months later, the discharged
employee will believe that the employer lied about the reasons for
termination. Thus, the employee could have a basis for contending
that the articulated justification was but a "pretext" and the "real
reason" was unlawful discrimination.

9. Ability to Sustain Burden of Proof: Some of the best cases
on their face end up being disposed of through summary judgment
if the employee cannot come forward with documents or other
witnesses to corroborate his position. A knowledgeable plaintiff's
lawyer will not find particularly appealing a case that boils down to
his client's word versus the employer's word since the employer can
generally offer several witnesses to support the company's position.
Thus, employees who are well liked amongst their peers are often
best situated as prospective plaintiffs in employment disputes.
They can produce other witnesses to substantiate the broken prom-
ises and representations allegedly made to them.

10. Public Policy Concerns: Since the Supreme Court defined
the tort cause of action for wrongful termination in violation of
public policy in Tannery v. Atlantic Richfield Co., 27 Cal. 3d 167
(1980), it has been important to ask whether there is a possibility
that the motivation for the layoff/discharge decision was to silence
a whistleblower — that is, to stop an employee from reporting unlaw-
ful activities of the employer.

11. Plaintiff's Economic Damages: Generally, most employees
who consult a lawyer in connection with a possible wrongful dis-
charge suit want the attorney to take their case on a contingency
fee basis. Obviously, the emotional distress and punitive damage
that may be available to the successful plaintiff as remedies for
discrimination or public policy claims are impossible to predict or
quantify with any degree of certainty. Because many employment
cases settle for some measure of lost wages and benefits, it is
important to examine the prospective client's provable economic
Joel Mark gives the impression that the employer just doesn’t care about the lawsuits are may create liability issues in employment layoff or discharge cases. Unfortunately, even experienced plaintiffs’ lawyers can be duped into accepting representation based on the one-sided story painted by his client. For this reason, it is critical that counsel explore whether there may be some “hidden agenda” behind the prospective client’s interest in securing legal representation in an employment lawsuit.

All employment cases are different and require analysis on a case-by-case basis. This article highlights some of the factors that may create liability issues in employment layoff or discharge cases. It is important to remember it does not provide an exhaustive list of other considerations unique to the particular employment situation.

—Barry B. Kaufman

The Anti-Competition Clause in the Legal Context

Across the United States, practitioners of almost every business and profession may agree to be bound by, and will be held to, reasonable contractual restrictions on the conduct of their business or profession after their withdrawal from a business or professional partnership to compete against their former partners. See Business Torts Reporter, Vol. 4, No. 5, pp. 147-148. Only attorneys are exempt from such restrictions. In California, Rules of Professional Conduct, Rule 1-500, renders unenforceable any partnership or other agreement expressly restricting an attorney from practicing law upon withdrawal from a law partnership. Moreover, two recent California Appellate decisions have considered the question of whether Rule 1-500 also voids withdraw-and-compete restrictions in attorney partnership agreements which do not expressly prohibit competition, but which involve only economic disincentives such as forfeiture of partnership benefits in the event of subsequent withdrawal to compete.

In Haight, Brown & Bonesteel v. Superior Court, 234 Cal.App.3d 963 (1991), the Second District Court of Appeal held that economic forfeiture clauses in law partnership agreements are permitted under Business and Professions Code § 16602, in the same general manner as they are appropriate with respect to other business and professional partnerships, and concluded (as virtually a singular voice against a sea of opposite authority) that a clause in a law partnership agreement which provided for the forfeiture of certain economic benefits by any partner who withdraws to compete does not violate Rule 1-500 unless it is proven as a matter of fact that the forfeiture is so significant that it operates to prohibit the withdrawing partner from all future practice.

An opposite result was then reached by the Fourth District Court of Appeal in Howard v. Babcock, 5 Cal.App.4th 1561 (1992). In a decision accepted for review by the State Supreme Court, the Fourth District held (consistent with the vast majority of other jurisdictions) that any forfeiture of economic benefits, upon withdrawal from a law partnership to compete, violates Rule 1-500 as a matter of law. As Justice Sonenshein wrote for the Court: “For several reasons, we believe Haight is wrong... Lawyers cannot be treated the same as business people or other professionals.”

This article dares to ask, along with the Haight Court: Why not?

The central premise upon which the Howard decision is based is that the business of lawyering is entirely different from all other economic pursuits. Justification is invoked from no less a preeminence than Abraham Lincoln, who observed in perhaps a more pastoral time in our history, that lawyers, unlike any other group of professionals, have only their time and advice as “stock and trade.” Lawyers cannot be compared with other professionals, such as doctors and accountants, because they can sell no goodwill, and

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because of the "personal and confidential relationship existing between [lawyer] and...client [which] places...a [law] partnership in a class apart from other business and professional partnerships." Apparently, any economic disincentive visited upon withdrawing partners would so profoundly impinge upon the rights of clients to choose their lawyers that all such provisions are void as against public policy as a matter of law.

The courts, denying enforcement of withdraw-and-compete forfeiture clauses in law partnership agreements, have not failed to recognize that the remaining partners have legitimate economic reasons to enforce such clauses; but, these courts nevertheless have denied enforcement because they have concluded that such clauses would place an impermissible chill upon the right of the client to choose counsel, a right which is said to far outweigh the legitimate economic interests of the remaining partners (see, e.g., Cohen v. Lord, Day & Lord, 75 N.Y.2d 96, 550 N.E.2d 410 (1989), and because the firm has no protectable property interest in its clients which the court can enforce (see, e.g., Williams & Montgomery, Ltd. v. Stellato, 195 Ill.App.3d 544, N.E. 2d 1100 (1989)).

The rationale for denying enforcement of withdraw-and-compete forfeiture clauses against attorneys is well-intentioned and appealing, especially to the departing lawyers; but, is it any longer consistent with modern economic realities affecting the legal profession?

In an era when lawyering is more and more practiced as a business, are lawyers in fact "a class apart" from all other professionals who provide personal and business services to their clients? Other professionals bring to their practices the same notion of "professionalism" as do members of the legal profession; clearly, lawyers have no monopoly on nobility in their professional pursuits. The ethical obligations which physicians embrace, such as their Hippocratic oath, require them to refrain from abandoning their patients, just as legal ethics prohibit abandonment of clients by lawyers. Clients of other professionals, such as doctors and psychologists, also enjoy by law a "personal and confidential relationship," just as they enjoy with members of the legal profession. Evidence Code §§990, 1010. Neither do other professionals have any greater "stock and trade" than do lawyers; all essentially are in service businesses and attract clients as much by their personal skills and reputations as by any other means. And, can it be argued seriously that the personal and business pursuits which bring clients to other professionals, such as doctors, accountants and architects, are somehow less important as a matter of law than the affairs for which legal advice is sought. In fact, they most often are the identical pursuits.

Recent economic changes affecting the business of practicing law also have brought about changes in the laws regulating lawyers, which changes have recognized that lawyers are not "a class apart" from other professionals. In at least one jurisdiction, the District of Columbia, attorneys now are accorded a limited right to be in partnership with non-lawyers. California permits non-lawyers to own stock in law corporations, and several other jurisdictions also permit non-lawyers to be officers or shareholders of professional law corporations, including Illinois, Oklahoma, Washington and Kentucky.

It also is interesting that some of the same courts which have refused to enforce withdraw-and-compete forfeiture clauses against lawyers nevertheless have recognized in numerous other contexts that lawyers are not that much different from other professionals. Goodwill in a law partnership was recognized in In re Marriage of Green, 213 Cal.App.3d 14 (1989). Attorneys for some time have been subject to a statute of limitations similar to other professionals (see Neel v. Magano, 6 Cal.3d 176 (1971)) and, consistent with other professionals generally, lawyers recently have been held liable for emotional distress caused by their negligence (see Juday v. Ronzoni, 226 Cal.App.3d 1571 (1990)) and have seen their self-regulatory ethical canons become admissible as evidence of their negligence. (Compare Mirabito v. Licardro, 232 Cal.App.3d 96 (1992), with Wilhelm v. Pray, Price, Williams & Russell, 186 Cal.App.3d 1924 (1986).)

If there is any trend in all of this regulatory and judicial activity, it would appear to be away from the notion that lawyering is "a class apart" from other service businesses, not toward it.

Furthermore, is the client's right to effective counsel really violated by withdraw-to-compete forfeiture clauses?

In Lincoln's day, when lawyering was more the noble profession than its critics would give it credit for today, and when a state such as Illinois may have had only 50 lawyers, perhaps every lawyer was unique. No doubt lawyering remains an honorable profession and litigators, in particular, are the last of the great knights in service to justice. But if there has been one palpable change in the profession in the last 20 years it is the proliferation of these knights to a staggering number.

Lawyers seemingly outnumber practitioners of almost all other professions. Clients are seldom left without alternatives when it comes to selecting a lawyer.

Additionally, even if the clients' choices are affected adversely, do the rights of the clients of the withdrawing partner truly outweigh the economic rights of the remaining partners so as to justify their entire nullification?

While the right to effective counsel is a fundamental right, the right to a particular lawyer is not.

Avoidance of the appearance of impropriety, even in the absence of an actual conflict of interest, has denied many clients the representation of the first counsel of their choosing. See, e.g., Truck Ins. Exch. v. Fireman's Fund Ins. Co., 92 Daily Journal D.A.R. 690 (1992). In the area of insurance defense, Civil Code §2860(c) limits the insured's choice of counsel by limiting the hourly fees that insurers must pay to independent counsel. What is that limitation if not an economic disincentive which limits the right of the insured to choose particular counsel?

A final premise invoked in support of decisions such as Howard is that, if the courts permit restrictions upon the withdrawing partner, they improperly would recognize that the remaining partners have a property right in the firm's clients. In other words, these courts seek to ignore the modern reality that attorneys move from one firm to another by selling their "book of business." The bigger and more portable the better.

Can the courts continue to ignore the double detriment suffered by the remaining partners? They not only lose the withdrawing partners' clients, but also the opportunity to accept representations adverse to those clients.

In fact, neither side in the dissolution has any "right" to the clients. See State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 1985-86; Los Angeles County Bar Association, Formal Ethics Opinion No.
405. The choice should be for the client to make, wholly apart from the economic detriment to either side. Thus, the Haight Court may be correct in concluding that economic disincentives are void only when they are so severe that they operate to prohibit competition upon withdrawal altogether, but not when the impact is merely to cause the withdrawing partner some economic discomfort upon withdrawal to compete.

The Howard case now is before the California Supreme Court when the same issue is currently before New York's highest court. If the issue is considered by these courts, their opinions should address the fundamental question of whether it is appropriate any longer to apply a different standard to the legal profession than to all other businesses and professions.

When any professional withdraws, restrictions on competition will visit some detriment upon the professional's clients. But partnership agreements with such clauses have been upheld and enforced in virtually every other professional setting. Perhaps it is time for lawyers to admit that they are not a class apart from the rest of the business world.

—Joel Mark

Cases of Note

Insurance

CGL insurers won a long-awaited victory in Bank of the West v. the Superior Court of Contra Costa County, 92 Daily Journal D.A.R. 10597 (July 30, 1992). The California Supreme Court ruled that the typical comprehensive general liability insurance policy does not provide coverage for advertising injury claims arising under the Unfair Business Practices Act (Bus. & Prof. Code §§ 17200, et seq.).

The Second Circuit Court of Appeal provided needed guidance regarding the scope of the duty to defend in Montrose Chemical v. Superior Court, 92 Daily Journal D.A.R. 10154 (July 22, 1992). The court held that there is no duty to defend where extrinsic facts conclusively eliminate any potential for coverage, even where the complaint may suggest that potentiality. In so holding, the court rejected decisions which have been interpreted as requiring the insurer to defend if the complaint suggests the basis for a duty, even if factual investigation seemingly eliminates that prospect. (See CNA Cas. v. Seaboard Surety, 176 Cal. App. 3d 1 (1986).)

Discovery Sanctions

Attorneys refusing to extend professional courtesies to opposing counsel in the scheduling of discovery should beware that they may be sanctioned under Code of Civil Procedure § 128.5. The First District Court of Appeal recently affirmed an award of sanctions in Tenderloin Housing Clinic, Inc. v. Sparks, 92 Daily Journal D.A.R. 10397 (July 29, 1992). There, counsel: (1) scheduled three discovery motions to be heard at a time when he knew opposing counsel would be unavailable; (2) scheduled depositions on days when he knew opposing counsel would be out of the country on a long-planned vacation; (3) failed to produce witnesses for depositions after he forced opposing counsel to return from her vacation early to attend depositions; and (4) reset a hearing in violation of a stipulation so that the opposition to the hearing would be due while opposing counsel was out of the country. In upholding the sanctions award (which included the costs incurred by opposing counsel in returning from her vacation early), the court noted that an attorney has an obligation not only to protect his client but also to respect legitimate interests of fellow attorneys. Thus, even if an attorney uses legitimate discovery procedures, but times them to be intentionally inconvenient, he may be sanctioned for harassment under Section 128.5.

Trial Procedure

In Tennal Company, Ltd, v. The Vessel "Hyundai Innovator", 92 Daily Journal D.A.R. 9544 (9th Cir., July 9, 1992), the Ninth Circuit held that the proponent of business records at trial must establish applicability of the business records exception to the hearsay rule by an offer of non-hearsay testimony. During a bench trial at which no live witnesses appeared, the District Court allowed the plaintiff to establish the foundation for numerous business records by submitting two declarations. In reversing judgment in favor of the plaintiff, the Ninth Circuit held that the trial court erred in admitting the declarations (which were themselves hearsay) and the business records.

Attorney Malpractice

In Laird v. Blacker, 2 Cal. 4th 606 (1992), the California Supreme Court held that Code of Civil Procedure § 340.6(a), the one-year statute of limitation for attorney malpractice, is not tolled during the time when a client appeals the underlying judgment on which the claim of malpractice is based. The court rejected plaintiff's contention that the statute of limitations was tolled until her injury (the dismissal) became "irremediable." The court noted that a plaintiff sustains "actual injury" when she suffers entry of an adverse judgment or a final order of dismissal.

Emotional Distress

The California Supreme Court held that a mother can recover damages from her doctor for negligent infliction of emotional distress caused by injuries to her child during labor and delivery. Burgess v. Superior Court, 92 Daily Journal D.A.R. 9608 (July 13, 1992). A mother whose child experienced severe brain damage during labor and delivery sued her attending physician, claiming that the doctor's negligence had caused not only the baby's injuries, but her distress as well. The trial court granted summary adjudication in favor of the doctor, concluding that the mother could not recover as a "bystander" to the injuries under Thing v. LaChusa.

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48 Cal.3d 644 (1989), because she had been under anesthesia when the injuries occurred. The appellate court vacated the adjudication, holding that Zelis was not controlling because the doctor had a preexisting duty to the mother. In allowing the plaintiff to pursue her cause of action, the Court found that the doctor had a preexisting duty to both the mother and the baby and that a doctor's allegedly negligent treatment of a baby during labor and delivery necessarily implicated the mother's participation. Thus, the mother was not required to prove that she was a qualified "bystander."

Liability of Corporate Officer

In Dubravetz v. Pillsbury, Inc., 92 Daily Journal D.A.R. 10177 (July 23, 1992), the Ninth Circuit held that, under California law, a corporate officer may be personally liable for damages in tort to the extent he participated in or otherwise directed the tortious activity. The plaintiff in Dubravetz claimed that the president of Haagen Daz and various corporate entities had violated RICO and the New York Franchise Sales Act and had committed fraud by misrepresenting to the plaintiff the start-up and operational costs associated with the purchase of a Haagen Daz franchise. Although the District Court granted summary judgment to most of the defendants, the Ninth Circuit reversed, finding that there was at least a material issue of fact as to whether Haagen Daz' president knowingly participated in a conspiracy to supply false information to plaintiff about the anticipated profitability and costs associated with the purchase of a franchise.

Punitive Damages

Only July 23, 1992, the California Supreme Court agreed to review the decision of the Court of Appeal in Wallersheim v. Church of Scientology, 4 Cal. App. 4th 1074 (Mar. 20, 1992), to uphold California's procedure for reviewing the propriety of punitive damages and reduce to $2.5 million a $30 million award in favor of the plaintiff, a former Church of Scientology member, for the Church's alleged infliction of emotional distress. (Review granted at 92 Daily Journal D.A.R. 10282 (July 23, 1992).) In Wallersheim, the Court of Appeal, in a case on remand from the United States Supreme Court, noted that California's punitive damage review process complies with Federal constitutional due process requirements in that it requires the reviewing court to examine: (1) the degree of reprehensibility of the defendant's conduct; (2) the relationship between the amount of the punitive damage award and the actual harm suffered; and (3) the relationship of the punitive damage award to the defendant's financial condition.

In Central Pathology Service Medical Clinic, Inc. v. Superior Court, 92 Daily Journal D.A.R. 10744 (July 31, 1992), the California Supreme Court held that the punitive damage limitations set forth in Code of Civil Procedure § 425.13 (a), which are applicable to medical malpractice actions, also extend to intentional torts arising out of the rendition of any medical service. Section 425.13(a) requires a plaintiff claiming damages for a health care provider's alleged professional negligence to obtain an order from the trial court allowing the filing of a punitive damage claim. The statute further provides that such an order will issue only when the plaintiff has proved a likelihood of success on the merits by submission of affidavits showing a substantial probability of success. In so holding, the Supreme Court specifically disagreed Bommaradly v. Superior Court (which had ruled that Section 425.12(a) did not apply to intentional torts).

Professional Liability


Plaintiffs in the case claimed that they relied on audits by Arthur Young & Co. (a Big Six accounting firm that has since merged into Ernst & Young). Regardless of whether the accounting firm was negligent, the Supreme Court held that the plaintiffs were not entitled to judgment because they were not owed a duty of care. Thus, the state Supreme Court reversed a 30-year trend toward increased liability for professionals in California.

The Court carved out two exceptions to the auditor's general immunity from liability to non-clients. First, an auditor can be held liable for negligent misrepresentation to a plaintiff who relies on a report intended to be used in a particular transaction. Second, any reasonably foreseeable third party can sue for intentional fraud.

Torts

In twin decisions, the California Supreme Court held that the assumption of the risk doctrine barred recovery for injuries suffered in a touch football game and a water skiing accident. Knight v. Janott, 92 Daily Journal D.A.R. 11765 (Aug. 24, 1992) (touch football); Ford v. Goevin, 92 Daily Journal D.A.R. 11785 (Aug. 24, 1992) (water skiing). The continued vitality of this doctrine had been questioned in light of the Court's adoption of comparative negligence 17 years ago in Li v. Yellow Cab. The scope of the doctrine is still unclear because of the Court's murky opinion which led Justice Kennard to pen a sharply worded dissent, stating, that the majority effectively abolished the defense without acknowledging that it was doing so. (92 D.A.R. at 11776-77.)

The Court criticized appellate courts which have drawn a distinction between plaintiffs who reasonably encounter a known risk and those who unreasonably encounter such a risk. Instead, the Court instructed that the distinction should be drawn between cases in which the defendant has no duty of care (termed "primary assumption of risk") and those where the defendant owes a duty of care but the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty (termed "secondary assumption of risk"). (92 D.A.R. 11769.)

Where there is primary assumption of risk—that is, where the defendant owes no duty of care—the defense operates as a complete bar to recovery, regardless of whether the plaintiff's conduct was reasonable or unreasonable. Where the defendant owes a duty of care, the case would involve contributory negligence and would be merged into the comparative fault scheme. (Id.)

Sanctions

A substantial sanction of $20,000 was awarded against defendants for attempting to appeal an interlocutory order. Papazakias v. Zelis, 92 Daily Journal D.A.R. 11728 (Aug. 24, 1992). The court required payment of $10,000 to the plaintiff and $10,000 to the clerk of the court to cover costs and for purposes of deterrence. Previously, sanctions of $10,000 had been awarded against the same defendants.

— Mary Lee Wegner