

XXth Anniversary  
Special Edition  
Table of Contents on page 2

# ASSOCIATION OF BUSINESS TRIAL LAWYERS

# abt1 REPORT

Volume XX No. 1

September 1997

## Letter from the President

In writing my first President's Column, I am honored to be in such distinguished company. *abt1 Report*, with this issue, celebrates its 20th anniversary. Next year, our association will be celebrating its 25th anniversary, a mark of distinction in a community in which lawyers change firms and firms change names with a rapidity that would have been unimaginable just two decades ago. Yet, somehow, this purely voluntary association has managed not only to survive, but to prosper and grow over the past turbulent 20 years.



David M. Stern

Looking backward with self-congratulation is appropriate at this time. Surviving amidst the changes that have rocked our profession since 1977 is a cause for celebration itself. However, if the ABTL is to have a future, it must go beyond justifiable pride and nostalgia. The ABTL must ask not only whether it has a future, but why it deserves one. In addressing that question, it must also try to

decide what that future should be. Answering that question requires us to look at what the ABTL is, why it has been successful and where it has been successful.

The ABTL, as the very first name in its title makes clear, is first and foremost an "association." It has, over the past two decades, brought together a mix of individuals, many of whom are involved in business, some of whom are occasionally involved in trials, and the vast majority of whom are lawyers. However, whether belonging in one or all of those categories, the most important decision each member has made is to associate with others who share concerns and ideals. And the ABTL is, most importantly, an association that has permitted and encouraged people who self-identify themselves as part of the business trial bar to associate with one another in an atmosphere of collegiality, cooperation, and ethical practice. It is these qualities, if the ABTL should and will have a future, that will make the ABTL as or more vital in the next 20 years than it has been in the last 20.

Where will the ABTL be in 20 years? Obviously, we do not and cannot know. Twenty years ago, it was possible to talk about lifetime association with law firms as the norm, not the unusual. The notion that New York, Chicago or even San Francisco firms would be a major presence in our market was unlikely. That our "local" firms would have branches not only around the country but

(Continued on page 17)

## Elvis Passes Bar on Mars: Establishes ABTL Chapter (A History of *abt1 Report*)

By Thomas J. McDermott, ABTL President '80-'81

A publication reflects a point of view and there are many to adopt. The *abt1 Report* could have gone the route of our headline, emulating the *Star*, the *Enquirer* or, more recently, the *American Lawyer*. That does seem unlikely, but the *abt1 Report* almost did go another way. This is that story.

The *Report* started mundanely when one of the founders of ABTL asked another founder, me, if we should not publish a newsletter. I agreed. He then outlined a two-page, mimeographed sheet that would announce the meetings. I wish I could tell you truthfully that I replied, "That would be floccinaucinihilipilification." This is not only the longest word in the English language, but with its mellifluous vowels, it conveys the elegance of the publication I was already dreaming of, its obscurity senses some of the intellectual curiosity I hoped to provoke. Also, it means, either "the art of esteeming as unworthy" or "full of sound and fury signifying nothing." I wanted the publication to be neither of those.



Thomas J. McDermott

The reason I give two definitions is that this word does not enter into most of my discourse. It came to my attention when William F. Buckley Jr. published a letter he had received asking if he knew the word, the letter giving the first definition as its meaning. Buckley replied in typical fashion, saying of course he knew the word, it being common on his playground while a child, and giving instead the second definition. The word was not common on my playground; our common words were certainly common, but would have been inappropriate to address to a colleague in those by-gone days of civility.

If I had known floccinaucinihilipilification, I would have used it. Mimeographed sheet, indeed! I had greater plans.

The battle between an inexpensive mimeographed two pages and an expensive publication of some substance was fought in the board room of the ABTL's first directors and the publication you now hold won by only a slim margin.

Here is what we would have missed. It was mid-1976 when we went to press with Vol. I, No. 1. Judge Robert S. Thompson told us: "The master calendar system is a little like penicillin. Once viewed as the miracle cure-all for congestion of metropolitan court systems, the method is now

(Continued on page 17)

The final few manuscripts fell into place on August 25, our "last call" deadline for this special 24-page edition inaugurating the 20th volume year of the *abt* Report. The Letters-cum-essays by 15 former leaders display a galaxy of opinions, reminiscences, reflections, insights and humor on a range of subjects.

The cover page carries our traditional column by the current President — the first by David Stern, who discusses the changes in the legal profession since ABTL's founding in 1977 and the future role of the organization in the Los Angeles legal community. Also on page 1, Tom McDermott, Jr., Founding Editor of *abt* Report, turns his humor and hindsight into an amusing not-so-traditional chronicle of our publication.

The former presidents' articles are presented in the chronological order of their presidency, beginning on page 3 with John Brinsley's comments on recent changes in the area of antitrust regulation and enforcement under California's Unfair Competition Act. Next, Murray Fields reflects on proposals to change the jury system — from trial by ordeal to OJ.

Loren Rothschild then philosophizes on the hazards and joys of book collecting. In "The Future of Patent Law," Laurence H. Pretty notes that the creation of the Federal Circuit Court of Appeals in 1982 led to increased confidence in the patent system, predicting that the next "hot" issue will be the "Doctrine of Equivalents."

Justice Charles S. Vogel details more than a dozen suggestions for attorneys who may be preparing to argue an appeal before him. His remarks cover everything from where to stand to quitting while you are ahead.

In "A Modest Proposal from the Bench," the Honorable Elihu M. Berle encourages the development of a more courteous and professional breed of civil litigators by means of "peer group mentoring." Judge Berle encourages ABTL to support such programs.

Robert A. Shlachter educates us on practicing law in Oregon, where he finds that clients are demanding and attorneys more civil than in Los Angeles.

In "Federal Court: New Rules, Old Problem," Howard O. ("Pat") Boltz, Jr. argues against the proliferation of "Local, Local Rules." Harvey I. Saferstein takes a hard look at the Federal Trade Commission in pursuing its dual mission of regulating antitrust and consumer protection. He concludes that the modern FTC has emerged as a responsible, respected protector of consumer welfare and healthy competition.

Computer chips and on-line services may have eliminated any obvious need for the dusty books that lined library shelves in days of yore. But Mark Neubauer reminds us that the availability of computer research has not eliminated the need for thinking lawyers. Bruce Friedman offers his insights on recent cases construing insurance policies in an "Assault on the Duty to Defend."

William Wegner acknowledges that incivility in the legal profession is on the rise, citing his top ten examples culled from a survey of colleagues and suggesting the State Bar publish anonymous examples of offending conduct for the rest of us to reflect upon.

"On Being a 'Dead' President" is Jeffrey Weinberger's witty proposal for benefits that could be offered to ABTL's past Presidents.

Karen Kaplowitz analyzes "Employment Law in the Twenty-First Century," reviewing the impact that emerging trends — such as the temporary worker, e-mail and voicemail — will have on traditional employment law issues.

All in all, the wide-ranging commentaries from ABTL's past presidents reflect well on the leadership that has fostered a place of reasoned dialogue and high professional standards.

—Vivian R. Bloomberg

	Page
Letter from the President . . . . .	1
<i>By David M. Stern, ABTL President '97</i>	
Elvis Passes Bar on Mars: Establishes ABTL Chapter (A History of <i>abt</i> Report) . . . . .	1
<i>By Thomas J. McDermott, ABTL President '80-'81</i>	
The Resurgence of Antitrust Litigation in California . . . . .	3
<i>By John H. Brinsley, ABTL President '76-'77</i>	
Should the Jury System Be Drastically Altered? . . . . .	4
<i>By Murray M. Fields, ABTL President '77-'78</i>	
Lawyer As Bibliophile . . . . .	5
<i>By Loren R. Rothschild, ABTL President '79-'80</i>	
The Future of Patent Law . . . . .	6
<i>By Laurence H. Pretty, ABTL President '83-'84</i>	
Oral Argument in the Court of Appeal. . . . .	7
<i>By Hon. Charles S. Vogel, ABTL President '84-'85</i>	
A Modest Proposal from the Bench . . . . .	8
<i>By Hon. Elihu M. Berle, ABTL President '85-'86</i>	
Is Practicing Law Different in Oregon? . . . . .	9
<i>By Robert A. Shlachter, ABTL President '86-'87</i>	
Federal Court: New Rules, Old Problem . . . . .	10
<i>By Howard O. ("Pat") Boltz, Jr., ABTL President '87-'88</i>	
The 'Peculiar' FTC: Where It's Been, Where It's Going . . . . .	11
<i>By Harvey I. Saferstein, ABTL President '90-'91</i>	
Farewell to Parchment . . . . .	12
<i>By Mark A. Neubauer, ABTL President '91-'92</i>	
Assault on the Duty to Defend . . . . .	13
<i>By Bruce A. Friedman, ABTL President '93-'94</i>	
Civility: The Good Old Days . . . . .	14
<i>By William E. Wegner, ABTL President '94-'95</i>	
On Being a 'Dead' President . . . . .	15
<i>By Jeffrey I. Weinberger, ABTL President '95-'96</i>	
Employment Law in the Twenty-First Century . . . . .	16
<i>By Karen Kaplowitz, ABTL President '96-'97</i>	
In Memoriam . . . . .	23
Seminar Theme: Selecting and Persuading Juries in a Diverse Society. . . . .	24

## The Resurgence of Antitrust Litigation in California

By John H. Brinsley, ABTL President '76-77

As ABTL president the year *abt* Report was launched, I congratulate the publication upon its Twentieth Anniversary. Nothing is more pleasing than the success of one's offspring.

These are interesting times for California antitrust practitioners. At every governmental level in the state — in the courts; at legislative hearings; and at the Attorney General's office, one sees a resurgence in antitrust enforcement. Such currents might not be so difficult to negotiate, if they clearly flowed in one direction. The trends, however, resemble whitewater moving in many directions at once. They therefore pose challenges for lawyers seeking to counsel and litigate in the antitrust field.

California prosecutors have become significant forces. The Attorney General's office has filed major cases across a broad range of areas traditionally thought to be dominated by federal authorities. For example, the Attorney General challenged a \$2.3 billion supermarket merger.<sup>1</sup> A year before, although the California Supreme Court ultimately rejected the state's challenge to the proposed merger between Texaco and Getty, its decision evidenced a newly aggressive and creative attempt to use state antitrust law to protect against potential injury to consumers.<sup>2</sup>

One reason for the antitrust resurgence is the cooperative efforts among the states through the National Association of Attorneys General ("NAAG"). The NAAG has established a Multi-State Antitrust Task Force, which coordinates investigations. The NAAG also has established guidelines for the state enforcement of vertical restraints and horizontal mergers.<sup>3</sup> As with state law, these guidelines reflect a pro-consumer attitude. Such an attitude sometimes counters the goal of federal antitrust law to protect against injury to competition itself.<sup>4</sup>

Not to be outdone, the California Legislature has increasingly devoted its attention to the effects of state antitrust laws on courtroom congestion. The sentiment in Sacramento, however, apparently is that state antitrust law, particularly the Unfair Competition Act ("UCA"),<sup>5</sup> has encouraged a flood of unmeritorious and vexatious cases.

In January of this year, Sen. Kopp introduced a bill, SB 143, to curtail suits brought under the UCA, particularly so-called copy cat suits filed by private individuals after prosecutors have brought successful actions on behalf of the state. SB 143 would force plaintiffs to notify the Attorney General and District Attorney when they file or settle claims under the UCA; subject judgments to a fairness hearing to ensure that the judgment is "fair, reasonable and adequate;" give prosecutors "procedural priority" over private plaintiffs; and prohibit plaintiffs from filing copy cat suits against businesses previously prosecuted under the UCA for the same set of circumstances.

At least two other bills have been or will be introduced in this session to reform the use of the UCA in private litigation.<sup>6</sup> According to one observer, the activity in the Legislature amounts to a "backlash" against the state's liberal consumer protection laws.<sup>7</sup>

Commentators also have noted the divergent approach to antitrust regulation under federal and California law.<sup>8</sup> Some tension is caused by the fact that federal law seeks generally to maximize competition, while state law seeks, in part, to protect consumers directly. This tension causes difficulties for businesses

and deters efficient competitive behavior because of different standards of appropriate conduct.

In a "truly stunning" decision decided this past Spring, the Supreme Court of California, which has traditionally taken a narrow view of state antitrust authority, changed decades of California law when it broadened the scope of liability allowed under the Unfair Practices Act.<sup>9</sup> In *ABC International Traders, Inc. v. Matsushita Electric Corp.*,<sup>10</sup> the Court held that Section 17045 of the Act reached price discriminations which not only affect sellers, but those affecting buyers as well.

The case is important for its broad implications. According to one commentator:

"This is truly a stunning decision from the California Supreme Court. It has literally taken the California bar by surprise, as it reverses decades of California jurisprudence with respect to the competitive injury requirement under Section 17045 of the California Business & Professions Code...It can be expected that ABC International will generate great debate and additional case law, and possibly legislation."<sup>11</sup>

One reason for the strong reaction is that the Court went beyond the seemingly clear wording of the statute, holding that the legislative history and general purposes of the Act dictated a broader remedy than the language of the statute might otherwise allow.<sup>12</sup>

The current term offers the California Supreme Court additional opportunities to challenge prevailing assumptions regarding antitrust law. The Court's opinions in *Quelimane Co. Inc. v. Stewart Title Guaranty Co.*<sup>13</sup> and *Stop Youth Addiction Inc. v. Lucky Stores Inc.*,<sup>14</sup> both of which concern provisions of the Unfair Competition Act, will greatly impact the face and direction of antitrust enforcement in California.

All in all, there is a lot going on to attract the attention of antitrust and business trial lawyers. ☞



John H. Brinsley

<sup>1</sup> See *California v. American Stores*, 495 U.S. 271, 110 S.Ct. 1853 (1990).

<sup>2</sup> See *California ex. rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147 (1989).

<sup>3</sup> For the full text of the NAAG guidelines see *Antitrust Laws and Trade Regulation: Primary Source Pamphlet* (Matthew Bender, 1996).

<sup>4</sup> See Thomas Greene, Kevin O'Connor & Susan Beth Farmer, *State Antitrust Law and Enforcement*, 777 PLI/CORP 641, 653-656 and Attachments B-C (1992).

<sup>5</sup> Cal. Bus. & Prof. Code § 17200 et seq.

<sup>6</sup> Sen. Mountjoy has introduced legislation (SB 1309) which would require plaintiffs in UCA cases to: (i) show individual harm from the alleged wrongful conduct; (ii) demonstrate their adequacy as representatives of the public interest; and (iii) subject all private settlements to court scrutiny. Assemblyman Caldera has introduced a similar bill (AB 1295) also requiring actual injury to the prospective plaintiff.

<sup>7</sup> Rinat Fried, *Private AG Act Faces Backlash*, *The Recorder*, March 13, 1997 at p. 1.

<sup>8</sup> See Mary Cranston & Elynn Freed, *The Tension Between Federal Antitrust and State Unfair Competition Laws*, 968 PLI/CORP 135 (1997).

<sup>9</sup> Cal. Bus. & Prof. Code §§ 17000-17101.

<sup>10</sup> 14 Cal. 4th 1247 (1997).

<sup>11</sup> Peter Sullivan, *Leading Cases*, *Antitrust Report*, May 1997 at 30-31.

<sup>12</sup> 14 Cal. 4th at 1261-1262.

<sup>13</sup> 46 Cal. App. 4th 1371, 54 Cal. Rptr. 2d 319, *review granted*, 57 Cal. Rptr. 2d 687 (1996).

<sup>14</sup> 46 Cal. App. 4th 848, 54 Cal. Rptr. 2d 364, *review granted*, 57 Cal. Rptr. 2d 22 (1996).

*Mr. Brinsley, a partner with Paul, Hastings, Janofsky & Walker LLP, is a Fellow of the American College of Trial Lawyers and a past President of the Los Angeles County Bar Association.*

## Should the Jury System Be Drastically Altered?

By Murray M. Fields, ABTL President '77-'78

I was delighted with the invitation to join the celebration of the Twentieth Anniversary of the *abtl Report*. The subject of the jury trial and its future is a most interesting and fascinating topic. It has a past that spans many centuries, and "what is past is prologue." What does the future hold for its continuance?

Imported to America with England's common law, the jury system through the years of its existence has evoked favorable as well as critical comments.

Thomas Jefferson in a 1709 letter to Thomas Paine wrote:

*"I consider that [trial by jury] as the only anchor, ever yet inspired by man, by which a government can be held to the principles of it's [sic] constitution"*

On the other side of the coin we have Mark Twain in a 1872 London speech saying:

*"We have a criminal jury system which is superior to any in the world; and its efficiency is*

*only marred by the difficulty of finding twelve men every day who don't know anything and can't read."*

No doubt their disparate views have been echoed by many others over the years that the jury system has existed; there can be little doubt that the future will see more of the same. Despite the conflicting views the durability of the jury system over the centuries augurs well for its continued viability.

A brief look at its past history may be of some interest. The evolution of the trial by jury from its ancient origin to its present form was slow and gradual. There are many theories regarding the origin of the jury system. Were there trials by juries in Anglo-Saxon England or did they come to England from another land? Some historians are of the opinion that no trace of a jury system is to be found in Anglo-Saxon times. There is probably more than one possible origin for the trial by jury but the most recognized theory is that the institution of summoning members of a community to supply information regarding a pending dispute or the detection of a crime was a system developed by the Norman dukes. It was they who brought that system to England with the Norman conquest in 1066. An early English legal historian, Frederick Mairland, said that the first English jury was a "body of neighbors summoned by some public officer to give, upon oath, a true answer to some questions".

William Holdsworth in his monumental "History of English Law" described at length the methods employed in the primitive English jury trials among which was the trial by witnesses. The parties were not permitted to testify. Witnesses were brought in by the plaintiff to swear that they believed what he alleged. The defendant in turn produced his defense and the witnesses that supported his claim. The court in those days decided the case by counting the credible witnesses on each side, and the side that had the greater number won the dispute.

Then also there were trials by battle and trials by ordeal relying on the belief that God would indicate by a sign or a miracle the determination of the dispute. Eventually all these early modes of trial grew in disfavor and were abolished.

The development of the jury system as we know it took many years. Gradually it permitted the parties to a dispute to testify regarding the facts in support of and in opposition to their respective claims. Space limitation curtails the exposition of all the changes that took place in the development of the jury system. However, one thing is certain. The common law of England was transported to the American colonies and with it came the jury system that then prevailed in the English courts.

Now, the jury system is besieged and challenged by those who support alternative dispute resolution and mediation as a superior method of determining civil disputes. Then there are those who would amend the United States Constitution to permit, in a criminal case, a conviction by less than a unanimous jury verdict. They would have us abandon the traditional number of members of the jury-twelve, for some lesser number. In criminal cases, Federal and State laws require the unanimous verdict of 12 jurors; in Federal cases there can be a lesser number with the mutual consent of the parties and approval of the court. The consistent number has been and still is 12. That number attracted the attention of the U.S. Supreme Court in *Williamson v. Florida*, 399 U.S. 78 (1970), which concluded the fact that the jury at common law was composed of precisely 12 is an historical accident. That accident must have occurred hundreds of years ago; in the 17th Century Edward Coke, Chief Justice of Common Pleas, wrote:

*"And it seemeth to me, that the law in this case delighteth herself in the number of 12; for there must not only be 12 jurors for the try all of matters of fact, but 12 judges of ancient time for trial of matters of law in the Exchequer Chamber: Also for matters of state there were in ancient time twelve Counsellors of State. He that wageth his law must have eleven others with him, which thinke he says true. And that number of twelve is much respected in holy writ, as 12 apostles, 12 stones, 12 tribes, etc."*

—COKE, I the First part of the Institute of the Laws of England; A Commentary Upon Littleton.

Now we have the knee-jerk reaction to some recent aberrant verdicts that bring a clamor for change: a less than unanimous number for verdicts in criminal cases; proposed legislation directing the courts to instruct jurors that they have the power to return a verdict of not guilty in the interest of justice; improving the composition of juries by an effort to induce a wider economic and social scope of citizens to participate in the system; a more reasonable fee to jurors to compensate them for their time in the jury box; a rule that if not empaneled in the first or second day of attendance, the juror should be excused from further attendance.

There may be many more changes that have been and will be sought but is there any cogent reason why the jury system tradition should be drastically altered? Federal and State Constitutions should not be amended lightly. Any attempt for change should be viewed cautiously. The essence of good law-making is that it should consider not necessarily the need for the day but for the years to come. Wise legislators should not be persuaded by voices that are raised for changes merely for the sake of changes. If some improvements are needed it is their duty to consider and make them but it is also their duty to cherish and guard zealously the jury system that has served so well through the ages.

Congratulations to *abtl Report* on its Twentieth Anniversary. May its success continue ad infinitum. ☺

*Mr. Fields is a partner with Buchalter, Nemer, Fields & Younger in Los Angeles.*

## Lawyer As Bibliophile

By Loren R. Rothschild, ABTL President '79-'80

**T**he topic, "Lawyer as Bibliophile," which the *abtl Report's* editors have assigned to me, offers several possible questions for discussion. These include: (i) What distinguishes lawyer as bibliophile from other lawyers? (ii) What distinguishes the lawyer bibliophile from other bibliophiles? (iii) How does the lawyer bibliophile differ from normal human beings? (iv) How is a lawyer's bibliophilia manifested? and (v) Is it a good or a bad thing to be a lawyer bibliophile?

I have pondered all of these questions and concluded that I have no answers for any of them. Nevertheless, I will offer some advice to trial lawyers who are contemplating becoming lawyer bibliophiles.

*First*, increase your billing rate and liquidate all of your assets including real estate and securities. Bibliophilia (hereinafter also referred to as "book collecting") requires serious money.

*Second*, using one-third of the funds obtained by selling your assets, purchase a large house with substantial space for the storage of books. Plan to subordinate the desires of family members for separate bedrooms, bathrooms and other unnecessary facilities to the overriding need for shelf space. The balance of the funds obtained from the sale of your assets should be set aside for the purchase of manuscripts, rare and antiquarian books. These funds should be deposited into an account on which you are the sole signatory. Spouses must not be allowed access to this account.

*Third*, reduce your living expenses by cutting down on meals and eliminating from your budget such items as entertainment and family outings. You will not mind doing this because once you become a collector you will want to devote all of your time to collecting and so won't have time for lavish dining, entertainment or family outings.

*Fourth*, do not plan to read the books you collect. Reading the books you collect is an activity that uses time better spent on the collecting activity itself.

*Fifth*, forget about reading anything other than book dealer

and auction house catalogues. You will receive so many sale catalogues that you will have no time to devote to reading anything else.

*Sixth*, since the readers of this Report are likely to be trial lawyers, types who, in my experience, talk reluctantly and little about themselves and their cases, they will be surprised to learn that book collectors are different; they love to talk about themselves and their collections. This phenomenon may require the trial lawyer who wishes to become a collector to shed his modest and retiring demeanor and develop a more assertive attitude.

*Seventh*, decide carefully on the authors or subjects you collect. I advise against collecting Gutenberg Bibles. They can be expensive. Similarly, Audubon elephant folios<sup>1</sup> can be a problem. If you really want to see copies of a Gutenberg or an elephant folio you should visit the Huntington Library in San Marino. While there, you can also glance at the c. 1410 Ellesmere manuscript of Chaucer's *Canterbury Tales*. You can't collect that either.

*Eighth*, avoid collecting the manuscripts and first and early editions of the following authors: Alexander Pope, Henry Fielding, Samuel Johnson, Oliver Goldsmith, Hester Lynch Piozzi, David Garrick, Sir Joshua Reynolds, Sir Richard Burton, W. Somerset Maugham, Evelyn Waugh and Paul Theroux. I don't want the competition.

*Ninth*, expect to be asked frequently the following difficult, silly and intrusive questions: (i) why did you decide to collect the works of \_\_\_\_\_?<sup>2</sup> (ii) have you read all the books in your collection?<sup>3</sup> and (iii) what are you going to do with your collection when you die?<sup>4</sup>

*Tenth*, be prepared to have a lot of fun. ☺

<sup>1</sup> The term "elephant" refers to the size of the book not its contents. The subject of this elephant folio happens to be birds.

<sup>2</sup> I suggest an answer along the following lines: "I can't remember."

<sup>3</sup> See point *Fourth* above.

<sup>4</sup> An appropriate response is "none of your business."



Loren R. Rothschild

*Mr. Rothschild is a "recovering lawyer" and the president of Sycamore Hill Capital Group, a private investment firm.*

### who/what/when/where/why?\*

- Who: Members of the Association of Business Trial Lawyers from Los Angeles, San Francisco, San Diego and Orange County chapters
- What: 24th Annual Seminar
- When: October 24-26, 1997
- Where: Westin Mission Hills Resort, Rancho, Mirage, California
- Why: To learn successful techniques for "Selecting and Persuading Juries in a Diverse Society," this year's timely theme • To hear Keynote Speaker, Justice Janice R. Brown, California Supreme Court, and Guest Speaker James W. McElhaney • To meet many state and federal judges • To earn 8.5 hours California MCLE Credit • To give the family a wonderful weekend of swimming, golf, tennis, biking and other resort activities

\*(How): For reservations, call Mosaic Event Management at (415) 908-2659 or FAX (415) 908-2660

## The Future of Patent Law

By Laurence H. Pretty, ABTL President '83-'84

Patent law is currently hot, a remarkable change from the late 1970's when patent litigation was a low profile, troubled specialty. Then, patents that reached trial were being invalidated at a rate exceeding 50% nationally and approaching 100% in the Eighth Circuit. Business, investors and inventors, who relied on the protection of patents to bring new products to the public were losing faith in what had become an unpredictable system and America had slipped well down the list of advanced countries in innovation, measured by patents per thousand of the population. Then Congress acted by taking patent law away from the regional Circuit Courts. In 1982 it created a new appellate court to decide appeals in all patent cases, the Federal Circuit Court of Appeals — its mission to bring uniformity and predictability to patent law. The Court has succeeded beyond expectations in revitalizing the patent system. In parallel with this development, juries became more



Laurence H. Pretty

familiar in patent trials because of a perception that jurors are less inclined to invalidate patents and more willing to award large damages than judges.

The patent practice itself has two sides, prosecution practice — the preparing and obtaining of patents, rendering of opinions and transactional work — and patent litigation. On the prosecution side, the realm of patentable technologies expands steadily beyond growth in established technologies. The advent of the microprocessor and its application to industrial processes, and the technology involved in making and designing chips, has spawned companies like Intel that are major securers of patents. Software based inventions have added to the field, despite case law limiting the availability of patent protection. Traditional technologies, mechanical, chemical, chemical engineering and pharmaceuticals still collectively provide the largest share of patent work, although perhaps not accorded the media attention of more glamorous, newer technologies such as biotechnology, computer networking and satellite technology. The volume of patent filings continues to grow steadily and the volume of related office practice, such as opinion work and licensing deals, grows commensurately.

The annual number of patent lawsuits filed has climbed from about 1300 to about 1600 in the last five years but, curiously, the number of patent trials has stayed remarkably flat at just under 100 trials per year from 1992-1995 and 105 in 1996. In 1966, 54 patent cases were tried to the bench and to 51 juries. I learned these figures from Paul Jaenicke, a professor at the University of Houston Law School, who keeps track. This represents a disposition of approximately 92% of patent cases before trial, many by settlement involving licensing and others by summary disposition. Although, as noted, the pendulum has swung more than 50% to jury trials, a recent crucial decision of the Federal Circuit, *Markman v. Westview Instruments, Inc.*, 52 F.3d 967

(Fed. Cir. 1995) *affirmed*, 116 S. Ct. 1384 (1996), is expected to cut back the role of the jury in patent litigation. The *Markman* decision requires judges exclusively — not juries — to construe the meaning of terms in patent claims. The proper construction of what a term in a claim means can often be the knife-edge issue which controls whether the patent owner or the accused infringer will win because the second question of the infringement inquiry, whether the defendant's device fits the claim, is often not an issue once the claim's meaning has been ruled upon. Accordingly, many expect this decision to reduce the role of the jury in patent litigation while increasing the number of cases that will be decided on summary judgment based on claim construction determinations. If this forecast turns out to be correct, the value of jury trial skills in patent litigation may recede somewhat relative to the value of solid patent law abilities in patent litigation.

The Federal Circuit spent the 1980s redefining the patent case law on the important issues of obviousness, inequitable conduct, computation of damages and availability of preliminary injunctive relief. In the early 1990s, claim construction became its area of concern, now resolved by *Markman*. The next hot issue of patent law that seems to be due for a period of overhaul is the Doctrine of Equivalents in the wake of the Supreme Court's recent decision of *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 1997 U.S. Lexis 2214, 117 S. Ct. 1352 (1997). In that case, the Supreme Court drew attention to the need for development by the Federal Circuit of further guidance in the tests to decide when a patent claim can be applied to cover a defendant's product or process for infringement as an equivalent even though there is a lack of literal correspondence with the words of the patent claim. An area of particular murkiness is the interpretation of equivalents in the context of claim elements drafted as "means" for performing a function under 35 U.S.C. § 112, paragraph 6. How the Federal Circuit develops the law of equivalents, expansively or restrictively, has a considerable potential to affect whether industry keeps up its present level of enthusiasm for taking patent suits through trial to obtain injunctions or perhaps softens that enthusiasm somewhat with a greater willingness to license or a shift to reliance on keeping technology secret rather than patenting it.

The international component of patent practice is also burgeoning. As it has grown, so has the political will among nations to seek closer harmonization of U.S. and foreign patent laws. While the prospect of a true international patent is still in the Holy Grail stage, important advances have been made. One notable advance is a Patent Cooperation Treaty that improves the application filing and patent search aspects of applying for patent protection in several PCT signatory countries. Another notable advance has been to harmonize the patent term to 20 years from filing, bringing the U.S. into line with other industrialized countries. Harmonization has a powerful impetus and offers a way to reduce the cost and duration of obtaining patent protection overseas.

The only cloud that could peril the present benign state of patent law would be a return to the unavailability of effective enforcement that existed in the 1970s. Just as the Federal Circuit can take the greatest credit for the turn around in fortunes of patent law, any threat to its well being could come from a change in the Federal Circuit that reduced the predictability of patent law by reinjecting judge-created doctrines harmful to patents. That must not be allowed to happen. ☞

*Mr. Pretty is a partner with Pretty, Schroeder & Poplawski in Los Angeles.*

---

## Oral Argument in the Court of Appeal

By Hon. Charles S. Vogel, ABTL President '84-'85

**B**efore I was appointed to the Court of Appeal, I sometimes wondered whether oral argument mattered. Since my appointment, I have learned the answer — it depends.

### The Lawyer's Perspective of the Court's Work

This is the way Rex Lee, a former Solicitor General of the United States, put it: "The first question that must be asked about oral argument...is how much good it does — that is, how much it affects the outcome of the case. My answer to that question is a confident 'I don't know.'...My guess is that a good oral argument helps the court more often than it helps the lawyers, in the sense that it is more likely to result in a better opinion than a changed vote."<sup>1</sup> Of course, Rex Lee was talking about practice before the United States Supreme Court, where cases are heard because the members of that court have decided they were worth hearing — not because the justices had to hear the case. In California's state courts, the parties have the right to appeal, the lawyers have the right to argue,<sup>2</sup> and the justices have the concomitant obligation to decide those appeals and listen to the argument.

Past generations of lawyers argued for reasons that no longer exist — to educate a "cold bench" — that is, judges who knew little if anything about the case before oral argument — about the facts of the case, the applicable rules of law and the desired outcome. In 1940, the nation's then-preeminent appellate lawyer advised his fellow members of the bar that "those who sit in solemn array before you, whatever their merit, know nothing whatever of the controversy that brings you to them....They are anxiously waiting to be supplied with what Justice Holmes called the 'implements of decision.'"<sup>3</sup>

Today, the 93 justices of California's Court of Appeal author an average of 137 opinions each year and sit as panel members on twice that many — meaning they each participated in more than 300 decisions in 1996. Today's electronic tools are helpful but they do not (yet) work without our help, and we have therefore had to develop procedures for preparing all of the cases that come before us. You will find the bench is no longer "cold." In my division, which I believe is typical of most, this is the way it works:

When a case is "ready" (when the appellant's reply brief has been filed or the time to file it has expired), it is assigned to a panel of three justices, with one of them designated as the author. At that point, the case is placed "on calendar," which means it is set for the court's next oral argument date, 30 to 45 days down the line. The author, with the help of an experienced staff lawyer, then reviews the briefs, the record and the law and prepares a draft opinion (still euphemistically referred to by some as a "calendar memo" or a "bench memo"). When the draft opinion is finished — by which time the author knows most of what there is to know about the case — it is circulated to the other members of the panel. In turn, each of them will review the briefs, the record and the draft opinion, and tentatively decide whether to agree with the proposed opinion. In my division, the panel will meet before oral argument to discuss the case and express whatever concerns there might be about the draft opinion. Sometimes there is agreement (this is true of the majority of the cases we decide), sometimes not. Sometimes one or two (or even all three) members of the panel have mixed feelings about the result.

### The Court's Perspective of the Lawyer's Argument

Based on my own experience and in conversations with other members of the Court of Appeal, I offer the following suggestions and comments about how to prepare for and present oral argument to our Court. I want to emphasize, however, that I am speaking for myself, not for any other member of the Court, and I know there are many who would give different advice. While I'm sure most if not all of what I have to say in this regard is old hat to our experienced appellate practitioners, many of the lawyers who appear before us handle only the occasional appeal, and what follows is meant to be of assistance to those in search of some guidance.

### The Rules of Preparation

*Rule No. 1:* Prepare thoroughly for argument. I know it takes a great deal of time to review the record and the briefs and the pertinent authorities, but you must be in a position to respond to all reasonable questions. Index and tab the portions of the record you are likely to need so that you will not have to stand at the podium fumbling through the transcripts. But don't overdo it. If your copy of the record looks like a battleship with all flags flying, you have overdone it — and we will be able to see that you have overdone it. Trust your judgment.

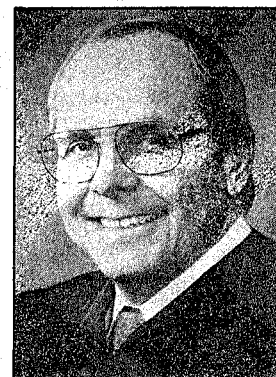
*Rule No. 2:* In your preparation, re-read not only your own cases but those relied on by your opponent. Shepardize all of them and check the subsequent history tables so that you can be the one to tell us a case you cited has since been depublished or taken up by the Supreme Court. Check for recent decisions. If you come upon a change in the controlling authority cited by either side, send a letter to the court (with a proof of service on all other parties) with the name of the case and a citation. If the case is very new, send a copy. If your research is on the eve of argument so that it is too late to send a letter, bring copies of the opinion to court. Without this step in your preparation, you run the risk of embarrassment when the court asks about a case you have never read.

The most fundamental thing to keep in mind is that the court is prepared and knowledgeable about your appeal. It expects you to be prepared, too.

### The General Rules About Presenting Argument

*Rule No. 3:* When you arrive, check in with the clerk and look at the calendar. In most divisions, including mine, the calendar will tell you the members of your panel. When your case is called, go to the proper counsel table — as you face the bench, the appellant is to the left of the podium, the respondent to the right. In some divisions, the court asks for appearances from both sides before the appellant argues. In others, the appellant simply goes to the podium, states his or her appearance, and begins. If you're lucky, your case will not be the first one called and you can watch how things are done.

*Rule No. 4:* When it is your turn to argue, stand up straight at the podium and adjust the microphone so that you can be seen and heard. Do not pace back and forth as you might when arguing to a jury and do not stand at the side of the podium with an elbow on top of it or argue with your hands in your pockets. There is a tendency of some counsel to assume the airs of a talk show host



Hon. Charles S. Vogel

(Continued on page 19)

## A Modest Proposal from the Bench

By Hon. Elihu M. Berle, ABTL President '85-'86

My warmest congratulations to the *abtl Report* on the occasion of its twentieth anniversary and to the ABTL for its outstanding success in providing quality educational programs and fostering collegiality among members of the bar over the years. This special anniversary issue of the *abtl Report*, together with recollection of the first ABTL dinner meeting in 1974 and the realization that twelve years have passed since

my presidency of the ABTL, brought home poignantly the fleeting nature of time.

Upon my recent appointment to the Superior Court, after over twenty six years of private practice in business and commercial litigation, my first judicial assignment was in the Criminal Courts Building (CCB) in downtown Los Angeles. The opportunity to immerse myself in a new area of law and render decisions that directly and seriously affect human beings has been not only a challenging and interesting experience, but also a heavy awesome responsibility. One of the



Hon. Elihu M. Berle

first revelations to me in my new position was the great difference in professional legal culture between the practice in the criminal courts as compared to that of civil law litigation. I was pleasantly surprised to find how well most of the attorneys appearing at CCB got along with each other. This state of affairs was not because cases are not litigated with equal vigor at the disparate venues. As in the civil departments, cases are usually hotly contested in the criminal courts. However, it appears that, in general, members of the criminal bar have managed to avoid having cases exacerbated by nitpicking contentiousness that interrupts and sidetracks the judicial process. By in large, the lawyers I have observed in the criminal courts, while being zealous advocates for their clients, have been courteous and not antagonistic with each other.

In analyzing the general civility of the criminal law practice, when contrasted to the recent trends of aggravated friction among some civil practitioners, it appears that members of the criminal bar deal with each other in a more professional, cordial manner because of their frequent contact with one another, both inside the courtroom and in the smaller bar groups dedicated to criminal law practice. Simply stated, the lawyers have to deal and face each other frequently. They cannot become anonymous in a large population of lawyers and avoid running into their adversaries. Thus, it would be professional suicide for a lawyer practicing in this smaller legal arena to risk his/her reputation by engaging in continuous harassing obstructionist tactics, or being overbearing or underhanded. Such lawyer simply would not be trusted and would find it difficult to obtain cooperation to ever reach resolution of cases.

ABTL came into prominence in our legal community as a result of its excellent dinner meeting programs and seminars. However, the most significant contribution ABTL has made to the practice of law in Southern California is the establishment of a community of lawyers with common interests who, in general, deal with each

other in a professional collegial manner, without rancor or acrimony. It has been frequently said among ABTL members that meeting adversaries at dinner programs increases mutual respect, reduces contentiousness, and instills camaraderie and a certain amount of *esprit de corps*. After breaking bread or sharing drinks with opposing counsel, it is more difficult to resort to obstructionist discovery tactics or belligerence in court. Contrary to the popular aphorism that familiarity breeds contempt, in the legal world the opposite may be true. The more a lawyer gets to know and understand an adversary's interests, family, and life experience, the greater the possibility that mutual respect will be shared and a hostile litigation environment will be diffused. Moreover, within the community of lawyers who meet regularly, no self-respecting professional would want to have his/her reputation tainted by accusations, suggestions, or innuendos or that he/she is an "out of control," hostile, quarrelsome litigator.

Over the last several years various bar groups have promulgated "codes of civility" for litigating attorneys, and in addition proposals have been made for courts to impose greater formal disciplinary and monetary sanctions for those lawyers violating the rules of civility and engaging in unacceptable unprofessional tactics. (See e.g. Rule 7.12, *Local Rules of the Los Angeles County Superior Court*; United States District Court for the Central District of California, *Civility and Professionalism Guidelines*; L.A. County Bar Committee on Professionalism, *Proposed Los Angeles Superior Court Rules for Conduct of Civility Dispute References*; *Final Report of the Committee on Civility of the Seventh Judicial Circuit*; ABA Section of Litigation, *Guidelines to Litigate By*; American College of Trial Lawyers, *Code of Trial Conduct*; Association of Southern California Defense Counsel, *Civility Pledge*.) Although such codes and guidelines all have some merit, it would seem that among the most effective and long lasting approaches to the problem of declining civility in litigation would be re-education and sensitizing of lawyers. A change of the legal culture could be brought about through peer group mentoring, sponsored by bar organizations such as ABTL and County Bar Association, modeled after the English Inns of Court or the programs of their counterparts, the American Inns of Court.

The mentoring of novice and errant lawyers would take place in

**"Professionalism and civility  
are attributes still  
valued in the practice of law."**

*Tylo v. Superior Court* (1997) 55 Cal App. 4th 1379

smaller attorney clubs or "Inns," composed of 30 to 40 member lawyers of various levels of experience (i.e. one-third each of 1 - 5, 5 - 10, and 10 or more, years of experience). The lawyers would come from a diverse cross-section of the legal community (e.g. mixture of large, mid-size, small, and solo practices) and from a variety of specialties. This structure would be an added incentive for lawyers to attend meetings in order to expand their business network outside their immediate friends and acquaintances. The senior lawyers would act as mentors, or advisors, to the other lawyers at regular bi-monthly seminar type meetings (held at restaurants or member homes) and be available for consultation on ethics or "practice" issues at other times. In this process the more seasoned, experienced attorneys would be able to inculcate the values and culture of an ethical civilized law practice in other counsel, and all practitioners would be able to consult with others on a confidential basis (but free from the various pressures of their respective firms) and have an opportunity to observe and learn from role models who have achieved success without resort-

(Continued on page 20)

## Is Practicing Law Different in Oregon?

By Robert A. Shlachter, ABTL President '86-'87

**T**his president's letter to Los Angeles litigators originates in Portland, Oregon. No, the ABTL has not established a branch in California's green and soggy neighbor. But in 1991, one of its former presidents relocated there.

What drives one to make such a major change at the age of 45? And apart from the scenery and rain, is law practice really any different in Oregon?

In 1986, while president of ABTL, I was entrenched and happy with my litigation practice in Los Angeles. ABTL and my law firm Alschuler Grossman & Pines were thriving, and a possible move out of the LA metropolis was not on my personal radar screen.

During the next five years, my firm and ABTL continued to grow, but my wife and I started fantasizing about living in a smaller city. Then, in 1991, after a year of soul searching, we held our breath, uprooted ourselves, bade friends and colleagues goodbye and forged our own Oregon trail.

We looked for a quieter, less hectic life in the Northwest, with an opportunity to work closer to home and be involved in more civic activities. The decision was one of personal (and family) lifestyle, and not the result of a search for a better or more user friendly legal practice or system. In fact, the hardest part of the move was leaving my colleagues and the firm which I helped build over the prior 15 years.

**F**or employment in Oregon, hanging up a shingle and starting over from scratch was not a viable option. If that were the only opportunity, we would not have made the move. Fortunately, I was able to connect with an energetic small firm (12 lawyers) that handled a variety of business litigation, including some of the largest in the Northwest.

Practicing law in Oregon has been an unexpected bonus of the move. In some ways, my practice here seems very similar to mine in Century City. In other ways, the practice here differs greatly.

The pressure to perform and obtain outstanding results knows no state boundaries. Oregon clients can be just as demanding as those in Los Angeles and, yes, sometimes just as unreasonable. Deadlines are deadlines, and stresses inevitably flow from a busy trial practice north or south.

There are, however, distinct differences in the practices. In a city the size of Portland (400,000 in the city, 1.5 million in the metropolitan area), lawyers are generally more courteous, forgiving and accommodating than those I litigated against in California. Because of the compact nature of the city and the relatively small number of lawyers, one is bound to cross paths with opposing lawyers and judges in a variety of ways: through schools, religious institutions, politics, bar activities and civic work. It is virtually impossible to remain anonymous in Portland, even if you wanted to. Lawyers and judges literally must live together and thus get along together. Do you deny a request for an extension or do you serve motion papers Friday at 5 p.m. when the opposing lawyer's husband is your daughter's teacher or soccer coach? This is not the kind of community (legal or otherwise) where people are eager to burn bridges.

In Oregon state practice, there are no (repeat no) interrogatories or expert discovery. That is something I readily became accustomed to. Of course, interrogatories and expert discovery

are appropriate in federal district court cases. The federal judges, however, grew up with no expert discovery and lean on lawyers not to depose experts. According to our federal judges, the expert disclosure reports under FRCP 26 should be more than adequate.

The federal magistrate judges in Oregon are excellent and well respected. Two of Portland's three magistrate judges have an aggregate of 40 years of experience as state trial court judges. The magistrate judges, without a criminal caseload, have flexible schedules, and lawyers here routinely stipulate to a magistrate judge for all purposes.

Both federal and state courts in Oregon are proud of their rocket docket. In federal court, it is possible to try a case within six months after filing, with a discovery cut-off within four months of filing. In state court, plaintiffs will receive an initial notice setting trial for four months after filing of the complaint. That trial date will be routinely set over by either party until it approaches the one year mark. In Oregon, expect to start picking the federal or state jury in less than 12 months after filing.

**O**ne pleasant benefit to law practice in Oregon is the convenience. The state and federal courts in Portland are within walking distance of almost all the lawyers in the county (and more than 70% of the lawyers in the entire state). Meetings with government agencies, other lawyers, clients and judges can generally be reached without a car (and without negotiating parking lots). Rubber soles and an umbrella, however, are essentials from November through May.

The state court in Portland seemed very informal to me when we moved here in 1991. But state courts in the outlying counties make the court in Portland seem downright stodgy. Donuts (now scones) and comfortable sofas are prevalent in judges' chambers in suburban county courthouses only 15 miles from Portland. The judges want to chat, get to know you and move the cases along.

Unfortunately, we do not have a direct calendaring system in Oregon state courts (except in limited cases). Too often, three or four different judges will rule on pre-trial matters in one case. That system is inefficient and produces inconsistent results. Additionally, lawyers in private practice often decide summary judgment motions as pro tem judges in Portland. Ugh!

Tentative rulings (a staple in my 8th floor days in LA Superior Court) are virtually non-existent in Oregon. State court judges are patient (perhaps too much so) in tolerating long oral argument. Federal judges here have learned to routinely issue decisions without oral argument. The papers better be good and persuasive.

**R**ent-a-judges are just catching on in Oregon, and we are light years behind California on that front. Unfortunately, there are few outstanding retired judges in Oregon who have become mediators/arbitrators. We need more.

There is no ABTL in Portland, but we have the next best thing: a business litigation section of the state bar. Programs usually attract 30-50 lawyers, not 400-500 as in LA, and we have no exotic getaway retreats. The ABTL seminars in warm climes are extremely attractive to us towards the end of October as we start battering down for the winter rains. See you in Palm Desert. ☺



Robert A. Shlachter

*Mr. Shlachter is a partner with Stoll Stoll Berne Lokting & Schlachter P.C. in Portland, Oregon.*

## Federal Court: New Rules, Old Problem

By Howard O. ("Pat") Boltz, Jr., ABTL President '87-'88

Uniformity, efficiency and the simplification of federal trial practice were the original purposes of the Federal Rules of Civil Procedure. Conflicting practices among different District Courts had produced confusion, inefficiency and unfairness based upon local idiosyncrasies of different federal courts. Clear, simple, uniform rules of procedure, it was universally believed, encourage fairness and allow judges to decide cases on the merits based upon the same ground rules.



Howard O. ("Pat") Boltz, Jr.

By encouraging a proliferation of local variations to the Federal Rules, some lawyers grumble, the Civil Justice Reform Act has managed to "balkanize" our federal practice. The Civil Justice Reform Act encouraged local variations in federal court procedure. In response to the mandate from Congress, each District established its own local committee to propose innovations tailored to the perceived needs of the specific District. As a result, local procedural rules were formulated and were

implemented on differing timetables in the various judicial Districts.

In no time, a detailed matrix was needed in order to track which District Court had adopted which new procedural innovations on which timetable. As unique local practices were adopted, the Federal Rules "matrix" grew to resemble an old-fashioned train schedule, complete with tiny print, fold-out panels and detailed summaries with differing effective dates, changes and requirements for the various judicial districts. Any federal trial lawyer who failed to master the new Federal Rules "train schedule" got left behind at the station.

The Central District of California has managed to extend the current trend favoring localized procedures to the next dimension. Our federal judges have adopted various rules by court order which the judges themselves now call the "Local, Local Rules." This inelegant term — for the information of "foreign" lawyers from the Northern District of California — means additional procedural requirements created by a standing order governing cases before a specific judge. Our various "Local, Local Rules" can and do conflict with the Local Rules of the Central District of California.

Newly-appointed Los Angeles federal judges reported to the ABTL membership at a recent gathering that, as one of their first actions upon arrival at their chambers, they gathered up examples of standing orders adopted by other federal judges, formulated their own variations, and issued orders governing all their own cases. Typically, these orders begin with the warning: "THIS ORDER CONTROLS THIS CASE AND DIFFERS IN SOME RESPECTS FROM THE LOCAL RULES."

As a result of this practice, the Central District of California has promulgated the most detailed and voluminous "Local, Local Rules" in the nation. If you gather all of our "Local, Local Rules"

into a single volume, it numbers several hundred pages in length. West's Publishing may want to develop a convenient reference guide to these new rules with obligatory updates! In the Central District of California, trial lawyers must maintain and consult (a) the Federal Rules of Civil Procedure, (b) the Local Rules of the Central District of California, and (c) the "Local, Local Rules" before filing any motion in any federal case.

Why can't we consolidate the growing collection of "Local, Local Rules" into the Local Rules? At one time, the Local Rules of the Central District of California supplied simple, clear, uniform answers which were published in a single collection.

I believe the time is plenty ripe for lawyers and judges (perhaps with the support of ABTL) to gather up the numerous standing orders, incorporate the good ideas into our Local Rules, and urge the District Court to resist the temptation to promulgate "Local, Local Rules" which differ from the Local Rules. This endeavor would serve those once-honored goals — clarity, simplicity and uniformity in federal practice — endorsed by the Judicial Conference. If successful, the effort will reduce the time and paper devoted to "Local, Local Rules" in conflict with our Local Rules. Lawyers, litigants, and even West's Publishing can stop chasing and searching court papers for those decrees which may "differ from the Local Rules."

The United States District Court for the Central District of California enjoys an excellent reputation for thoughtful, exquisitely detailed Local Rules. Federal District Courts throughout the nation, and some state courts, have adopted procedural practices and pretrial requirements which were developed by Los Angeles federal judges for the Local Rules of the Central District of California. The original purpose of our Local Rules was to institutionalize uniform practices and facilitate compliance with federal procedural standards.

We need to incorporate the best practices and ideas from the current federal court into our Local Rules, and clean the federal courthouse as much as possible of "Local, Local Rules" which conflict with provisions of the Local Rules of the Central District of California. Continuing expansion of our "Local, Local Rules" warrants the attention, resources and joint efforts of ABTL and the District Court to restore uniform local procedural rules to our federal courts. ☞

*Mr. Boltz is a partner with Bryan Cave LLP in Los Angeles.*

### Editors of **abtl** REPORT

Thomas J. McDermott . . . . .	1976-1980
(Founding Editor)	
Thomas J. McDermott & Benjamin E. (Tom) King . . . . .	1980
Benjamin E. (Tom) King . . . . .	1980-1983
Mark A. Neubauer . . . . .	1983-1989
Mark A. Neubauer & Bruce Alan Friedman . . . . .	1989-1990
Vivian R. Bloomberg . . . . .	1990-

## The 'Peculiar' FTC: Where It's Been, Where It's Going

By Harvey I. Saferstein, ABTL President '90-'91

The Federal Trade Commission is now over 80 years old. Created in 1915, the FTC has been criticized by some as stodgy and bureaucratic — "The little Old Lady of Pennsylvania" that moves too slow and in the wrong direction. Conversely, it has been criticized by others as an overactive "National Nanny" trying to regulate what every American child watches on television or eats for breakfast. Today, the FTC stands as a reinvigorated, but balanced regulatory agency overseeing the Federal antitrust and consumer protection laws.

### The "Peculiar" Nature of the FTC

The FTC is a truly unique, some might say peculiar, agency. It is one of the few remaining "independent" regulatory agencies. The "independence" of the FTC draws from its peculiar structure — a 5-person, bipartisan commission — intended to make it beholden to neither Congress nor the President. The five members serve staggered 7-year terms, and no more than three can be of the same political party. Although the President can name or remove the Chairman, he cannot remove a commissioner.

The FTC is charged with the responsibility for the enforcement of 37 different statutes impacting antitrust and consumer protection. In addition, Section 5 of the FTC Act gives the agency an omnibus mandate to attack any "unfair or deceptive practice." Its sweeping powers include rulemaking, adjudication and investigative authority. It can levy fines, order consumer redress, and order divestiture. In addition, the FTC provides a wide variety of consumer education and contributes economic analysis to assist policymakers at the federal, state and local level.

*The "Peculiar" Dual Mission* — The FTC is peculiar in having two separate but inter-related missions — antitrust and consumer protection. It "regulates" both. On the consumer protection side, its mandate is broad and sweeping. As a practical matter, it has jurisdiction over all unfair and deceptive practices by any industry not otherwise regulated. In addition, the FTC has specific enforcement authority pursuant to a number of consumer protection statutes. On the antitrust side, it shares jurisdiction for civil antitrust enforcement with the Antitrust Division of the Justice Department.

*The "Peculiar" Procedures of the FTC* — The FTC is both prosecutor and judge in many of its proceedings. In administrative cases, the five Commissioners vote out a complaint, which then goes to hearing before an FTC Administrative Law Judge, whose decision is then appealed to the same five Commissioners for a final decision. It can also bring many of its cases directly to federal court. Additionally, it can choose to attack a problem with industry-wide rules.

### The Unique History of the FTC

The FTC has had a peculiar, and sometimes controversial history of maintaining its dual mission. Its mandate is so large, and its resources so small, that it must exercise careful discretion in determining where to focus its resources. The choice of where and how to deploy its limited resources has been the source of great controversy, and has allowed its various chairmen to place their own unique stamp on the agency. Two examples from recent history provide a striking example of this phenomenon.

*Michael Pertschuk and the "National Nanny"* — Michael

Pertschuk was named Chairman of the FTC by President Jimmy Carter in 1977. Pertschuk's appointment followed a period of consumer protection legislation, which Pertschuk himself engineered as Chief Counsel to the Senate Commerce Committee in the 1960's and 1970's.

Under Pertschuk, the FTC began aggressive, innovative and groundbreaking rulemaking proceedings regarding consumer advertising. The FTC's activist role in pursuing consumer protection earned it the derisive label — "National Nanny." This activism was epitomized by the three year "kidvid" investigation into television advertising aimed at children. The FTC report resulting from the investigation called for a ban on all television advertising aimed at children under 8, and suggested special rules to control advertising for "sugared products."

Dissatisfaction with the FTC's activist role led Congress to consider abolishing the agency. While it was not abolished, the controversy resulted in a federal law giving Congress the right to exercise a legislative veto over FTC regulations. (The United States Supreme Court has since held that Congress may not exercise veto power over regulatory agencies. See *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 959 (1983).)

*Laissez-Faire: The FTC Under James Miller* — President Reagan's appointment of economist James Miller as FTC Chairman signaled an end to what some had perceived as the activist role of the FTC under Chairman Pertschuk. In fact, the FTC officially announced the end of the notorious "kidvid" investigation only hours before Miller was sworn in as its new Chairman. This shift was not surprising since, as a member of Reagan's transition team, Miller headed a task force that suggested eliminating the FTC's antitrust enforcement responsibility by cutting off funding for the FTC's Bureau of Competition.



Harvey I. Saferstein

Under Miller, the FTC was criticized for its failure to pursue its consumer protection responsibilities. When the FTC announced that it had changed its policy under Section 5 of the FTC Act from barring advertisements with a "tendency or capacity" to mislead to one of prohibiting only those "likely to mislead," Senator William Proxmire accused the FTC of "marching backwards." In 1982, Senator Al Gore criticized the FTC for dragging its feet after the Coast Guard determined that 90% of certain survival suits manufactured by a California company were defective. Instead of taking immediate action, an FTC economist had suggested that a study should be undertaken concerning the costs of any proposed notification and recall. Miller responded to such criticism by saying that the FTC preferred to concentrate on "hard-core fraud and deception" instead of being a "National Nanny."

### The Modern FTC: How it Pursues its Dual Mission

Today, under the innovative leadership of Chairman Robert Pitofsky (a Clinton appointment), the FTC has sought to be an aggressive enforcer of consumer protection and antitrust laws, while at the same time creating procedures that make it easier for businesses to understand and comply with the law. Building on the foundation engineered by the prior Chairman, Janet Steiger, Pitofsky has created a strong and widely respected FTC.

(Continued on page 20)

## Farewell to Parchment

By Mark A. Neubauer, ABTL President '91-'92

The casebook is dead. Gone are the days of piling volume after volume of Fed. Second on a musty table, a solitary bulb shining overhead. Gone is the sound of rustling paper as you turn page after page, frantically searching for that magical language that will convince the judge to grant your motion. Yes, the hardcover law book has gone the way of the dodo, carbon paper and shorthand.

Probably the biggest change in the life of *abtI Report* has been the computer. It has revolutionized the practice of law. Not just the drafting of pleadings but the research of them as well.



Mark A. Neubauer

Now, we log onto massive computer libraries of Westlaw or Lexis. The largest law libraries are at the instant access of the smallest practitioner. The need for books is over.

This change is, of course, causing law firm administrators to salivate. Think of the hundreds of thousands of dollars we lawyers spend for renting expensive office space for row after row of bookshelves that now can be replaced by a single personal computer.

Nor do you have to lug book after book home or burn the midnight oil at the office or the County Law Library. Instead, just grab your laptop, plug in the modem and the world is at your feet.

Simply put, the massive West mailings are dinosaurs. Those volumes that arrive in your mailroom in heavy boxes no longer make sense.

Soon, law firms will have those rows of book shelves replaced by a thin CD-rom disk. As disk servers become more sophisticated, young associates will merely access the disk from their office PC.

Most young lawyers are computer conversant; they can work from a screen. But for those of us who still need to feel paper, we can always print out the cases from either the CD-Rom or from the library on line.

Librarians, already a vanishing breed, will finally become extinct. Instead, just call your service representative from the central computer service.

The rapid change makes it difficult for the noncomputer literate. There are still some of us who love to thumb through casebooks or, better yet, digests. But those days are fast disappearing.

What alarms me about the loss of the book is that too often we stumble onto the right line of cases accidentally. This points out the limits of computer research — the old computer nerd saying of "Garbage in, garbage out" applies to computerized legal research as well.

The problem is thinking of the right key word or phrase. We don't always do it. And, if we fail to detect the right word, our research is lacking. We miss the key statute or the key case.

Finding the right word or the correct West key number always unlocks the door, then the right cases come tumbling out. But how do you get there? Browsing through a digest or a treatise is my tool. You can't easily do that with a computer. Pump in the wrong word — say, "jury", and you get 200,000 hits. Restrict your search to "jury tampering" and you get zilch.

We have all been there — even the most adept legal researcher

— fumbling through search after search, looking for the right key. So even the computer has its limitations.

You have to focus your research and carefully script your searches so you get the information you want.

Fortunately, treatises will survive this revolution. That will allow the perusal that results in finding the magic key. No matter how much we utilize computers we will still need to skim the lawbooks to probe new areas of law. Computers are only as good as the person using them.

Along with legal research, the computer has changed the scope of discovery in business litigation. On-line services, such as Nexis, computerized newspaper libraries, such as the *New York Times* or *Wall Street Journal*, are all available at a switch of your modem.

Even more potent are the on-line access services to public reports. Filings with the Secretary of State, lawsuits, property transfers, and divorces are all available. For most business litigators that search is the first step to drafting the complaint. Who are the directors, officers and principal place of business? Computers tell you.

Do a search of pending lawsuits against your opposing party. That allows you to link up with other lawyers who can give the benefit of their discovery.

Of course, the greatest fun is litigating against a publicly held company, which must file reams of reports with the SEC. 10-K's, 10-Q's and the like present a wealth of information to the wary litigator. Not only does it set forth the officers, directors, and income of your opponent, it also sets forth various discussions of contingent liabilities, including possibly the very lawsuit you are fighting.

Reading these reports is a must, even if your lawsuit might not be listed. It lets you know who the players are on the other side.

Plus, if the existing databases don't give you the needed facts, you can create your own. More and more we are developing our computer databases using the documents released in discovery. With the advent of scanners and CD-Rom, the old-fashioned document depository, where lawyers stored thousands of pages of documents in complex business cases, is no longer necessary.

Nor are the legions of paralegals sorting and indexing those documents. Remember 20 years ago when everyone would debate the best method of organizing documents? Paralegals would have to create index cards by hand, laboriously entering each key item of data on the cards — who drafted the document, when, the topics discussed, etc.

Now, the documents that once filled file cabinets are scanned on a CD-Rom disk. Then we do a word search. Deposing President Smith of the corporation, out plunks each document containing President Smith's name.

The only limitation to this tool is the same limitation that affects legal research — you have to use the right search words.

Moreover, computers are not a substitute for thought. There is no true substitute for actually looking at the documents. Indeed, the greatest theories of liability result from perusals of hard copy.

Computers have also affected depositions in business litigation. We all get the transcripts on a computer format as well. Word searches can be effective for cross-examination of an opponent. With a press of a key, out pops every time the witness discussed that same word. And out pops the inconsistencies.

So we are now going to far more of a paperless litigation. Casebooks, cartons of copies of documents and piles and piles of notes are all going the way of the microchip.

In the next 20 years we will see the end of casebooks once and for all. Libraries will be a distant memory, as will the paper-crammed "warroom" of documents. Business litigation has truly entered the computer age. ☞

---

*Mr. Neubauer, Editor of abtI Report from 1983-1989, is a partner with Stern, Neubauer, Greenwald & Pauly in Santa Monica.*

---

## Assault on the Duty to Defend

By Bruce A. Friedman, ABTL President '93-'94

**L**et me begin with heartfelt congratulations to the *abt* Report on its 20th anniversary. I appreciate this opportunity to give my point of view on what I regard as some very disturbing recent developments in the substantive area of insurance law. I am referring to the California Supreme Court's recent decision in *Buss v. Transamerica*, 97 Daily Journal D.A.R. 9412 (July 24, 1997), and other recent Court of Appeal decisions which I regard as an assault on the long-standing and well-reasoned principles applicable to the duty to defend.

### Reimbursement

Before pronouncing new rules with respect to reimbursement of defense costs, Justice Stanley Mosk of the California Supreme Court writing for the majority in *Buss v. Transamerica*, *supra*, discusses the development of California law with respect to the duty to defend and reaffirms certain of its rules.

Then, Justice Mosk departs from the public policy principles underlying the duty to defend when he states:

"The fact remains, as to the claims that are at least potentially covered, the insurer gives, and the insured gets, just what they bargained for, namely, the mounting and funding of a defense. But as to the claims that are not, the insurer may give, and the insured may get, more than they agree, depending on whether defense of these claims necessitates any additional costs."

**U**nfortunately, a corollary to the rule that bad facts make bad law, is that wealthy policyholders make bad insurance law. This corollary was at work in the Supreme Court's decision in *Buss*. Confronted with an underlying case arising out of a contractual relationship between Jerry Buss, owner of the Lakers, and H&H Sports, an entity through whom Buss obtained advertising and other services, in which H&H Sports sued Buss on 27 causes of action, only one of which (defamation) was potentially covered, the Supreme Court chose to establish new rules with respect to an insurance company's ability to obtain reimbursement of defense costs from its insured. In the context of the *Buss* case, one could reasonably argue that a defense provided by the insurer in an action between Buss and his advertising agency arising out of their contractual relationship, was a windfall to Buss. In succumbing to the wealthy policyholder corollary, the Supreme Court appears to have forgotten that liability policies are written for millions of homeowners, small businesses and professionals who can ill-afford to defend a lawsuit against them in a legal environment in which nearly every plaintiff is not satisfied to merely obtain compensatory damages, but also seeks to plead uncovered claims of intentional tortious conduct in an effort to obtain punitive damages. The Supreme Court also appears to have forgotten that an insurance contract does not involve a typical commercial contractual relationship to be governed by rules limiting recovery of contract damages to those that are foreseeable, but instead is a contract of adhesion purchased in one form or another by nearly every adult in our society for the purposes of protecting the insured from personal exposure and providing the insured with a security blanket against lawsuits both meritorious and frivolous.

Despite paying lip service to these principles in *Buss v.*

*Transamerica*, the Supreme Court ruled that in a lawsuit which includes both potentially covered claims and others, an insurer may seek reimbursement from the insured for defense costs as to claims that are not potentially covered. The court justified its conclusion on a contract analysis that equates an insurance contract with an ordinary commercial contract. In doing so, the Supreme Court has given the insurance industry a number of new and potentially effective weapons which will undermine the reasons for which insurance policies are acquired. First, in stating that the insurer has a duty to defend the insured as to claims that are at least potentially covered, the court noted that the insured was entitled to payment of these defense costs because the insurer had been paid premiums by the insured and had bargained to bear these costs. To attempt to shift them would upset the arrangement. The court went on to state that this arrangement would change if the policy itself provided for reimbursement of such defense costs.

Unfortunately, the Supreme Court has invited the insurance industry to rewrite insurance policies to provide for reimbursement of defense costs for even potentially covered claims when it is ultimately determined that there is no actual coverage. You can bet that some insurance coverage counsel is going to recommend to her carrier client that it adopt a policy revision to permit reimbursement even for potentially covered claims where no coverage actually exists. Such a policy provision would do nothing to fulfill the expectations of the insured with respect to the duty to defend, nor would it assist the courts in settling claims. Insurance companies would have an incentive to sue over coverage issues even after settlement or judgment of the underlying case.

But let's focus on more immediate concerns raised by the *Buss* decision. The court held that, as to claims which are not even potentially covered, the insurer may seek reimbursement for defense costs that can be allocated solely to such uncovered claims. If defense costs can be allocated jointly to claims that are potentially covered as well as to those that are not, then these defense costs cannot be recovered. The court imposes the burden of proof on the insurer to prove that defense costs are not reasonably related to any actually or potentially covered claims in order to recover them, and holds that the insurer's burden of proof in order to obtain reimbursement is proof by a preponderance of the evidence. In doing so, the court determined that the "undeniable evidence" burden imposed by the court in *Hogan v. Midland*, 3 Cal.3d 553 (1970) was dictum.

**W**hile I believe that the court's holding in *Buss* will spawn some immediate litigation between insurers and their policyholders in which insurers are seeking reimbursement of defense costs, ultimately, I do not think that this new rule regarding reimbursement will, as Mr. Buss argued, open the floodgates of litigation causing the courts to be inundated with reimbursement litigation. The rule that the Supreme Court adopted with respect to reimbursement is the same rule that courts have used in allocating cases under directors' and officers' liability policies. See *Norstrom Inc. v. Chubb & Son, Inc.* 54 F.2d 1424 (9th Cir. 1995); *Raychem Corp. v. Federal Ins. Co.*, 853 F.Supp. 1170 (N.D. Cal. 1994). Generally, these courts have found that all fees and costs



Bruce A. Friedman

(Continued on page 22)

## Civility: The Good Old Days

By William E. Wegner, ABTL President '94-'95

**T**he good old days weren't. That's what I told my son after one of his high school graduation speakers finished a speech in which he lamented how difficult kids have it today and how well off we (their parents) had it. "Every generation has its demons and challenges...turn them into opportunities, not excuses!" I intoned, self-satisfied at having delivered a profound (and unappreciated) contribution to his graduation event.

When I was asked to write a short article about *The Decline of*



William E. Wegner

*Civility in Litigation* for the twentieth anniversary edition of the *abtl Report*, my initial reaction was the same — the good old days weren't. When I did some research and gave it some thought, however, I concluded that they were.

We as a profession, on the whole, were more civil, more cordial and more accommodating to one another, to our clients and to the communities we serve, than we are now. Coming to this conclusion required some research on my part because, as my wife is quick to remind me, I have had a charmed practice. The lawyers with

whom I have jostled over the years have been professionals whom I came to respect and, in many cases, befriend.

**S**o, taking this assignment seriously, I initiated a sophisticated, scientific survey. I asked a bunch of trial lawyers to give me two examples each of the uncivilized conduct they had experienced in the past five years that best illustrated the decline of civility in litigation.

The objectives of my survey were threefold: (1) to determine whether things really are worse; (2) to ascertain the difference between incivility and zealous advocacy; and (3) to bounce off my patient surveyees an idea I have about how to improve things.

### Are Things Worse?

Yes. How do I know? Because everyone says so. Because everyone had several horror stories to tell. Because the bitterness with which many of these stories were recounted was palpable. Because the State Bar and numerous bar associations have impaneled committees to study the problem and make recommendations.

Those scientists among you will want to know whether I conducted a similar survey five or ten years ago so that I would have some actual data with which to compare my recent results in order to support my "things are worse" conclusion. No. If you want that kind of precision, you will have to give me a salary, a budget, an impressive title and a large staff.

If you do not think things are worse, you are most likely either a blind optimist, you have a "charmed practice" (see above) or you're simply out of touch. Either way, you may want to read on and address the issue of civility in order to make litigation even more civil.

### What is Incivility?

We are required by the canons of professional responsibility to

zealously advocate on behalf of the interests of our clients. Trial lawyers are also extremely competitive creatures, armed with overweight vocabularies. We have at our disposal the ability to have secret (really secret) conversations with our clients, and we are empowered by the Rules of Civil Procedure and the Evidence Code, which can be used to pursue or to frustrate justice.

We're also always in a fight with *someone*. In this mix, how do we recognize the difference between zealous advocacy and inappropriate, downright shameful conduct. What is incivility?

Let's start with what it is not. It is not "uncivilized" to take proper advantage of the rules of engagement. Sometimes the rules are harsh, and they render a result that may seem unjust. Employed *properly*, the use of the rules to your client's advantage is not only appropriate, it is required.

**I** use the words "proper" and "properly." Incivility occurs most frequently when the rules are employed *improperly* for reasons that have nothing to do with the reason for the rule. Incivility is, most frequently, just bad manners.

Too vague for a working definition of incivility? Agreed. Incivility falls into that, "you know it when you see it" category of phenomena. Therefore, I have listed below the top ten examples of incivility culled from my scientific survey. They are all taken from real cases. They were all too easy to compile. Here goes:

*Number 10:* Using terms such as, "you are out of your \_ucking mind", "Bullshit", "stick this motion up your \_\_\_\_" and "if brains were dynamite, you would not have enough to blow your nose!" when conversing with opposing counsel.

*Number 9:* Faxing fourteen, one-paragraph letters to opposing counsel at 5:30 p.m. on a Friday when you know he/she will be out of town until Wednesday of the following week. Each letter ended with, "If I do not receive a reply from you by the close of business Monday, I will assume you agree with my position and will proceed accordingly."

*Number 8:* Surreptitiously taping conversations with opposing counsel and/or the court.

*Number 7:* Lawyer A calls a potential expert and learns within the first few minutes of the conversation that the other side (Lawyer B) already has contacted the expert, and the expert had declined the assignment. Lawyer A immediately calls Lawyer B and tells him what happened, that no confidential information was disclosed and that Lawyer A will provide a declaration to that effect to Lawyer B. Lawyer B moves to disqualify Lawyer A and his/her law firm. The (expensive) motion is properly denied with Lawyer B receiving a brow-beating from the judge.

*Number 6:* Throwing a book across the table at opposing counsel during a videotaped deposition — missing opposing counsel but hitting the camera! Compare: During a trial in federal court in Birmingham, Alabama, trial counsel asked, pursuant to FRCP 32 (which permits the use of a deposition at trial "for any purpose") for permission to strike opposing counsel with his clients' deposition transcript. Opposing counsel was slow to object and was struck. He then objected. The trial court sustained the objection and called for the next witness! Throwing books during depositions is unquestionably uncivil; assaulting opposing counsel with a deposition transcript at trial apparently remains an open question.

*Number 5:* Purposefully scheduling motions so that opposing counsel must prepare opposition papers over holidays.

*Number 4:* Sending "emergency" messages at 5:00 p.m. that demand a response the same day—and then leaving the office.

*Number 3:* Sending a FAX to the managing partner of a firm advising him/her that a young lawyer at the firm (opposing counsel who is doing a fine job) is "engaged in conduct that is

(Continued on page 21)

## On Being a 'Dead' President

By Jeffrey I. Weinberger, ABTL President '95-'96

All of the authors who contributed to this special issue share a common experience. We were each lucky enough at some point in our careers to land a spot on the ABTL's Board of Governors. A smooth talking ABTL President convinced us that it would be a great career move if we agreed to spend hundreds of hours organizing an annual seminar in a remote locale, planning programs, securing participants, selling tickets, and picking dinner menus. Not having learned our lesson, we next "volunteered" to stage five dinner meetings with programs and panels good enough to convince between 300 and 500 people to stay downtown on a weekday night. Then, in turn, we reported on ABTL's bank accounts as Treasurer, recorded its monthly history as Secretary, and did basically nothing as Vice President (my apologies to the current occupant of this office) until finally our turn arrived to assume the mantle of power.

Yet, it seemed that, in the wink of an eye after the long-awaited event, our terms were suddenly over. There was no possibility of running for re-election. We were banished forever from the Board of Governors, prohibited by ABTL by-laws from serving again. The only physical manifestation of our prior service was to have our names placed at the bottom of the ABTL letterhead, joining a list of other exiled ABTL has-beens. In the words of one of one of my predecessors, as far as the ABTL was concerned, we were now officially "dead." To cope with the feelings of loss, powerlessness and rejection, this past President proposed the formation of the Dead Presidents Society ("DPS-ABTL") as a vehicle for past ABTL Presidents to recapture their influence and prestige and continue to make their mark on the organization. (Actually, it was an excuse to get together once in a while and party.) Although we have not yet implemented this idea, I am hoping that the 20th Anniversary issue of *abtl Report* provides the impetus for DPS-ABTL to formally organize itself and begin to function.

I don't want to leave the impression that the ABTL has ignored

its past Presidents. In fact, in its typically informal and unstructured way, the ABTL has fully exploited whatever talents and resources its past leaders have to offer. For example, past Presidents have been frequent participants in ABTL programs long after they have left the fold. Over the last seven years, past Presidents have been instrumental in the formation and start-up of ABTL chapters in Northern California, San Diego, Orange County, and recently in Fresno. Unconcerned with the nagging responsibility of organizing meeting agendas, planning programs, contracting with hotels, looking for ways to increase membership, and boosting attendance at ABTL functions and programs, past Presidents have been able to focus more on long-range issues. These have included how the ABTL Board should be selected, what role ABTL should play with respect to the public perception of the legal profession, how ABTL can maximize its new statewide presence and what criteria and standards should be applied to chapters which have been granted the right to use the ABTL name. For the past five years, the combined Boards of all ABTL chapters have held annual meetings to discuss and explore these long-range issues, and the outgrowth of those meetings has frequently been the formation of small groups of ABTL leaders, heavily populated by past Presidents, to pursue these issues in greater depth. Past Presidents have also served as liaisons from our Board to Boards of our other chapters in order to facilitate the constant exchange of ideas and maintain a level of organizational cohesiveness state-wide.



Jeffrey I. Weinberger

Compared to most voluntary bar associations, ABTL has minimal structure, little bureaucracy, and few rules. Continued participation in ABTL's evolution by its past leadership has provided continuity and tradition which its lack of structure might otherwise threaten. That participation has also contributed to ABTL's determination to maintain its consistently high standards. I believe that the ABTL would be well advised to continue to exploit the experience of its past Presidents in this way.

Now that DPS-ABTL is closer to reality, however, the free ride may soon be over. Our first order of business will be to formulate a list of non-negotiable demands designed to put an end, once and for all, to our premature exile from the halls of power. I propose the following for initial consideration: (1) moving the list of past Presidents from the bottom to the top of the letterhead (rearranged in reverse chronological order); (2) providing complimentary registration, hotel rooms and chartered transportation for the ABTL annual seminar. (Because we recognize that this might unduly burden the ABTL treasury, we might be willing to reduce our demand to alternate years, commencing in October 1998); (3) a special table at ABTL dinner meetings (near the back of the room) for all DPS-ABTL members, along with pre-printed name tags that do not fall off, (4) the right to form an ABTL chapter in any city to which any of us might ever relocate.

In my own unbiased view, this would seem like a small price to pay for continued access to the accumulated wisdom of ABTL's past leadership. If you have any comments, I suggest you write to ABTL's current President who, when deciding whether to implement these suggestions, will hopefully keep in mind that, in the wink of an eye, he will be a "dead" President as well. ☺

*Mr. Weinberger is a partner with Munger, Tolles & Olson LLP in Los Angeles.*

## JOIN US

**abtl**  
REPORT

Association of Business Trial Lawyers  
P.O. Box 67C46, Los Angeles, California 90067  
(310) 445-9555

I would like to join  renew my membership in ABTL. Enclosed is a check for \$75.00 covering my first year's dues (or \$50.00 for members admitted to the State Bar within the past three years).

State Bar No. \_\_\_\_\_ Dues Enclosed \$ \_\_\_\_\_

Name(s) \_\_\_\_\_

Firm \_\_\_\_\_

Address \_\_\_\_\_ Suite \_\_\_\_\_

City \_\_\_\_\_ Zip Code \_\_\_\_\_

Telephone \_\_\_\_\_

Facsimile \_\_\_\_\_ E-mail \_\_\_\_\_

## Employment Law in the Twenty-First Century

By Karen Kaplowitz, ABTL President '96-'97

Labor and employment law has become one of the fastest growing legal specialties because of the proliferation of labor and employment litigation. The growth has been fueled by huge jury verdicts (Hughes, \$89 million; Pitney Bowes, \$11 million) and settlements like the Texaco race discrimination class action. The field is no longer restricted to traditional labor lawyers with collective bargaining experience. To the contrary, the field seems increasingly dominated by lawyers who have

mainstream business and tort litigation experience. The best lawyers in the plaintiffs' personal injury bar handle employment cases as do the best defense lawyers. Many of the trends which will predominate over the next 20 years are visible now: more self-employed, independent contractors in the workforce whose rights are still undefined; more insurance coverage of employment disputes; more alternative dispute resolution, with continued scrutiny by the courts; and continued focus on sexual harassment, disability rights, privacy rights and age discrimination.



Karen Kaplowitz

*The Self-Employed and Temporary Workforce.* We will continue to see the rise of non-traditional working relationships. In every industry, including law, businesses have seized the flexibility of hiring people to handle projects rather than hiring full time employees. In our own industry, we have providers of temporary lawyers, paralegals and staff and providers of legal research, like the Legal Research Network. Even mainstream law firms are offering temporary lawyers to work in-house with clients. The well-publicized *Microsoft* case, holding that the Microsoft workers, misclassified as independent contractors instead of employees, are entitled to employee benefits like stock option plans, will force employers to exercise more care in structuring relationships with non-employee workers and to make greater distinctions between employees and contingent workers. The ruling, *Vizcaino v. Microsoft*, 97 Daily Journal D.A.R. 9429, is not likely, however, to diminish the trend to the self-employed and temporary workforce. The major temporary staffing companies, like Kelly, Olsen, Acustaff and Volt, have grown dramatically in the last five years for a reason: project-based employment relationships make a lot of sense.

The legal system will have to sort out the rights of the self-employed or temporary worker. If they are not covered by existing state and federal civil rights laws, we can expect that those laws will be amended or that statutes, like California Civil Code Section 51.9, which prohibits sexual harassment by people in business, service or professional relationships, will be enacted to cover people who are deemed not employees.

The well-established doctrine of joint employers may also be used to cover situations in which one employer hires employees to be used in another employer's workplace. In *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997), the court held a farm owner liable for a leasing company's minimum wage violations under the joint employer doctrine.

In the short-term, the use of temporary workers may diminish the number of employment claims against employers. In the long term, we can expect laws that will provide comparable protection

to temporary workers in key civil rights areas.

*Unfair Competition and Misuse of Trade Secrets.* One consequence of the growing use of independent contractors and temporary workers is heightened mobility of workers which can result in less loyalty and more risk of misappropriation of confidential, proprietary information. Because of the fact that it is difficult under California law to enforce non-compete agreements, absent sale of an ownership interest, employers must become more zealous about the protection of their proprietary information. The well-publicized General Motors/Volkswagen and General Electric disputes reflect the increased mobility of the workforce with resulting risks to proprietary technology and business strategy.

*Insurance Coverage.* Two trends have occurred: insurance companies have tightened the employment exclusion clauses in general liability policies and have also designed specialized policies to cover the defense and indemnity of employment claims.

The availability of insurance coverage for defense costs is significant because defense costs often distort the settlement value of cases. Large employers usually do not weigh defense costs heavily in settlement values, and view such expenses as a cost of doing business. Absent insurance, employers who are sued less frequently tend to give more weight to the cost of defense.

*Alternative Dispute Resolution.* Many aspects of employment litigation create natural incentives for alternative dispute resolution for employees and employers alike: the disruptiveness of litigation; the cost of litigation; the length of litigation and the exposure of jury trials. Thus far, legislative efforts to curtail mandatory arbitration have not been successful, though the plaintiffs' bar has continued to seek legislative limits. The courts, however, are forcefully shaping the nature of arbitration. In the recent case, *Engalla v. Kaiser*, 97 Daily Journal D.A.R. 8384, the California Supreme Court refused to enforce an arbitration agreement in a non-employment context where the arbitration was fundamentally unfair. In the employment context, the courts have issued similar mandates. In *Stirlen v. Supercuts*, 51 Cal.App. 4th 1519 (1997), the Court rejected a mandatory arbitration agreement in which only the employer had the right to resort to the courts, and the agreement was too one-sided.

When disputes are properly subject to arbitration, however, the courts have enforced the arbitrators' rulings with very limited bases for judicial review, which promotes finality.

Notwithstanding the judicial hurdles, arbitration as a primary means of dispute resolution, and non-binding forms of ADR, like mediation, will continue to increase. The cost of lawsuits and jury verdicts creates too high an incentive for this trend to be derailed.

*Privacy Rights.* In and out of the employment arena, privacy issues are getting increased attention. E-mail and voicemail communications have increased the overall volume of communications within and external to the worksite. E-mail as evidence will radically alter employment litigation. The ease of e-mail leads to many intemperate communications which have a perpetual life. As in many workplace issues, employers have to balance the advantages of encouraging communication against the dangers of electronic communications, including Internet access, of a sexual or offensive nature.

*Sexual Harassment.* Sexual harassment continues as one of the primary sources of employment disputes. Two things appear to be perversely true: there is a lot of sexual harassment in the workplace yet many claims of sexual harassment are frivolous or grossly exaggerated. Even though many people in the workplace are wary of situations with sexual overtones, employers often find it difficult, even with persistent training and warnings, to change the behavior of people whose sexually-oriented behavior is deeply ingrained. There is a backlash occurring because of the barrage of sexual harassment claims; men are avoiding threatening situations, like travel, dinners, meetings behind closed doors; mentoring rela-

(Continued on page 23)

## Letter from the President

Continued from page 1

around the world was unthinkable. Would we have imagined 20 years ago that lawyers could regularly practice in courts thousands of miles away while sitting at their desks? Could we have envisioned checking millions of newspaper articles and wire service reports from our offices for information about clients and adversaries?

In 1977, Lexis was a nascent technology and the Internet was a well-guarded national security secret. Yet today they are part of our lives. Federal Express had yet to be born and only the largest firms had even a single fax machine. And, on a more personal level, lawyers were generally male and white. All of these have changed, as the legal profession has become part of the twentieth century and as it, reluctantly, anticipates the twenty-first.

Continued social and technological changes, many that are beyond imagination, will alter Los Angeles and the law over the next two decades. Our city, once a western backwater, may well become the bridge between North and South America as well as between the Americas and Asia. It will become even more multi-cultural, multi-racial and multi-lingual. The ABTL will, we can only hope, embrace these trends and itself serve as a bridge between different communities, old and new, and help to improve communication and civility amidst all this change.

When, once upon a time, the major players in the Los Angeles legal community regularly dined together at the same private club, there was no need for our association. The influential elite met informally and frequently, discussing and even deciding what needed to be done. However, by the 1970's, the old order had broken down. The ABTL was a response to that breakdown. We were born and have thrived because we were on the forefront of change, sometimes caused it, and responded to it eagerly. But now, as we have become an institution, the changes to which we reacted have become the *status quo*. Further growth and change are not merely desirable, but essential to survival. Over the coming years and decades, the ABTL must be as dynamic as the day it started or we will become irrelevant and deservedly pass from the scene.

Over the next 20 years, technology will no doubt make major changes in our lives, not only as lawyers but as citizens of the twenty-first century. Technology may have many beneficent effects upon our lives, but it also allows us to be more isolated. Living in Aspen or Algiers, while practicing in Los Angeles, may be possible. But will it be desirable? Might it simply be too easy to send an angry and unproductive e-mail to someone we never see in person? If the virtual courtroom becomes a reality, how can we be sure that some of the values of the current system — hallway conferences, discussions over coffee in the cafeteria — will endure? Can we embrace the future and its benefits while preserving what is good from the past?

The ABTL will, quite obviously, not be the answer to all these issues. However, organizations like ours can help to foster the feeling of community that once existed almost effortlessly. In that not so distant, almost forgotten past, the Los Angeles legal community met not because it wanted to, but because there was no alternative. A few dozen men — and it was then only men — ran into each other at the same parties, supped at the same restaurants, played golf at the same clubs, and fought each other in a small number of courtrooms before judges whom they knew. Community was something that happened; it didn't need to be created. As the legal world changed, the need for associations like ours increased. In the next 20 years, that need for human connection will, almost of necessity, grow.

If we are to survive, if we deserve to survive, it will be because we address the need to preserve traditional, even old-fashioned,

moral, ethical and collegial values in a world in which technological isolation will grow ever easier. If the ABTL can address these issues and bring into the future the healthy and important values of the past, it will be here — and it will deserve to be here — 20 years from now. See you in 2017. ☞

---

*Mr. Stern, President of ABTL, is a partner with Stern, Neubauer, Greenwald & Pauly in Santa Monica.*

---

## Elvis Passes Bar on Mars

Continued from page 1

being recognized as throwing off undesirable side effects. As in the use of the antibiotic, identification of the area of effectiveness and means of elimination of adverse side effects are required in the case of the master calendar." This was the beginning of the end for the master calendar system. But not the end, for *abtl Report* churned out pros and cons on the subject for years before direct calendaring finally triumphed.

Lloyd P. Derby of Adams, Duque & Hazeltine assured us, "in the April 26, 1976 Memorandum, the *Hochfelder* case is viewed by the [SEC] Commission as 'the most recent of a line of Supreme Court decisions which emphasize the Court's determination to cut back on the proliferation of federal court remedies and, in general, to reduce the increasing work load on the federal court systems.'"

So we had one wrong and one right in the first issue.

In No. 2, UCLA Law Dean William D. Warren broke the champagne on the Los Angeles County Bar's Judicial Evaluation Committee: "Initially, the 15-person Committee had to decide how to proceed in a manner that would be fair to the contestants; feasible, given the limited amount of time the busy Committee members could spend on the project; and helpful to the voting public." Unfortunately, the contestants have yet to acknowledge this.

John Brinsley, our President, noted: "In March of 1976, Assemblyman Knox, with the concurrence of the Governor, introduced a bill which would have required attorneys to provide not less than 40 hours per year of 'public service' (to be defined by the State Bar Board of Governors), without fee or at a substantially reduced fee." Obviously, the bill did not pass and the debate continues. As Brinsley put it: "What is the professional responsibility of the lawyer to provide public interest legal services?" That question from 1976 remains unanswered.

In No. 3, then-Dean of the USC Law Center and now Ninth Circuit Justice Dorothy Nelson spoke of the Devitt Committee and the possible imposition of standards for admission to the federal bar. She was not for it, at least as conceived. Brinsley carried on the discussion in Vol. II, No. 1. He was not for it either, at least as conceived.

Apparently, nobody else was for it (at least as conceived).

Next issue, Richard K. Hansen focused us on the "Rising Costs of Business Litigation." Hansen was general counsel of Pertec Computer Corporation, which is no longer with us, so I guess he knew of what he spoke.

In Vol. III, No. 1, Presiding Judge of the Los Angeles Superior Court Richard Schauer introduced us to the new Judicial Arbitration Act, mandatory arbitration for cases of a certain value. That idea stuck (perhaps if the right word "us" were placed after "stuck") and we live with it today, for better or worse.

Buried on page 3 was an article by Los Angeles Superior Court

(Continued on page 18)

Judge Steven S. Weisman entitled "Shortcut to Trial: Use of Orders of Reference and Judges Pro Tem." In it were the seeds of every reference procedure we currently use, from discovery referees to trial by Rent-A-Judge. Ideas have consequences.

In Volume III, No. 3, *abtl Report* ran its first interview. Alan Halkett and Joseph Wheelock of Latham & Watkins had tried a 10b-5 class action to a conclusion, one of the first such trials, and they explained how to win. The losers were not heard from.

Vol. IV, No. 1 sported our first plebiscite. Here's what we voted on and how we voted:

- "Should the Los Angeles Superior Court institute, on a pilot program basis, a direct calendaring system?

Yes	254 (81%)
No	53 (17%)
Abstain	6 (2%)

- Should the \$15,000 limitation on mandatory arbitration be raised to \$25,000, to \$50,000, or not at all?

To \$25,000	135 (43%)
To \$50,000	91 (29%)
No change	81 (26%)
Abstain	6 (2%)

- Should the party setting aside an arbitration award be liable for attorneys' fees if the trial de novo does not result in a more favorable award?

Yes	262 (84%)
No	44 (14%)
Abstain	7 (2%)

The MacArthur Awards Committee asked ABTL to locate these 6 or 7 lawyers who would not express an opinion but we were unsuccessful. A hoax seemed probable.

The pattern was set and we continued in this vein with comments on how to improve time to trial, how to better try a case, common mistakes in discovery, motion practice, and appellate practice and how to correct them. We dealt with securities litigation, anti-trust, insurance law, contract litigation, jury instructions, the use of computers, attachments, criminal law, statutes of limitations, arbitration, mediation, *voir dire*, experts. I am pleased to state we never published an opinion on the Middle East Crisis, Bosnia, cigarettes, abortion, animal rights, arms control, the Catholic Church, God or Mammon. We left those to the ones who know at the State Bar and the ABA.

Our authors included Judges Harry V. Peatris, Thomas C. Murphy, Philip H. Richards, Robert W. Zakon, David N. Eagleson, Harry L. Hupp, Philip H. Saeta, William Matthew Byrne, Jr., Marianna Pfaelzer, Ralph J. Geffen, Arthur L. Alarcon, Pamela Ann Rymer, Norman L. Epstein, Lester E. Olson, Jack Tenner, Richard P. Byrne, Robert Lopez, Diane Wayne, John Zebrowski, Robert Bonner, William Huss, John Paul Stevens, Malcolm Lucas, William A. Masterson, Thomas E. Carlson, William A. MacLaughlin, Howard B. Wiener, Miriam Vogel, A. Wallace Tashina, and Eli Chernow.

We heard from lawyers Howard I. Friedman, C. Stephen Howard, Peter H. Strong, Stuart B. Walzer, Edward M. Lynch, Paul J. Hall, Thomas W. Johnson, Jr., David C. Wheeler, Brian O'Neill, Richard C. Fruin, Stephen C. Drapkin, Thomas M. Fortuin, Sharon Baumgold, Richard K. Cole, Jr., Bernard LeSage, Linda J. Bernhard, Michael J. Wagner (expert witness), Alan D. Bersin, Michael C. Kelly, Marilyn McDowell, Edward E. Corey, David Stern, Barbara C. Luna (expert witness), James Goldman, Todd M. Bailey, Maxwell M. Blecher, Ann I. Jones, Joan Dolinsky, Stephen M. Ray, Laura C. Nachison, Arthur Miller, Patrick Lynch, Larry R. Feldman, Gerald M. Stern, Rex Julian Beaber, Laurence Jackson, Stanley Arkin, Arnold P. Peter, Richard Sheldon, Nicole

A. Crittenden, Mark Becker, Alex R. Baghdassarian, Larry C. Russ, Michael A. Bertz, Laurence D. Jackson, Joseph F. Dzida, Barry B. Kaufman, Joel Mark, Mary Lee Wegner, Craig J. de Recat, Alice A. Seebach, Nelson E. Brestoff, Scott A. Edelman, Vivienne A. Vella, Charles R. Hartman, Charles E. Wheeler, Michele G. Wein, Edith N. Dinneen, Denise M. Parga, Jasmina A. Theodore, Terry W. Bird, Barbara Moses, Ralph O. Williams, James F. Elliott, Robert M. Turner, Carrie Battilegia, John A. Sturgeon, John A. Dito, Robert Roché, Michael A. Sherman, Constance C. Willems, Patrick A. Cathcart, Geoffrey L. Brian, Michael L. Cypers, Robert W. Stone, Melvyn B. Fliegel, Katherine L. McDaniel, Richard L. Stone, Paul M. Miloknay, Glenn M. White, Lester J. Levy, John W. Amberg, Robin Meadow, Robert Olson, Greg R. Woodburn, Michael Grace, Robert J. Stumph, Jr., James Plummer, Gerald McGowin, Peter S. Selvin, Glenn A. Rothstein, Robert Olson, Michael L. Cypers, Neill W. Freeman (expert), Larry C. Russ, Jeffrey M. Loeb, Jeffrey H. Mintz, and Geoffrey L. Brian.

Then there were our presidents, each of whom contributed many articles and comments starting with John H. Brinsley who was president during the first year of publication. Thereafter we heard from the Honorable William A. Masterson, Murray M. Fields, Loren R. Rothschild, Howard P. Miller, Marsha McLean-Utley, Lawrence H. Pretty, Honorable Charles S. Vogel, Elihu M. Berle, Robert A. Shlachter, Howard O. (Pat) Boltz, Peter I. Ostroff, Harvey I. Saferstein, Mark A. Neubauer, Richard B. Mainland, Bruce A. Friedman, William E. Wegner, Jeffrey I. Weinberger, Karen Kaplowitz and your author. Only presidents Alan Browne and Richard Keatinge did not publish. There were no Reports during their years as president.

Our articles run from dry to drier. But, after all, the law is a desert, a trillion grains of sand called procedure and substance, a footfall of grains important as one passes over them, then left behind forever. Only the clients and their witnesses, human beings engaged in true struggle, remain in the memory as a sort of oasis. Those human beings seldom inhabit our articles.

Dry does not mean dull. A "dry" sense of humor is considered best. Dry is "not wet," i.e., distilled, concise, containing what is important without unnecessary sloppiness. Our authors, with some help from our editors, achieve that.

When I started the *abtl Report*, I knew the commitment required of its editor, and although I had the dream, frankly, I did not want the work. So I asked Benjamin E. (Tom) King to help me get it going, knowing I could let him take over as editor in a couple of years. King, no dummy, invited his Buchalter associate, Mark Neubauer, to one of our first meetings, knowing Neubauer could eventually take over from him and become editor. Soon Neubauer brought in another associate, Vivian Rigdon Bloomberg. And so it went. Our four editors, McDermott, King, Neubauer and Bloomberg, all with newspaper backgrounds, all prepared to edit, but all replacing themselves almost before they started.

Good writing and strong subject matter are not enough to produce a decent periodical. Design and editing are required and on a constant and consistent basis. Luckily, we stumbled onto a Ph.D. in political science, whose dissertation had just been published by Columbia University Press and who had moved to publishing a series of commercial newsletters. His name was, and is, Stan Bachrack, our managing editor for 20 years. Among other editorial contributions, the "look" and the "feel" of this publication are Stan's. The *abtl Report* is not exactly "commercial" and it has been more or less a labor of love for Stan, a love that the ABTL should reciprocate.

"So we beat on, boats against the current, borne back cease-

(Continued on page 19)

## Elvis Passes Bar on Mars

Continued from page 18

lessly into the past." Those are the last words, of course, of *The Great Gatsby*, and seem to reflect what I've been doing here.

But keep in mind Fitzgerald's words that just precede those, as Dutch sailors first viewed our continent and "for a transitory enchanted moment man must have held his breath...face to face...with something commensurate to his capacity for wonder."

The law is commensurate to our capacity for wonder. If we continue to question it, to explain it, to teach it, to challenge it, to forge it into reality, we will not be like Gatsby's "final guest who...didn't know that the party was over."

The party's still on. The *abtl Report* flourishes. The guest list grows. The most distinguished judges and lawyers of our era voluntarily give us their time and their wisdom, challenge our capacity for wonder, reinvigorate our commitment to our profession, guide us to a future of — who knows? We did not go the *Star* route, so we don't predict the future — but so far as the *abtl Report* goes, if *supra* predicts *infra*, the next 20 years should be great. ☺

---

*Mr. McDermott, Founding Editor of abtl Report, is a partner with Manatt, Phelps & Phillips in Los Angeles.*

---

## Oral Argument in the Court of Appeal

Continued from page 7

and it makes a very bad impression. While we may not be as formal as some courts, you will not impress anyone by adopting a casual stance. While we try to not take ourselves too seriously, we do take our work very seriously. Proper decorum is important.

*Rule No. 5:* While the appellant might want to offer a one-sentence opener to be sure the court is focusing on the right case ("As the court knows, this is the case where the trial court refused to trail the case for two days to permit my client to attend her husband's funera..."), do *not* start reciting all of the substantive facts and procedural history of the case. Remember that it is called oral "argument" for a reason. The idea is to argue the merits of your legal position. Your approach must take into account the posture of the case. If the appeal is from an order of dismissal entered because of a failure to diligently prosecute, tie the facts of your case to the standards governing relief. If the appeal is from a summary judgment, argue your best issue — disputed facts or burden of proof or whatever, but skip the obvious (such as our standard of review). If the case was tried to a jury, focus on the claim of error and its prejudicial effect. If the court has questions, one or more of the judges will ask for answers.

*Rule No. 6:* Do not read your argument. There are few things in life more boring, uninspiring and unimpressive. Most courts will stop you if you try to read and you will then be as frustrated as we are bored. Of course, it is sometimes necessary to read an occasional one-line quote, and that is perfectly appropriate. If it is longer than two lines, question your decision to read it. If it is more than three lines, don't read it.

### Rules for the Appellant

*Rule No. 7:* My own view is that you should not begin this way: "Unless the court has questions, I will submit." While some panels encourage this approach and welcome it, you should know that it does not mean the court is in agreement with you. To the contrary, the panel may have decided that your case is a dead-bang loser and they are delighted that they don't have to hear anything more about it. Since you are there, why not take advantage of your opportunity? Your client is entitled to your best effort, and

the least you can do is to emphasize your best point. It often happens that, once you begin, one of the justices may decide to ask a question. You may get a dialogue going. While you may still lose, you will have the satisfaction of knowing you did everything possible to advance your client's cause. You can still keep it short.

For example: "As I'm sure the court recognizes, *Buckaloo v. Johnson* is controlling and entitles my client to a commission under the facts of this case. The jury instructions were wrong because they did not require a decision in conformance with *Buckaloo*. If the court has any questions, I would be pleased to answer them; otherwise, I will submit." Please note that I did not give a citation for the case mentioned. The citation is in your brief and known to the court, and a side-track to that sort of detail detracts from the appearance you want to give the court — that you are prepared for argument and are interested in serious dialogue.

*Rule 8:* Know your panel before you stand up and state your appearance. You may not want to tell the court you waive your opening argument but want to reserve your time to respond. Some courts view this as sandbagging, others do not. Those that do will limit your argument to a true response and not let you bring up any point not raised by the respondent. Of course, the respondent may submit, in which event you have nothing to respond to, and you have then waived your entire argument. See *Rule 7, ante*.

### Rules for the Respondent

*Rule 9:* If all three members of the panel have told the appellant, directly or indirectly, that the appeal is borderline frivolous, you may submit. Otherwise, you should respond to the appellant's argument. Don't forget, however, that you are not bound by the appellant's limited presentation. If appellant's counsel has argued two points but you believe a third point is dispositive of the appeal in your favor, argue that point.

*Rule 10:* Try to answer whatever concerns you heard from the court in the questions asked of the appellant, and explain why an affirmance resolves those concerns most effectively.

### Rules for Both Sides

*Rule 11:* Always respond to questions directly, in one of four ways: (1) Yes, (2) No, (3) I'm sorry, I didn't understand the question; may I ask the court to repeat it, or (4) I don't know. Do not say, "I'll get to that in a minute." There is nothing more infuriating and most judges will interrupt and tell you to answer now. Listen carefully to the court's questions, and ask for clarification if you don't understand. If the questions are based on a false premise, it is okay to say so as part of your answer. If you have the impression the court has misunderstood or missed something in the record (because otherwise it wouldn't be asking a particular question), say so in your answer. As one commentator advises those who are not sure of their ability to think on their feet, "(1) stop and think; (2) do not evade the question; (3) respond directly, confidently, and as succinctly as possible."<sup>4</sup>

*Rule 12:* Do not take the full time (30 minutes) allowed unless you have an extraordinary case (you probably don't). Most cases require no more than five or ten minutes at the most, some only three or four minutes. Some courts count the time used to answer the court's questions as part of your allotted time, then end up using all of your time with their questions, many of which sound to you as though they are talking to each other. If this happens, it probably means the panel is divided and one member is trying to convince another to switch sides. So long as you have used your time to answer the questions to the best of your ability, you have done well.

(Continued on page 20)

*Rule No. 13:* Never interrupt your opponent. You are not in the trial court. You need not object to preserve a point. You must wait your turn to argue. Also, derogatory comments about opposing counsel are inappropriate and won't be tolerated. However, if the court has indicated it will entertain a motion to treat the appeal as frivolous, you may factually address that issue even if it is uncomplimentary to the opposing party or counsel.

*Rule No. 14:* Quit while you are ahead. Do not snatch defeat from the jaws of victory. When the presiding justice says the case is submitted, you are finished, whether you want to be or not. Conversely, do not leave just because you have finished. Although it doesn't happen often, one lawyer will sometimes make his presentation, then leave before the other side has even started. If your argument is not last (that is, if you are not the appellant and it is not your response time), sit down at counsel table while your opponent argues.

\*\*\*

Above all else, remember that oral argument is your final opportunity to do what you can to advance your client's position and to contribute to a better opinion. In some cases, you may even win over an undecided justice. Think positive and do your best. You might even enjoy it. ☺

<sup>1</sup> Rex E. Lee, *Oral Argument in the Supreme Court* (1986) 72 ABAJ 60.

<sup>2</sup> *Moles v. Regents of University of California* (1982) 32 Cal.3d 867, 871-872; *People v. Brigham* (1979) 25 Cal.3d 283, 287-288; Cal. Rules of Court, rule 22.

<sup>3</sup> John W. Davis, *Address to the Bar of the City of New York* (1940) 26 ABAJ 895. Between 1913 and 1950, Mr. Davis argued 140 cases before the United States Supreme Court, more than anyone save Daniel Webster. See also, Milton S. Gould, *Oral Argument Losing Its Appeal* (March 23, 1981) *The National Law Journal*, p. 15.

<sup>4</sup> Cooley, *Appellate Advocacy Manual* (Lawyers Edition), *Oral Argument*, Chap. 11, section 11.09, p. 50.

---

*Justice Vogel is Presiding Justice, California Court of Appeal, Second District, Division Four.*

---

---

### *A Modest Proposal from the Bench*

Continued from page 8

ing to untoward abusive tactics.

ABTL can effectively use its prominent recognition and outstanding reputation in the legal community to be in the forefront of lawyer education and the renaissance of civility in our legal culture. Because its involvement in legal education is already well ensconced, ABTL should consider the important further contribution it could make to the practice of law in California through the establishment and sponsorship of smaller sub-units or seminar size clubs ("Inns") of groups of lawyers, which would meet between regular ABTL meetings for the purpose of mentoring, consulting, and networking, and most importantly for sharing and inculcating values supportive of what it means to be a courteous true professional within the legal community.

The impact of the ABTL backing and participation in this type of a program would be significant. The attention that would be accorded ABTL's leadership in such an effort would encourage other bar groups to become similarly active in the endeavor to change the legal culture so as to restore civility and professionalism to civil litigation. ☺

---

*Judge Berle is a Judge of the Superior Court, Criminal Division, in Los Angeles County.*

---

### *Consumer Protection*

Under Pitofsky, the FTC has outlined three basic strategies to achieve its goal of consumer protection:

- Place a priority on practices that directly affect the health, safety and financial well-being of consumers.
- Correct practices that undermine the development of globalized technologies.
- Focus on creative solutions that will provide effective protection for consumers without being unduly burdensome for businesses.

As a practical matter, the Bureau of Consumer Protection, under the leadership of Jodie Bernstein has been able to leverage the FTC's meager consumer protection resources by joining with state attorneys general to enforce consumer protection laws. The FTC pursues these goals through rulemaking, litigation and consumer education. Under Bernstein, the FTC has launched a blizzard of industry-wide investigations—labeling each with a catchy name. For example, in "Project Mousetrap," the FTC and state authorities targeted firms that promise to develop and market individuals' inventions. In conjunction with state attorneys general, the FTC brought 7 actions and issued consumer education pieces designed to warn consumers on how to avoid invention promotion scams. In "Field of Schemes," the FTC and state authorities targeted telemarketing investment fraud and pyramid schemes. In operation "Peach Sweep," the FTC joined federal, state and local agencies to crack down on telemarketing fraud in Georgia, ranging from advance fee credit card scams to "luxury" cruises that turned out to be ferry rides.

### *Antitrust*

Like the Justice Department, the FTC currently spends the bulk of its antitrust resources screening and challenging mergers—especially those which must be reported to the FTC and Justice Department under the Hart-Scott-Rodino Premerger Notification Act. In addition, the FTC can bring actions for price fixing and illegal vertical arrangements, such as resale price maintenance and tying arrangements.

As part of the FTC's attempt to become a more user-friendly regulator, it has committed itself to more efficient and accurate review in the merger clearance process. As part of this program, the FTC and the Justice Department have committed to apportioning merger reviews between the two agencies within 9 days of filing. This increases the time allotted for actual review.

However, there can be no question that the Pitofsky FTC is one that is committed to "tough" review of mergers. As part of its antitrust mission, the FTC, under the leadership of William Baer as the head of its Bureau of Competition, has not hesitated to move to block large, high profile mergers—to the point of litigation in Federal court over preliminary injunctions. Recently, the FTC successfully blocked, with a preliminary injunction in Federal court, the proposed merger between Staples and Office Depot—one of the first major tests for the new FTC efficiencies guidelines promulgated in 1997 as additions to the merger guidelines. These new guidelines focus on efficiencies in the marketplace and ask (1) whether the claimed efficiencies are verifiable and substantiated, and (2) whether the efficiencies are likely to be passed on to the consumer. In the case of Office Depot and Staples, the FTC argued successfully to the District Court in Washington D.C. that any efficiencies resulting from the merger would not be passed on by presenting evidence that Staples historically passed on only 15-17% of its cost savings to consumers.

(Continued on page 21)

unethical and will embarrass your firm." Note: The managing partner concluded the young lawyer must be doing a great job.

*Number 2:* The entire O.J. Simpson criminal trial. You pick the day.

*Number 1:* Following unsuccessful demurrers, defendant answered, and plaintiff commenced discovery. Defendant was recalcitrant throughout the discovery process, actively resisting both document production and deposition notices. After repeated failures to appear and numerous postponements, he appeared at a deposition on February 12, 1981, rescheduled at his request, only to refuse to answer questions because it was Lincoln's Birthday—assertedly a "legal holiday." At a June, 1981 deposition, on a court order to appear with records at the office of plaintiff's counsel, defendant produced an assortment of papers in a box filled with straw and horse excrement, which he laughingly dumped on the table. After counsel and the court reporter had inspected the documents for an hour, defendant announced they should be sure to wash their hands thoroughly because the straw had been treated with a toxic chemical readily absorbed through the skin. The reporter, five months pregnant, asked to be excused so that she could contact her physician immediately, and the session was terminated by plaintiff's counsel.

Think I made this one up? See *Greenup v. Rodman*, 231 Cal.Rptr. 220, 221 (1986).

#### **A Suggestion**

You cannot enforce civility. So, no Ms. Manners' police.

Nor do we need another committee to study the problem. Have you noticed that no major religion supports the notion that when the Deity addresses an important problem or wants to communicate, he or she sends a committee to do the job?

Also, no new rules. They just become another weapon that, in the hands of one of them, does more harm than good. Has Rule 11 really cleaned up pleadings, or has it merely added another loop to the litigation track?

We need to elevate the playing field by elevating our collective consciousness about the differences between zealous advocacy and incivility. We also need to communicate the message that civility is a day-to-day priority in our legal community.

No single idea will do the job. Here is one that may help. The State Bar administers discipline and publishes the results. The due process protections that attend that system are, appropriately, a necessary expense inherent in providing lawyers with a full hearing before publishing their names and offenses.

Let me suggest a much simpler system that is designed to *publish* rather than *punish* incivility.

The same State Bar committee that addresses unethical conduct (or some other folks or organization), would solicit complaints and examples of incivility. This group would then collect and review actual examples of incivility to select, on a monthly or quarterly basis, the top ten examples of incivility for publication *without the name of the accuser or the offending lawyer*. This way, the conduct could be criticized and publicized without incurring the expense and administrative burden that attends connecting the misconduct with the lawyer.

I predict that such a column would be more widely read than the current published discipline notices which tend to be rather repetitious—commingling funds etc. Most of us look at the discipline notices to see if we know anyone rather than to learn the do's and don't of ethical lawyering. The Top Ten list will be more interesting for *what* rather than *who* was outside the bounds of civility.

What would this accomplish? Well, for younger lawyers, it would provide insight into the type of conduct that is over the line. For senior lawyers, it would provide the same insight, but would have the added benefit of confirming that the good old days really were better. For those who suffered incivility, the "column of shame" would provide a civilized outlet. For those who committed the offending conduct, an anonymous slap on the wrist. For all of us, a heightened awareness of what constitutes incivility and *that* it is a priority.

This proposal was met with enthusiasm among my surveyees. Two concerns were raised. First, several individuals pointed out that the offending (or offensive) lawyers will not read the column. My answer, it's not just for them and, more to the point, you *know* the lawyer who sent in the example will read the column and will send it along to the perpetrator to let him or her know that his/her particular brand of incivility made the "top ten" list if the incivility is published.

Second, several surveyees opined that the proposal would backfire because our competitive brothers and sisters in litigation will strive to make the list. To this cynical criticism, I have no civil response.

There are details that will need to be worked out, but that is the general idea. Perhaps the State Bar will give it a try. If not, I would ask the board of the ABTL to think about it. It's worth the trouble. Incivility diminishes the image, effectiveness and enjoyment of our profession.

One of my heroes, David Mellinkoff, wrote in his book, *The Conscience of a Lawyer*, "The lawyer's choice is the choice of the man (or woman) who is, 'not prepared to creep into a corner.' His is a learned profession, even a great profession, but it is a learned profession that has deliberately walked down from the tower to mingle with the people. The lawyer shares with the people their best moments and their worst."

We do our clients, our profession and our society a disservice if, when we "walk down from the tower," we fail to bring with us the empathy, dignity and integrity that is civility. ☺

---

*Mr. Wegner is a partner with Gibson, Dunn & Crutcher LLP in Los Angeles.*

---

#### **The 'Peculiar' FTC:**

*Continued from page 20*

##### **The Future of This "Peculiar" Agency**

After surviving severe cutbacks, and even the threat of being abolished altogether, the 1990's has witnessed the regeneration of the FTC as a responsible, respected protector of consumer welfare and healthy competition.

The strength of the FTC is, strangely enough, what has often been its weakness — the unique structure that insures its independence. This independence has given the FTC the flexibility to adjust to a changing role in a changing environment. By striking a proper balance between pursuing its dual mission and allowing business to function free of unreasonable or unduly burdensome regulation, the FTC may continue to maintain a stability that defies politics. ☺

---

*Mr. Saferstein is a partner with Chadbourne & Parke LLP in Los Angeles. Special thanks to Stephen P. Collette of Chadbourne & Parke for his contribution.*

---

incurred in securities litigation on behalf of both the insured directors and officers and the uninsured corporation must be paid by the directors' and officers' liability insurance so long as the services rendered were reasonably related to the defense of the directors and officers. In these cases, the insured, not the insurer, has had the burden of proving by a preponderance of evidence that the fees and costs incurred were reasonably related to the defense of the directors and officers. Policyholders have successfully met this burden.

What really concerns me about the holding in *Buss*, is that, contrary to the court's belief, it will encourage insurers to offer to give up the reimbursement right in return for the policyholder's agreement to bear an allocated percentage of the defense. This negotiation will undermine the defense obligation to defend the entire action, and will place significant economic pressure on policyholders, most of whom can ill-afford the costs of defending a lawsuit.

The policyholder's response to an effort on the part of the insurance company to reserve its right to reimbursement should be to argue that it triggers the obligation of the insurer under Civil Code Section 2860 to provide the policyholder with *Cumis* counsel. Since defense counsel is likely to be a witness in any reimbursement litigation and will to a great extent be an arbiter of what is related to the potentially covered claims, defense counsel selected by an insurer would have a conflict of interest in representation of the insured as a result of these issues. Therefore the policyholder should be able to select its defense counsel at the expense of the insurer.

The policyholder's second weapon is that any insurer who takes unreasonable positions with respect to reimbursement issues will violate the covenant of good faith and fair dealing. The threat of bad faith will hopefully dissuade some insurers from engaging in unreasonable tactics with respect to reimbursement.

Moreover, a policyholder also has the argument that an insurer that seeks an early allocation of defense costs rather than defending the entire action, both potentially covered and uncovered claims, is in breach of the defense obligation which may result in the insurer being responsible for all defense fees and costs reasonably incurred in the defense of the case as well as any judgment or settlement. (The consequences for breach of the defense obligation will be discussed later.)

Additionally, litigation will arise over the right of reimbursement in cases involving continuing bodily injury and property damage. Such cases could include periods when the policyholder was self-insured. Would the right to reimbursement undermine the recent holding in *County of San Bernardino v. Pacific Indemnity*, 97 Daily Journal D.A.R. 9255 July 23, 1997, which required the insurer to defend the entire lawsuit irrespective of the fact that the County was entirely self-insured for a substantial period of the alleged property damage? *Buss* has the potential for eviscerating the defense obligation by throwing the policyholder into expensive allocation litigation between and among the primary insurers who provided insurance over a long period of time. This amounts to an invitation to expensive and protracted litigation in which an insured will be required to defend the underlying substantive claims as well as litigate allocation of defense costs.

#### **Damages for Breach**

Another very disturbing assault on the duty to defend is found

in the recent case of *Amato v. Mercury Casualty Company*, 53 Cal.App.4th 825 (1997). Over the years, the potential exposure for breach of the defense obligation has been an effective weapon against an insurer's breach of the duty to defend. Since *Gray v. Zurich Insurance Co.*, 65 Cal.2d 263 (1966), policyholders' counsel have successfully argued that such a breach exposes the insurer to both defense costs as well as payment of settlement or judgment. In the event of breach, the insurer must pay the defense costs reasonably incurred, as well as any settlement or judgment whether the suit is ultimately determined to have been covered or not. *Isaacson v. California Insurance Guaranty Association*, 44 Cal.3d 775 (1988).

The case of *Amato v. Mercury Casualty Company*, *supra*, is an invitation to insurers to argue that the breach of the duty to defend must be in bad faith in order for an insured to recover more than the defense costs incurred. Justice Charles Vogel, presiding justice of the California Court of Appeal Second Appellate District, and a former ABTL president, justifies this departure from the long-standing principles of *Gray v. Zurich* and *Isaacson v. CIGA* on the basis that contract damages are limited to those contemplated by the parties at the outset of the agreement. Accordingly, Justice Vogel concludes that the contract damages that are available for a breach of contract resulting from a refusal to defend are limited to the defense costs alone.

The court overlooks the foreseeability of a judgment or settlement resulting from a breach of the duty to defend. These are damages contemplated by the insurer in entering into a contract which provides for an independent obligation to defend. To require an insured to prove bad faith in order to recover a settlement or judgment resulting from a breach of the duty to defend saddles an insured with the additional burden of proving that the insurance company engaged in unreasonable conduct in denying a defense. Such a rule encourages insurance carriers to decline a defense in cases where the duty to defend is a close call. In such cases, it may be difficult for the insured to prove that the insurer was unreasonable and, therefore, a policyholder who cannot afford a defense or is unable to mount an effective one, will be precluded from recovering any judgment entered against him or any settlement entered into in an effort to avoid personal financial catastrophe.

The rule in *Amato* violates the reasonable expectations of the insured in purchasing insurance to defend against claims or suits and undermines the security one seeks in purchasing liability insurance. It is an issue over which insurers and policyholders will continue to clash unless and until the Supreme Court reaffirms its position in *Gray v. Zurich* and *Isaacson v. CIGA* that the damages resulting from a breach of the defense obligation not only include the defense fees and costs incurred, but also any judgment against the insured or settlement entered into by the insured. Such a rule is not only well within the rules applicable to damages for breach of contract, but is necessary as an effective weapon for policyholders to use in order to get insurance companies to fulfill their duty to defend.

Policyholders' counsel have our work cut out for us in refocusing the courts' attention on the unique nature of the insurance policy and the important public policy issues underlying its nature and interpretation. We must work to reverse the trend of limiting insurers' obligations by subjecting insurance policies to rules applicable to ordinary commercial contracts as exemplified

---

*Mr. Friedman, Co-Editor of abtl Report from 1989-1990, is a partner with Alschuler Grossman & Pines LLP.*

## In Memoriam



**RICHARD H. KEATINGE** — ABTL *President '78-'79*  
(1918-1992)

"Dick Keatinge had a passion for the law. His devotion to his profession was intense. He left his mark on numerous young lawyers who were inspired by his example of excellence, integrity, ethics and perseverance to rise to positions of leadership in their profession....It is no surprise that his last efforts were on behalf of a program to provide affordable legal representation to increasing numbers of citizens....Above all, he was known for a love and dedication to Cal, where he served as Chairman of the UC Berkeley Foundation during the critical years of 1983-85."

*From the Dedication Ceremonies Program for the Richard H. Keatinge Memorial Building of the Western Justice Center Foundation, May 3, 1994, Pasadena, California*



**HOWARD P. MILLER** — ABTL *President '81-'82*  
(1936-1992)

"Howard's sophistication and brilliance as a trial lawyer and litigator, his personal charm, sense of humor, confidence, and leadership skills endowed him with the ability to persuade people to his point of view. If they didn't come around, Howard would glare at them in mock amazement, then slowly smile and say, 'Okay, then suffer in darkness.' As a graduate of Harvard Law School, a Fellow of the American College of Trial Lawyers and Managing Partner of Buchalter, Nemer, Fields & Younger, he is sorely missed by his many friends and colleagues."

*Leonard D. Venger, longtime partner and friend*



**BENJAMIN E. (Tom) KING** — Editor, *abtl Report '80-'84*  
(1929-1985)

Tom King's abundantly active life as lawyer, expert skier, mountain climber and writer was recalled in the February 1986 *abtl Report* by Tom McDermott, his friend since high school, and by Elihu Berle, his partner and friend at Buchalter, Nemer, Fields, Chrystie & Younger. "Tom had the unique ability to extract as much as possible out of every moment of life," wrote Berle. "He loved the challenge of life itself." About this warm, friendly, agile man who twice climbed the Matterhorn and was elected to the American College of Trial Lawyers came these memorable words from McDermott: "Tom was a good writer, a good lawyer and a true friend. For those of us who wrote with him, lawyered with him and were friends together, life will not be the same."

It hasn't been.

### *Employment Law in the Twenty-First Century* \_\_\_\_\_ *Continued from page 16*

tionships. Women are exerting more social pressure against other women's claims that are perceived to be frivolous or exploitive.

**Disability Issues.** The Americans with Disabilities Act is the most recent major piece of civil rights legislation and it is generating massive litigation. We will continue to see the major issues decided: what is a disability and what is reasonable accommodation.

**Age Discrimination.** Given the aging of the baby boom generation and the pace of consolidation, age discrimination issues will continue to arise. Like other forms of discrimination, age discrimination is often hard to detect. The recent decision, *Marks v. Loral Corp.*, 97 Daily Journal D.A.R. 9559, which holds that employers can justifiably lay off higher paid employees adds

another neutral reason to employers' arsenal of defenses to age discrimination claims.

**The Legal Employer.** The legal employment marketplace has changed, slowly but inexorably, over the past 20 years. Law firms will continue to become more diverse because of business pressure to do so. Law firms diversify when they lose business to more diverse firms. The formal mechanisms, like the California Minority Law Council, and the informal bonds among women and people of color will continue to profoundly change the makeup of law firms. ☞

---

*Ms. Kaplowitz is Co-Chair of the Employment Law Group of Alschuler, Grossman & Pines LLP and Chair of the Employer-Employee Relations Committee of the ABA's Tort and Insurance Practice Section.*

---

## Seminar Theme: Selecting and Persuading Jurors in a Diverse Society

**ABTL's** annual seminar always provides a valuable opportunity to network with fellow attorneys and judges in an informal setting. This year's featured speakers are the Honorable Janice R. Brown of the California Supreme Court and Professor James W. McElhaney of Case Western Reserve University School of Law, an internationally renowned trial attorney and author.

The theme for this year's seminar is effective communication with jurors from diverse backgrounds. It will feature California judges, leading trial attorneys and jury consultants demonstrating successful techniques for selecting and persuading today's jurors.

The program will feature an in-depth demonstration of *voir dire* and jury selection using a mock jury selected and pre-screened by our jury consultants. Using a hypothetical fact situation, a team of plaintiffs' attorneys and a team of defense attorneys will present effective techniques for questioning and challenging jurors from diverse backgrounds.

The Los Angeles, San Francisco, San Diego and Orange County chapters of the ABTL will host the seminar at the Westin Mission Hills Resort in Rancho Mirage, California from October 24-26, 1997. In addition to meeting numerous state and federal judges and receiving 8.5 hours of MCLE credit, you and your family will be able to enjoy swimming, golf, tennis, biking and other resort activities at one of California's finest resort hotels.

The program will offer insights into the jury trial process, from *voir dire* through deliberation. Four of California's pre-eminent trial lawyers will conduct *voir dire* with a mock jury panel. Two respected judges will provide their insights. When the jurors reveal their reactions to the hypothetical case, we will all learn who was best at obtaining an advantage through jury selection.

You will have an opportunity to hear from real jurors through video-taped interviews. A panel will present highlights from video-taped interviews conducted by National Jury Project West with jurors from notable business cases.

Learn how to integrate technology into your trial presentation. Our panel of leading trial attorneys will present vignettes of how they used technology to persuasively tell the story of their case.

Judges participating in the seminar will include the Hon. Paul Boland of the Los Angeles Superior Court; Matthew Byrne, Jr. of the U.S. District Court, Central District; William J. Cahill of the San Francisco Superior Court; Florence Marie Cooper of the Los Angeles Superior Court; Norman Epstein of the California Court of Appeal, Second District; Laurence D. Kay of the San Francisco Superior Court; Judith McConnell of the San Diego Superior Court; William F. Rylaarsdam of the California Court of Appeal, Fourth District; Gary L. Taylor of the U.S. District Court, Central District; Stuart Waldrip of the Orange County Superior Court; Vaughn R. Walker of the U.S. District Court, Northern District; and Kim M. Wardlaw of the U.S. District Court, Central District. Trial attorneys on the seminar faculty will include Wylie A. Aitken, Cristina Arguedas, James J. Brosnahan, Johnnie L. Cochran, Jr., Larry R. Feldman, Gail E. Lees, Raymond C. Marshall, Terrence P. McMahon, David A. Monahan and Andrea S. Ordín.

To make your reservation, act now and call Mosaic Event Management at (415) 908-2659 or fax (415) 908-2660.

## abtl REPORT

P.O. Box 67C46  
Los Angeles, California 90067  
(310) 445-9555 • FAX: (310) 478-1932

### OFFICERS

David M. Stern  
President  
(310) 451-8001

Richard J. Burdge, Jr.  
Vice President  
(213) 626-3399

Jeffrey C. Briggs  
Secretary  
(310) 277-1226

Barbara Reeves  
Treasurer  
(213) 689-5800

### BOARD OF GOVERNORS

Seth Aronson • Patricia Benson • Michael Bertz  
Vivian R. Bloomberg • Bruce A. Broillet  
Christine W. S. Byrd • Hon. Wm. Matthew Byrne, Jr.  
Deborah A. David • Anne H. Egerton • Hon. Norman Epstein  
Larry R. Feldman • Alan E. Friedman • Margaret L. Levy  
Robert A. Long • Brian C. Lysaght • Hon. Nora Manella  
Hon. Charles W. McCoy • Robert A. Meyer • Thomas J. Nolan  
Hon. Stephen E. O'Neil • John R. Pennington  
Dennis M. Perluss • Glenn D. Pomerantz • Robert S. Span  
Hon. Kim M. Wardlaw • Mark E. Weber • Jeffrey S. Westerman

### PAST PRESIDENTS

Allen Browne '74-'75  
Hon. William A. Masterson '75-'76  
John H. Brinsley '76-'77  
Murray M. Fields '77-'78  
Richard H. Keatinge '78-'79  
Loren R. Rothschild '79-'80  
Thomas J. McDermott '80-'81  
Howard P. Miller '81-'82  
Marsha McLean-Utley '82-'83  
Laurence H. Pretty '83-'84  
Hon. Charles S. Vogel '84-'85  
Hon. Elihu M. Berle '85-'86  
Robert A. Shlachter '86-'87  
Howard O. ("Pat") Boltz, Jr. '87-'88  
Peter I. Ostroff '88-'89  
Robert H. Fairbank '89-'90  
Harvey I. Saferstein '90-'91  
Mark A. Neubauer '91-'92  
Richard R. Mainland '92-'93  
Bruce A. Friedman '93-'94  
William E. Wegner '94-'95  
Jeffrey I. Weinberger '95-'96  
Karen Kaplowitz '96-'97

### EDITOR

Vivian R. Bloomberg

### ASSOCIATE EDITORS

Michael A. Bertz • Alan E. Friedman • Peter B. Gelblum  
Michael K. Grace • Laurence D. Jackson • Joel Mark  
Robin Meadow • Paul M. Miloknay • Denise M. Parga  
Larry C. Russ • Peter S. Selvin • Michael A. Sherman  
Richard L. Stone • Mark E. Terman • Mary Lee Wegner

### MANAGING EDITOR

Stan Bachrack, Ph.D.