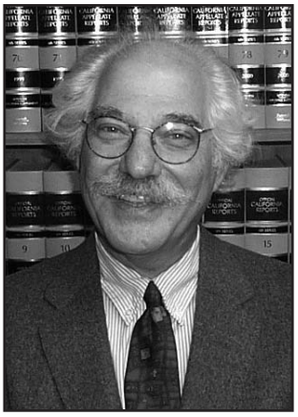
ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

Volume XXXI No. 2 *Summer 2009*

Listen to the Jury

Although most lawyers who try cases understand that the jury is the elephant in the room, even the best lawyers will sometimes overlook the fact that the elephant is both the decision maker and the audience. It would be presumptuous of me to tell lawyers skilled at trials how to deal with their juries, but I would like to offer some cautionary thoughts based upon my 30 years on the bench. Although these thoughts are anecdotal, they may give cause to reflect how to gain the good will, or at least avoid the bad will, of your jurors. I am confident that most jurors conscientiously follow the judge's instructions and make their decisions based upon the law and the evidence. However, human nature is such that in part we are all guided by personal considerations. Among those personal considerations are the persona of the advocates in the courtroom and how they conduct themselves. Therefore, by sharing these anecdotal recollections I offer up a warning: do not forget that the elephant is there. Listen to what the jury is telling you through their words, actions, and expressions.



Hon. David C. Lee (Ret.)

A caveat: text in quotation marks below is my recollection of the words used and not verbatim quotes. The text captures the essence of the actual quotations, adjusted for dramatic effect.

The Start: *Voir Dire*

First impressions count a lot. They can also scuttle a trial, as

(Continued on page 2)

INSIDE

SPECIAL APPEARANCE: PAST PRESIDENTS SPEAK UP

I Left My Start in San Francisco

(Editor's Note: This issue of The Report launches a series of columns by past presidents of the Association. The idea for such a column grew out of a recent ABTL Dinner Meeting attended by a number of past presidents. Tom Mc Dermott, a former ABTL president and the Founding Editor of The Report, was invited to write the premiere column in this new series.)

When the Editor suggested it would be fine if past presidents wrote a column for The Report, I replied with my misanthropic grunt, usually reserved for clients who want to know why their case has not yet come to trial. The grunt is useful. It can mean "I don't know" or "I don't care" or whatever. It never means "yes."

Tom McDermott

But here I am, doing it. This is out of my great respect for our wonderful Editor, Denise Parga. She has been squeezing good articles out of reluctant judges and lawyers for eight years. I also owe one to the Managing Editor, Stan Bachrack, whom I saddled with this job 33 years ago when the late Tom King, Mark Neubauer and I founded The Report.

Secrets! That's the reason past presidents are paid to write books and articles. The naive public believes that the president knows secrets which he now will tell. After all, a past President of the United States has only a huge lifetime pension, a clutch of security people who can be sent for pizza, 24/7, and a speaking fee of $250,000 a pop. He *needs* that $10,000,000 he will get for his book of secrets. Therefore, he will deliver. Of course, he does not. Has any past President written a good book, even a readable book, since U. S. Grant?

But with me, you're going to get the real goods: the secrets, how the *ABTL* chapters in San Francisco, San Diego and Orange County did not get founded and why.

You all know the history of how the Los Angeles Chapter came about. Alan Browne and Leon Alexander crawling on their bellies through no man's land at Verdun with the By-laws filched from the headquarters of the Kaiser himself. The group of 67 Los Angeles lawyers who would become founders anxiously awaiting to breathe life into the document. The postwar fight with the American Legion for dominance. Roosevelt's insistence that *ABTL* be equivalent to WPA, NRA, and CCC. The near collapse when *ABTL* members had to stop billing hours and win World War II.

(Continued on page 5)

Listening to the Jury

Continued from page 1

happened during jury selection in a case involving the decreased value of a $750,000 automobile caused by a repair garage owner who could not resist the chance to drive it. *Bang*, it went into a power pole. After an extensive *voir dire* of most of the panel by myself and the attorneys, defense counsel asked the last prospective juror in the first "six pack" if instead of answering counsel's questions, the juror had any questions of his own to ask. Licking his lips, number 18 said "we are asked to take time off from work to decide a case about a rich guy's toy…how seriously do you think we will take this…it's not like someone got hurt.…" The rest of the panel gave him a near standing ovation. Was it wise for defense counsel to ask a question like that? Might the case have resulted in a defense verdict? You be the judge. I think that the defendant was in better shape than he realized. Of course the case settled.

Along the same lines, I heard a case where the plaintiff was both an attorney and an elected member of a local board. Plaintiff's attorney asked the following: "My client is an attorney who also serves on XYZ board so sometimes will not be here because of those other duties. Will you hold it against my client when that happens?" To that question one prospective juror replied, "if I have to give up my work time why shouldn't your client do the same? After all it is his case." Affirmative nods from the panel followed the juror's sentiments. By comparison, in a similar situation involving a medical malpractice case, the physician's attorney did not ask, but rather told the jury that the client could not always be in attendance using the following explanation: "Unfortunately my client could not, in good faith, hand off some patients to other physicians because of their unique treatment needs. So from time to time, in order to care properly for those patients, he will be in surgery rather than here. We trust that you will understand and forgive those absences. They will be few but necessary for the patient's welfare and not out of disrespect for this process and your time and sacrifice." Plaintiff's attorney was finessed completely yet could not raise a stink because of the diplomacy of opposing counsel. This approach both excused the client's absences and gave the case a serious PR boost at the same time.

The lesson of these cases is that the jury will expect that counsel will respect their time. This respect starts outside the courthouse door — make sure that the case is worthy of taking up a jury's time before insisting on a trial, because if it is not, they will hold it against you and your client. Jurors are often focused on what they are missing when they are called for jury service — their jobs, their family, or even their free time — and an approach which does not take into account what the jurors give up to serve will be held against the party who fails to respect their sacrifice.

Juror Questions

Many judges now permit jurors to ask questions, almost always in writing. *See* California Rule of Court 2.1030 (governing written or oral communications from jurors). It is critical for counsel to think about the questions and why they are asked. Many questions are poorly phrased or not really to the point, but they do reflect what a juror is thinking about the case, and so they should never be ignored.

First, an example from a criminal trial. It was a burglary case where a former tenant in an apartment building was seen by the manager looking into an apartment which was not inhabited but was being used to store belongings of a couple of tenants while their apartments were being painted. When the manager heard someone in the apartment, the police were summoned and the former tenant arrested for burglary because the stored items were neatly stacked up ready for the getaway. The foreperson of the jury passed up the following question: "Can we see a diagram of the apartment?" To this the DA said to me that it was a stupid request and he would not care to respond to it. After the jury acquitted the defendant of burglary, finding only trespass, the DA asked what was wrong with the evidence. The jurors said that although they subjectively felt the defendant was guilty, the evidence was not sufficient. The jurors went on to explain that had a diagram been provided as requested, the jury could have known if the stored material was in the room into which the defendant was seen looking by the manager, because "the judge said that burglary is entry with the intent to steal and if defendant didn't see the property in an otherwise empty apartment the prior intent to steal was not proven." Perhaps even thinking about it might not have saved the day but a summary dismissal of the question guaranteed the result.

My wife served on a civil jury where the jury was outraged at the conduct of the defendant and wanted to give plaintiff more than counsel requested in argument. The question to the judge was: "Can we give plaintiff attorney's fees?" Plaintiff's counsel could not argue that the answer should be anything but "no." On the other hand, counsel might have suggested that the judge inform the jury that it is not bound by the attorney's argument concerning the amount of damages if it feels that more money is supported by the evidence. It might not have worked, but nothing ventured, nothing gained. Listening to the jury's intentions might have given an opportunity to provide them the legal tools to follow their reaction to the case to its conclusion.

The lesson here is to pay attention to the questions of the jury because they could give a clue as to some concerns and the need for additional information. Consider whether it is best to tell the jury what you want, or to give suggestions, conceding to them their just authority. Remember that the jury comes to the case with between 400 and 700 years of life experience among them; do not discount the wisdom they bring to the process.

Observe the Jury's Reaction During the Trial Examination of Witnesses

Too many attorneys get caught up in their withering examination of witnesses, and fail to observe their audience for its reaction. Here, the more withering the examination the more danger lurks.

In a wrongful death case, the plaintiff was the fifteen year old child of the decedent. Decedent was a rehabilitated ex-convict dope dealer who until the child was twelve seldom saw him because of incarceration. During the three years since the last incarceration decedent had become a dutiful parent and had created a good relationship with his child. During the withering cross-examination, defense counsel almost angrily attacked the child about what a bad parent the father had been during the first twelve years of plaintiff's life. Counsel was so busy getting into the face of the child — in an attempt to discredit his story of what his father meant to him — that the anger of juror number twelve went unnoticed. Juror number twelve was a former NFL linebacker who was working with a project to help underprivileged youth. I took a recess because I feared, from that juror's demeanor including clenched jaw and fist, that when counsel returned to counsel's table, the juror was going to take a swing. Why had counsel not noticed the anger of the juror, and the other jurors who joined him in that reaction? Also, why didn't counsel think about how attacking a child would look to his audience? The jury was most generous in its verdict. If counsel had taken account of how the jury was reacting to the examination, he might have changed his tone so that the jury could hear the points he was making instead of viscerally reacting to the way that he made them.

Relationships with Others in the Courtroom

For the jury, the courtroom is an unfamiliar place, but also a place where they expect a high degree of respectfulness and

(Continued on Page 3)

Listening to the Jury

Continued from page 2

"good manners." Counsel should make sure that they show respect for all of the participants in the courtroom — the judge, opposing counsel, and the jury — or risk offending the sensibilities of his or her audience.

The judge, no matter what you think about her or him, is usually very well respected by the jurors. When I made a simple ruling, in the mind of the attorney who lost, a simple- minded one, the attorney emoted long and loud in the presence of the jury. At the next break, I cautioned counsel that, although we may have differed about the ruling, the case could be compromised because of counsel's reaction to it. Unfortunately for the client, counsel could not regain composure and it went downhill for the rest of the trial. At the conclusion of the trial the foreperson asked to be heard. The jurors were anxious to assert that it was not counsel's "rude" and "unprofessional" conduct toward "your honor" but the evidence that caused the verdict against the rude counsel's client. But one cannot help but think that the attorney's conduct could have had something to do with how the jurors interpreted some of the evidence, and therefore, their decision.

In another case, while examining a witness one of the attorneys stood in a place that blocked opposing counsel's view of the witness. Opposing counsel, in an angry and loud voice, demanded that I instruct the attorney not to block the view. The jury looked aghast about the angry outburst. This reaction, however, was not noticed by counsel. The view-blocking attorney protested that it was not intentional, but later in the trial again strayed into the view-blocking position, thus earning an additional rebuke from opposing counsel. Each time the jurors showed a very negative reaction to the renewed outburst, which always went unnoticed. Civility is not harmful to a case but lack of civility can put your credibility and thus your case in jeopardy.

Take note too of the "personal space" of the jurors. In one case, counsel walked up to the jury box, placed his hands on the railing and leaned into the box coming within a few inches of the jurors in the front row. He later told me that he wanted to be "close and intimate" with the jurors so as to have a meaningful relationship with them. What counsel didn't notice was that the jurors where recoiling from the space invasion. I took a recess and advised him that it appeared that the jurors were uncomfortable. When the jury returned he gave them space. At the end of the trial, the foreperson volunteered that the jurors really appreciated that he had quit getting too close to them. Perhaps I should not have cautioned counsel as points were clearly being lost and the opposing side may have benefited. I did mention it because I was concerned for the jury's comfort. Be that as it may, the lesson is clear: remember that jurors are people too, and give them the space they need to feel comfortable so that they can focus on what you have to say.

I have always been proud of our profession and the social and civic good lawyers perform. I also have great respect for you, the practitioners of the law. The motive that gave rise to this article is not to point out foibles on the part of any attorney. Rather I am motivated by the lessons that human nature and experience provide. The elephant is there in the courtroom. We must multitask. Pay attention to the jurors and observe their reaction to you, your case, opposing counsel, the judge, their fellow jurors, the clients and witnesses. The dynamics of the process are foreign to the jurors and we sometimes tend to forget that and go on without observing how we interact with them. As my wise old great-grandfather would say: "David, you will always learn more by listening than by talking." I would add "…and by observing too."

— Hon. David C. Lee (Ret.)

Insurance Coverage for SEC and Other Governmental Investigations

In this post-Madoff era, directors and officers of companies are coming under increasing administrative scrutiny, including SEC investigations. In this context, the question often arises whether the costs incurred in responding to administrative inquiries or investigations are recoverable under directors and officers liability policies.

Subject to the scope of any exclusions from coverage, the answer to this question often depends on whether the governmental investigation constitutes a "claim" as that term is defined in the pertinent policy. Thus, "the ordinary meaning of claim is 'an assertion by a third party that in the opinion of that party the insured may be liable to it for damages [which are] within the risks covered by the policy'." *Andy Warhol Found. for the Visual Arts, Inc. vs. Federal Ins. Co.*, 189 F.3d 208 (2nd Cir. N.Y. 1999) (citations omitted). Accordingly, threats by regulatory bodies demanding compliance and other communications such as notices of charges, warnings of penalties and cease and desist orders do not constitute "claims." See, *e.g., FDIC vs. Barham*, 995 F.2d 600 (5th Cir. La. 1993); *FDIC vs. Mijalis*, 15 F.3d 1314 (5th Cir. La. 1994). Similarly, the commencement of an administrative investigation (even where that investigation may be coupled with a suspension of payments) does not qualify as a "claim." *Treasure Valley Transit vs. Philadelphia Indem. Ins. Co.*, 88 P.3d 744 (Idaho 2004).

Peter S. Selvin

As to the definition of claim, there are two principal formulations in modern directors and officers policies. The first formulation defines a claim to be "any judicial or administrative proceeding initiated against any of the Directors and Officers in which they may be subjected to a binding adjudication of liability for damages or other relief, including any appeal therefrom." The other principal definition of claim is phrased as follows:

> (i) a written demand for monetary damages,
> (ii) a civil proceeding commenced by the service of a complaint or similar pleading,
> (iii) a criminal proceeding commenced by a return of an indictment, or
> (iv) a formal administrative or regulatory proceeding commenced by the filing of a notice of charges, formal investigation order or similar document, against an Insured Person for a Wrongful Act, including any appeal therefrom.

There are two main lines of cases, each interpreting one of these formulations. Under the first formulation, the key battleground has frequently been whether an SEC or other administrative investigation subjects the directors and officers to an "*adjudication* of liability for damages or *other relief.*" (emphasis added).

The court in *Foster vs. Summit Medical Systems, Inc.*, 610 N.W.2d 350 (Minn. App. 2000), answered that question in the negative. In that case, a public company had to correct its registration statement, thereby triggering investor lawsuits and an SEC investigation. On the question of whether the SEC investigation constituted a "claim", the policy defined Securities Action

(Continued on page 4)

Reprinted from ABTL Report Northern California, Vol 18, No. 2, Spring 2009.

SEC and Other Governmental Investigations

Continued from page 3

Claim to include any judicial or administrative proceeding relating to the sale of securities in which the directors and officers "may be subjected to a binding adjudication of liability for damages or other relief."

In concluding that the SEC investigation did not constitute a "claim", the court noted that such an investigation is not a proceeding in which the directors and officers will be subjected to a binding *adjudication* of liability. Nor did the court find that such an investigation would result in the issuance of "*other relief*" against the directors and officers. See also *Center For Blood Research, Inc. vs. Coregis Insurance Co*., 305 F.3d 38 (1st Cir. Mass. 2002) (no coverage in respect to costs incurred in responding to investigative subpoena served by U.S. Attorney, because there was no threat of "binding adjudication for liability or damages").

The court reached a similar conclusion in *JB Oxford Holdings, Inc. vs. Certain Underwriters at Lloyd's, London*, 2001 Cal.App. Unpub. LEXIS 111 (2001). There the SEC initiated an investigation and the Justice Department brought a parallel grand jury investigation concerning whether JB Oxford and certain of its officers and directors had manipulated the price of certain stocks. As part of their parallel investigations, both the SEC and the Justice Department served subpoenas.

JB Oxford put its directors and officers liability carrier on notice of the two proceedings, requesting that the carrier indemnify JB Oxford for the costs associated with responding to the subpoenas from the SEC and the Justice Department. The carrier denied the claim and JB Oxford brought suit.

On cross-motions for summary judgment, the trial court found that investigations constituted "claims" under the policy, but denied coverage based on an exclusion for regulatory investigations. The Court of Appeal affirmed the result, but held that trial court erred by determining that the investigations constituted "claims" under the meaning of the policy:

> It is not disputed that before coverage is afforded to an officer, director, or the company, for loss resulting for either a "Claim" or a "Securities Action Claim," the loss must result from "any judicial or administrative proceeding,…in which they may be subjected to a binding adjudication of liability for damages or other relief, including any appeal therefrom." Here, the loss claimed resulted from costs incurred in responding to the subpoenas issued in connection with a grand jury investigation by the Justice Department and a preliminary Securities and Exchange investigation.
>
> * * * * * * * * * * * *
>
> This demonstrates that neither proceeding which forms the basis of the request for coverage is an adjudicative proceeding which may result in "a binding adjudication of liability for damages or other relief.…" New proceedings would have to have been initiated after these for which coverage may have been afforded. Thus, the trial court erred in concluding that coverage existed for costs incurred by JB Oxford in response to these non-adjudicative proceedings and in applying the Government/regulatory exclusion.

Id. at 9-11.

There is at least one case that takes a dissenting view from that expressed in *Foster* and *JB Oxford*. In *Minuteman International, Inc. vs. Great American Insurance Company*, 2004 US Dist. LEXIS 4660 (N.D. Ill. Mar. 18 2004), the policy at issue defined "claim" expansively to include monetary or non-monetary relief. The definition did not require that the insured be subject to a binding adjudication of liability. The policy only required a demand for non-monetary relief or an administrative proceeding seeking non-monetary relief. In *Minuteman*, the court noted that the case involved SEC orders and SEC subpoenas. If the insured or any of its employees failed to comply with the subpoenas, the SEC would have brought suit in court to require compliance with the subpoena.

The court found that a "claim" was present because the insured's disobedience of the subpoenas would have subjected it to "relief" in the form of an enforcement proceeding. "The 'relief' that could have been granted in such a proceeding would have been requiring plaintiff and/or its employees to produce documents and/or appear for a deposition….A demand for 'relief' is a broad enough term to include a demand for something due, including a demand to produce documents or appear to testify.… The investigative proceedings at issue in the present case constituted a Claim as that term is used in the Policy." *Id.* at 21-22.

There is a second line of cases which addresses the alternative formulation of "claim" — that is, "a formal administrative or regulatory proceeding commenced by the filing of notice of charges, formal investigation order or similar document." In addressing this formulation, the key cases often focus on the nature of the underlying investigation.

In *The National Stock Exchange vs. Federal Insurance Co*., 2007 US Dist LEXIS 23876 (N.D. Ill. Mar. 30, 2007), the insured company was the subject of an SEC investigation which escalated in scope. At the beginning, the company received notice that the SEC had commenced an informal investigation. Thereafter, the SEC issued an order directing a private investigation and designating officers to take testimony. Following this stage, the SEC sent Wells notices to certain of the company's officers and directors. Thereafter, the SEC issued an order to institute administrative and cease and desist proceedings against the company and administrative proceedings against the company's officer. Finally, the SEC filed a complaint in federal court against one of the company's officers.

The key issue in *National Stock Exchange* was at what point in this escalating process had a "claim" been asserted. Although the carrier took the position that there was no "claim" until the SEC issued an order instituting administrative proceedings against the company's officers, the court disagreed. The court held that the SEC's initiation of "formal investigation" triggered coverage under the policy: The language of the policy defines 'Claim' as 'a formal administrative or regulatory proceeding commenced by the filing of a notice of charges, formal investigative order, or similar document.'…It is clear from this language that a formal investigation was intended to be included in the definition of 'Claim.' If a formal investigative order did not commence a formal administrative or regulatory proceeding, then the term 'formal investigative order' as used in the policy, would have no meaning. Thus, a formal investigation must be deemed to qualify as a formal administrative or regulatory proceeding and, therefore, as a 'Claim' as defined by the contract language." *Id*. at 9.

In *Diamond Glass Companies, Inc. vs. Twin City Fire Insurance Company*, 2008 U.S. Dist. LEXIS 86752 (S.D.N.Y. Aug. 18, 2008), the key question was whether the insured's expenses in responding to a federal grand jury investigation were covered under the company's directors and officers policy. As in *National Stock Exchange*, the critical issue was whether the investigation had matured to the point of constituting "a formal administrative or regulatory proceeding commenced by the filing of notice of charges, formal investigation order or similar document."

The court answered that question in the negative, finding that a federal grand jury *investigation* was not tantamount to an actual criminal proceeding because there was no "return of an indictment, filing of a notice of charges or similar document". Accordingly, the court found that coverage would not be triggered. *But see Polychron v. Crum & Forster Insurance Companies*, 916 F.2d 461 (8th Cir. Ark. 1990) (where directors and officers policy contained no definition of "claim", grand jury subpoena and investigation would constitute "claim"); *Richardson Electronics, Ltd. vs. Federal Ins. Co*., 120 F.Supp.2d 698 (N.D. Ill. 2000).

(Continued on Page 5)

SEC and Other Governmental Investigations

Continued from page 4

The Court reached a similar result in *Asche vs. Hartford Insurance Company of Illinois*, 2006 US Dist. LEXIS 70192 (D. Conn. Sept. 28, 2006). In that case the FDIC had issued an administrative order noting weaknesses in the insured bank's loan management practices and ordering the dismissal of two of its officers. Plaintiffs, former directors and officers of the insured bank, asserted that the order constituted a "claim" within the meaning of the bank's directors and officers liability policy. The court rejected plaintiffs' contention and granted summary judgment to the liability carrier on the ground that the equivocal language of the order ("[the insured bank's] directors and officers…*may be subject to claims* for wrongful acts") belied the existence of an actual claim.

Finally, companies that may be subject to governmental investigations should also consider seeking coverage under errors and omissions ("E &O") policies. Two recent cases suggest that even where coverage may not arise under a directors and officers policy, coverage may exist for governmental investigations under an E & O policy. See *Dan Nelson Automotive Group, Inc. vs. Universal Underwriters Group*, 2008 U.S. Dist. LEXIS 4987 (D. S. D. Jan. 15, 2008) and *Ace American Insurance Company vs. Ascend One Corporation*, 570 F.Supp.2d 789 (D. Md. 2008).

In *Nelson*, a state attorney general initiated an investigation of an automobile dealership concerning alleged violations of the state's consumer fraud act. In connection with that investigation, the attorney general issued Civil Investigative Demands ("CIDS") to the dealership. The dealership tendered the investigation to its E & O carrier which denied the claim.

The court granted the dealer's summary judgment motion concerning its carrier's duty to defend. In so ruling the Court held that "the CIDs functioned to command the Plaintiffs to produce documents and provide information relevant to the alleged violations of statutes and therefore constitute a claim or claims against the insured within the meaning of [the E & O policy]." *Id*. at 5.

Similarly, in *Ace*, the court found coverage under an E & O policy for two state investigations into the defendants' consumer practices. Citing *Richardson*, the Court noted that "[a]lthough the law is not settled as to whether any subpoena or investigative demand is considered an 'investigation' for insurance purposes, subpoenas or investigative demands have been found to constitute a claim where the insured was required to produce testimony and documents pursuant to an ongoing investigation of its activities." *Id*. at 796. Distinguishing between an investigation which could be characterized as a mere "request for information" from one in which the insureds are in fact the targets of the investigation, the court held as follows:

> Thus, the case law suggests that Subpoenas and Investigative demands may constitute Claims where they are issued by government investigative agencies related to an investigation of the insured. Courts give weight to the seriousness of government subpoenas in considering whether they constitute an investigation. The court in *Richardson* noted that "characterizing a Justice investigation as involving a 'request' for information understates the seriousness of what such an investigation involves." 120 F.Supp.2d at 701 (citing *Polychron v. Crum & Forster Ins. Co*., 916 F.2d 461, 463 (8th Cir. 1990)). "In this case, the Subpoena and Texas Demand came from the Maryland and Texas Attorney General's Offices. Additionally, unlike Coregis, the Subpoena here is more than a "Keeper of Records" subpoena. Both the caption on the Subpoena ("In re: Amerix") and the specific inquiries into Amerix's marketing and credit counseling activities indicate that Amerix is a target of the investigation, not simply a source of information". *Id*. at 796 - 797.

These cases underscore the fact that where companies or their directors and officers are the subject of a governmental investigation or proceeding, coverage for that investigation or proceeding may be available under a directors and officers policy, an E & O policy or a business liability policy. See, *e.g.*, *State Farm and Casualty Company vs. National Research Center for College and University Admission*s, 445 F.3d 1100 (8th Cir. 2006) (coverage dispute arising from FTC proceeding and actions by state attorney generals). For this reason, businesses and their principals ought to promptly tender their defense in such actions to their liability carriers in order to preserve their right to coverage.

— Peter S. Selvin

I Left My Start in San Francisco

Continued from page 1

All of this fades in comparison to the battle for San Francisco. I fought it, and I lost it. That's the ignominious secret I had hoped to take to the grave, but now it is yours.

When I was President in 1981 the seas were calmer, the wars were smaller and the Board was adventurous. We had been so successful in Los Angeles that we decided the concept should be imported to San Francisco. I was designated to test the waters covertly.

I went to San Francisco on my own dime (although I believe it was in connection with a State Bar convention), and contacted David Balabanian, whom I had worked with on a case. David was a big mucky-muck in the San Francisco Bar then and still is today. He contacted Jim Brosnahan, another major mucky-muck then and still, and both were encouraging about the idea. A lot of ground work was laid. Then, nothing. Either I didn't get back to them or they didn't get back to me and the records are lost (that's a joke; we have never had any records).

So *ABTL* flourished and San Francisco floundered; not as a city, of course, but just as a Bar. Several years later, after the vast duties of the Presidency had been removed from my shoulders, I decided to try again. I took the idea to the then Board, and since I was a past President, after three or four tries, they agreed to hear me out. Why not have a chapter in San Francisco, I asked. This was met with a full board misanthropic grunt, which I took for a "why?" Certainly a negative.

Nine months later, a representative of the Board came to me and said that the Board had developed this outstanding concept, a San Francisco chapter, and would like me to do the legwork. I asked "why me" and the response was a reference to the great respect that the Board had for past Presidents. Since I was the only past President anyone could remember, they picked me.

Back to San Francisco I went, this time determined to succeed. I had my ace in the hole, a great and respected San Francisco lawyer named John Vlahos whom I had worked with in the past and who had agreed that San Francisco would be honored to have an *ABTL* chapter and assured me it could meet the stringent requirements. Vlahos and I were to meet at Tadich Grill, a fish house extraordinaire, down on California Street.

Arriving at 6:00 p.m. to the usual crowd, I gave my name to the maitre d' — no reservations at Tadich. First come, first served. No seats at Tadich, either. You stand and you wait. This interlude gave Vlahos and me an opportunity to address the issue of *ABTL* in San Francisco. In about 45 minutes, we had worked out the necessary details including methods of recruitment. Unfortunately, we were still standing. With nothing more to do, Vlahos, a fine singer and a great Gilbert and Sullivanian, began to sing *soto voce* snatches of the Mikado. I, in turn, hummed the various leit motifs from The Ring of the Nibelung. Soon we were in full arias and I had just completed all the parts in Act III of *Das Rhinegold* when the man in charge called my name. It went like this: "McDermott"…beat…beat…beat… "Jones." Each beat was one second. I was frantically elbowing my way through the crowd and finally reached the maitre d'. "I'm McDermott." "Sorry, McDermott, you did not respond and your table has been given to Jones. I could put you back at the end of the list."

(Continued on Page 8)

Is There An Obligation to Preserve Experts' Draft Reports? Maybe, Maybe Not

For obvious reasons, counsel may not want to share with his adversary the substance of communications he has had with his expert witnesses — doing so may lead to the discovery of counsel's thoughts, impressions and strategies about the case, *i.e.*, his work product. Nevertheless, it is widely accepted that all communications between an attorney and a testifying expert, all materials shared with such expert and all notes and other working papers created by an expert during his engagement, including any drafts of his expert report, are discoverable. With email having become a primary form of communication over the past decade and a convenient means of sharing documents, attorneys and experts are likely to create a substantial amount of discoverable information unless they take precautions. As a result, expert witnesses (either acting on their own experience or the advice of counsel) often take steps to avoid the creation of discoverable information entirely. What happens, however, when attorneys and experts exchange emails, experts take notes or experts create multiple versions of their reports? Can the expert permissibly throw out, delete from the computer or otherwise destroy this information? The answer is "maybe," although this practice does not come without risks. Some courts have held that, along with the requirement to disclose all information which an expert considered in the preparation of her report, there is a corresponding duty to *preserve* that information. Other courts, however, have refused to impose such an obligation.

Jennifer W. Leland

The author notes that in August 2006, the American Bar Association adopted a resolution urging federal and state courts to adopt consistent rules regarding expert witness discovery and recommending that Federal Rule of Civil Procedure 26 be amended to protect expert-attorney communications and draft reports from discovery. The Committee on Rules of Practice and Procedure submitted a preliminary draft of the proposed amendments for public comment in August 2008. The amendments specifically extend work-product protections to drafts of expert reports and expert disclosures under Rule 26(a)(2)(C), and to attorney-expert communications. This article does not address these amendments but focuses on how, to date, the federal courts have dealt with the question of whether and when drafts of expert reports, notes or evidence of attorney-expert communications must be preserved, whether the failure to do so constitutes spoliation and what, if any, sanctions are warranted.

Federal Rule of Civil Procedure 26

The Federal Rules of Civil Procedure used to provide that parties could discover "facts known and opinions held by experts…acquired or developed in anticipation of litigation or for trial." In 1993, Federal Rule of Civil Procedure 26 ("Rule 26") was amended. Among other things, the amendments required that any expert "retained or specially employed to provide expert testimony in the case" had to submit a written report disclosing "*the data or other information considered* by the expert witness in forming" his or her opinions. The Advisory Committee's notes to the 1993 Amendments provide that "litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions — whether or not ultimately relied upon by the expert — are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." The majority of courts have broadly interpreted Rule 26, as amended, to require the disclosure of all attorney-expert communications, any notes created by the expert, and any drafts of the expert's written report even where this entails the disclosure of attorney work product. These courts generally reason that draft reports and attorney-expert communications are "data or other information considered" by an expert in forming her opinions and that production of such material, even if it reflects attorney work product, is consistent with the intent of the drafters of the 1993 Amendments. Other courts have held that draft reports and attorney-expert communications — even if not "considered" by the expert — are discoverable through traditional, non-expert, discovery methods pursuant to Rule 26(b)(1), which provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense.…". Indeed, the term "considered" has been interpreted so expansively by most courts that it has become synonymous with "reviewed," "read," "reflected on" or even simply "provided to." As pointed out by one court, "experts have been deemed to have considered materials even when they have testified, under oath, that they did not consider the materials in forming their opinions." Perhaps as a result of the foregoing, it has become commonplace for parties to demand and expect that expert witnesses turn over their entire file on a matter even if the expert did not actually consider everything in the file.

Given the interpretation of Rule 26 and the expectation of the parties regarding the nature and scope of discoverable documents, the question them becomes: Is there a duty on the part of the expert to *preserve* her draft reports, attorney-expert communications and other materials created by her in connection with a case? The answer is not that clear. While several courts have held that discoverable information should be saved once requested by the opposing party, none has said an absolute duty exists absent such a request. And, even in cases where documents were requested prior to their destruction, courts are reluctant to impose sanctions unless there is evidence of bad faith or prejudice to the opposing party.

Cases Finding A Duty To Preserve

The most oft-cited case dealing with this issue is *Trignon Insurance Company v. United States*, 204 F.R.D. 277 (E.D. Va. 2001). *Trignon* involved an action by a corporate taxpayer against the United States to recover federal income taxes and interest. The United States produced their expert witness reports on March 13, 2001. On March 19, 2001, the plaintiff requested drafts of the government's expert witness reports. The drafts also had been sought in previous document requests; however, it wasn't until the March 19 request that the government directed its litigation consultant (who had participated in the drafting of the expert reports) and its testifying experts to preserve all drafts and all communications among them. By this time, however, it was too late. In accordance with their individual document retention policies, the litigation consultant and experts already had thrown out or deleted from their computers many of the draft reports and communications among themselves and the attorneys. In response to the plaintiff's "motion for appropriate relief," the district court entered an order directing the government to hire an independent computer forensics expert to determine whether the deleted documents could be recovered and per-

(Continued on page 7)

Preserving Experts' Draft Reports

Continued from page 6

mitting the plaintiff to depose the government's experts and consultant about the destruction of the documents at issue.

After the parties reported back to the district court that hundreds of communications and many draft reports had been recovered, the court held a hearing to determine whether the government should be sanctioned for spoliation. The district court began its analysis by stating that communications between the consultant and the experts, communications between the experts, and draft reports were evidence that "the United States was obligated to produce…from the time of their genesis" under the mandatory disclosure rules of Rule 26(a)(2). Its holding regarding the duty to *preserve* this same information ultimately was not as far reaching. Emphasizing that the government was "on notice" that it was expected to produce communications and draft reports as a result of (i) various document requests made by Trignon as early as December 2000 through March 2001 and (ii) a prior warning by the court concerning the need to disclose information considered by testifying experts, the district court found that, under the circumstances of this case, the government had an affirmative duty to preserve correspondence between its expert witnesses and consultants as well as drafts of the experts' reports. The district court noted, however, that there may be situations where drafts need not be retained and declined "to decide in this case whether a testifying expert is required to retain…the drafts prepared solely by that expert while formulating the proper language in which to articulate that experts' own, ultimate opinion arrived at by the expert's own work or those working at the expert's personal direction."

Finding the witnesses' destruction of the materials to be willful and intentional, the Court imposed sanctions for spoliation of evidence but declined the harsher sanction of precluding the experts' testimony entirely given that some of the information had been recovered. Instead, the district court ruled that the trier of fact could permissibly draw adverse inferences against the substance of the experts' testimony and their credibility.

Two unreported decisions — one out of New York and one out of California — reached similar results. In *W.R. Grace & Co.-Conn v. Zotos International Inc.*, 2000 WL 1843258 (W.D.N.Y. 2000), the defendants' expert witness testified at his deposition that he destroyed drafts of his final expert report two weeks prior upon the instruction of defense counsel, who advised the expert to do so in order to "avoid 'confusion'." In opposing the plaintiff's request for sanctions, the defendant argued that he did not receive any formal document requests until after the drafts had been destroyed and that the expert's practice was to discard drafts even absent an instruction from counsel. The Court was unsympathetic to these arguments, pointing out that the plaintiff had earlier sent a letter request for documents, including "any notes or other work product." Finding that the documents had been destroyed intentionally, the Court found sanctions were warranted. The Court, however, withheld imposing any sanctions because it was not clear that the plaintiff had been harmed — it appeared the draft reports could be recovered electronically or from the attorney's files and the content of such drafts could be reconstructed through a further deposition of the expert witness. More recently, in *Semtech Corp. v. Royal Ins. Co. of Am.*, 2007 WL 5462339 (C.D. Cal. 2007), the plaintiff moved to preclude the testimony of the defendant's expert witness on the ground that, four days after receiving a subpoena seeking draft reports, the expert destroyed a hard copy of his draft report containing handwritten edits based on conversations he had with defense counsel. The expert also could not recall edits to the report made by three other individuals. Finding that the plaintiff had "suffered prejudice to an incalculable degree" because the expert could not disclose how his final report differed from his draft, the district court granted the motion and precluded the expert's testimony.

The only appellate decision addressing whether drafts must be preserved is *Fidelity Nat. Title Ins. Co. of New York v. Intercounty Nat. Title Ins. Co.*, 412 F.3d 745 (7th Cir. 2005). The Seventh Circuit, however, declined to impose a bright line rule. In *Fidelity*, the lower court excluded the testimony of the plaintiff's expert on the ground that the expert discarded interview notes taken during his investigation of the case. The Court of Appeal reversed the lower court's decision, finding that the lower court's sanction was too severe in light of the fact that the notes did not bear directly on the expert's opinion and that a nearly complete set of the notes surfaced in connection with a related case and were made available to the defendants. The Court of Appeal held that a more appropriate sanction would be to permit the defendants time to conduct additional discovery regarding the notes at plaintiff's expense. The court did not address what would have been the appropriate sanction if the notes had not been recovered; however, the opinion suggests that, to the extent the notes were prepared by the expert and reflected only his thoughts, his failure to preserve them would not have warranted preclusion of his testimony. Addressing the requirements of Rule 26, the Court stated, "A testifying expert must disclose and therefore retain whatever materials are *given* to him to review in preparing his testimony, even if in the end he does not rely on them in formulating his expert opinion," but he "is not required to retain every scrap of paper that he created in the course of his preparation-only documents" even if they would be helpful to an understanding of his expert testimony or useful for cross-examination.

Cases Rejecting A Duty To Preserve

Several courts have expressly rejected the argument that a necessary implication of the duty to disclose all information which an expert considered is a duty to preserve that same information. In a case decided by the United States Bankruptcy Court for the District of Delaware, *Teleglobe USA, Inc. v. BCE Inc.*, 392 B.R. 561 (Bank D. Del. 2008), the court held that the Federal Rules of Civil Procedure did not impose on debtors or their experts an obligation to preserve and produce drafts of experts' reports. In *Teleglobe*, the defendants moved to exclude the testimony and reports of two of the plaintiffs' expert witnesses on the ground that they had destroyed notes, drafts of their reports and other information they considered in forming their opinions. The court held that, even assuming the notes and draft reports contained discoverable information, the failure to preserve them did not warrant sanctions. In reaching this conclusion, the court analyzed the plaintiffs' "degree of fault" and the prejudice suffered by the defendants. The court found the degree of fault to be *de minimus* where the experts did not physically destroy any draft reports but rather made corrections to the drafts on their computers without saving the prior versions. The court pointed out that "[i]t would be impossible for the court to require that all 'drafts' of expert reports be produced because it might require that an expert retain and print his report every time a single change was made to it." The court also found that there was no prejudice to the defendants given (i) their opportunity to cross-examine the experts at depositions and evidentiary hearings, (ii) that the defendants appeared to have all the data considered by the experts except for possible comments to their draft reports and (iii) the experts' testimony that the comments they received from counsel and other experts did not alter their opinions.

The majority of courts have taken a similar approach, declining to find spoliation absent some evidence of bad faith or an intent to deprive the opposing party of relevant information. *See St. Tammany Parish Hospital Service District No. 1 v. Travelers Property Casualty Company,* 250 F.R.D. 275 (E.D. La. 2008), (holding that expert's destruction of his notes and fail-

(Continued on page 8)

Preserving Experts' Draft Reports

Continued from page 7

ure to save prior versions of his report did not warrant sanctions where there was no evidence that expert acted in bad faith or that he destroyed the information with the intent to deprive the defendant of their use); *Peterson v. Union Pacific Railroad Co*., 2008 WL 4104169 (C.D. Ill. 2008) (denying motion to preclude expert testimony where there was no evidence that expert's destruction of drafts, correspondence and emails was willful or resulted in prejudice to defendant); *Federal Trade Commission v. Nationwide Connections, Inc*., 2007 WL 4482607 (S.D. Fla. 2007) (holding that sanctions were not warranted where plaintiff failed to instruct expert to preserve his notes absent evidence that the notes were critical to defense of claims or that their destruction constituted bad faith); *Sandata Technologies, Inc. v. Infocrossing, Inc*., 2007 WL 4157163 (S.D.N.Y. 2007) (fact that expert tossed out his notes of meeting with counsel did not give rise to sanctions); *Univ. of Pittsburgh v. Townsend,* 2007 WL 1002317 (E.D. Tenn. 2007) (acknowledging that an expert's draft report may be subject to a proper discovery request and that such a request may give rise to a duty to preserve draft reports but holding that Rule 26(a)(2) in and of itself "does not …impose an 'affirmative duty' upon an expert to preserve 'all documents,' particularly report drafts"); *McDonald v. Sun Oil Co*., 423 F. Supp. 2d 1114 (D. Ore. 2006) (experts' destruction of working notes did not warrant adverse inference sanction where there was no showing that notes would have been relevant or that experts or counsel knew of any such relevance); *Mastercard Int'l Inc. v. First Nat. Bank of Omaha, Inc*., 2004 WL 326708 (S.D.N.Y. 2004) (denying motion to exclude expert witness testimony where expert overwrote changes onto draft copies of his report rather than creating new versions but reaching no conclusion on the legitimacy of this process); *Daly v. Royal Ins. Co. of America,* 2002 WL 1768887 (D. Ariz. 2002) (holding that allowing expert to follow her custom of destroying working papers did not support a claim for bad faith under state law); see also *Adler v. Shelton*, 778 A. 2d 1181 (N.J. Super. 2001)(concluding that while drafts of expert reports are discoverable, experts "familiar with the litigation process usually destroy their draft reports and the rules do not forbid this.").

The vast majority of courts recognize that a testifying expert must produce his or her draft reports and working notes. It is less clear whether experts have a duty to preserve those same drafts and notes and whether the failure to do so puts them and their client's case at risk. There is no bright line rule; even where the courts have found an obligation to preserve drafts, such as in *Trignon*, they have indicated that there may be limits to this obligation. The courts generally have looked to the following factors in deciding whether a duty to preserve exists, and, if it does, whether sanctions for spoliation are appropriate: (1) when and under what circumstances the drafts and notes were destroyed, (2) whether and to what extent the destruction of information resulted in prejudice to the opposing party and (3) the nature of the notes or drafts. If the information was discarded or destroyed *after* the expert was requested to produce the information by the opposing party, there is a greater likelihood the courts will find the documents should have been preserved. Likewise, the courts are more inclined to find spoliation and impose sanctions if there is evidence that the expert willfully destroyed her notes or drafts in an effort to deprive the opponent of relevant information. The courts appear reluctant, however, to impose sanctions where the "destruction" consists of failing to save electronic versions of prior drafts as opposed to throwing out hard copies or deleting email communications with counsel or other experts.

The proposed amendments to the Federal Rules may resolve the questions identified herein. Until the amendments become law, however, what precautions should attorneys take and what should they advise their experts? One solution is to limit — or avoid entirely — the creation of such materials in the first place by dispensing with written correspondence between counsel and experts (as well as between experts or experts and consultants), refraining from note-taking, and avoiding the creation of numerous versions of the expert's report by keeping only one working copy. Another is to reach an agreement with opposing counsel at the outset of a case regarding what materials need to be exchanged. If both sides can stipulate that draft reports, notes and communications with counsel will not be subject to discovery, this will eliminate discovery disputes regarding what does and does not need to be produced. Absent an agreement among the parties, counsel should advise experts that their notes, correspondence and draft reports are generally discoverable and, once this type of information has been requested, even on an informal basis, the wisest course of action is to preserve these materials.

— Jennifer W. Leland

I Left My Start in San Francisco

Continued from page 5

Something snapped. I still have no idea why I grabbed this 6'3", 225 pound Italian by his red tie and said "First, I break your nose." Vlahos grabbed me as I was in full back swing and pulled me away. "Sorry, he's from Los Angeles," he said. "I understand," the maitre'd said. "If you still wish to eat with him, Mr. Vlahos, I will seat you." We finished the meal in relative silence, although I did apologize. Vlahos graciously indicated that he was still ready to organize the *ABTL* in San Francisco but perhaps some other representatives from Los Angeles might be designated.

I went home and reported to the Board with a somewhat redacted version of my success. We were all set. San Francisco would become the second *ABTL* chapter. Joy prevailed.

Three weeks later I was summoned by three Board members to a secret meeting. We were to congregate in an out-of-the-way corner of the lobby of the Biltmore Hotel. We were to look like ordinary lawyers conducting ordinary business. We were to stay away from the bar.

Three solemn Board members arrived. Needless to say, names will be disguised. Mr. A said, "The Board has met again. There will be no San Francisco chapter." "Why?" Thoughts flashed through my mind. Too many vests? The danger of an earthquake with the vaunted *ABTL* plaque flying into the bay? An uncontrollable flow of sentimental songs linking us with a cable car?

"This must be kept secret!" Mr. B speaking. "The Board has determined that San Francisco simply cannot be trusted to maintain the high standards of decency and decorum associated with the *ABTL* name. We can't let '*ABTL*' fall into the public domain, much less into the hands of those whom we cannot control. We have determined to trademark the name, and, perhaps license it in the future."

My heart sank. Was I to tell Vlahos that San Francisco could not be trusted after I had practically started a brawl in one of their finer restaurants? I told him. That was the end of *ABTL* in San Francisco.

Times change. Boards change. Cities change. Perhaps San Francisco became more refined. Perhaps Los Angeles became more trusting. *ABTL* did, finally, make it to San Francisco and then to San Diego and then to Orange County. I got no credit. So be it, but if they ever start naming chapters of *ABTL* as they name Inns of Court, I expect to be considered.

— Tom McDermott

(Editor's Postscript: The ABTL was conceived by Mr. Alan Browne and Mr. Leon Alexander. It is known that Mr. McDermott made several trips to San Francisco on behalf of ABTL. Except as stated, The Report is unable to confirm the information set forth. Although the first ABTL By-laws were said to be written in German, Mr. Browne states unequivocally that he did not participate in World War I. Presently, ABTL has no plans to name its chapters.)

Public Service Committee Reaches Out To Public School Students

To support law-related education in our local schools, the Public Service Committee of the Los Angeles Chapter of the ABTL has been reaching out to public school students through its Speakers Bureau. Legal education programs in our public schools are extremely important to increase knowledge of the law and the judicial system amongst our school children. These programs for our youth not only help correct misconceptions about the judicial branch of government and the constitutional guarantees related to the court system, but also help to build positive attitudes, awareness and respect for the law and legal processes. This in turn helps students become responsible citizens.

Board member Hon. Charles W. McCoy, Jr. gives introductory remarks at "Power Lunch" for students.

To promote legal education, on May 1, 2009, a group of ABTL judges and lawyers visited Dorsey High School Law/Government Magnet and served on a panel as part of the school's celebration of "Law Day". The panelists spoke to students about careers in law and various law-related topics in the school's renowned Thurgood Marshall Courtroom. The panel also discussed the role of the judicial branch of government, and shared personal and professional insights.

Another successful legal education event involving the Speakers Bureau was the "Power Lunch" held on December 9, 2008 at the Stanley Mosk Courthouse. The Public Service Committee sponsored the "Power Lunch" in conjunction with the Los Angeles Superior Court and MLA Partner Schools, a charitable organization whose mission is to improve schools and empower neighborhoods in some of the most disenfranchised communities in Los Angeles. A group of Superior Court judges (from both the civil and criminal courts) and ABTL members attended the lunchtime program with students from West Adams Preparatory Senior High School, a Los Angeles Unified School District school. The purpose of the Power Lunch was to educate the students about the court system and legal careers, including law enforcement. Following a formal presentation, including introductory remarks by the Presiding Judge Charles "Tim" McCoy, the judges, attorneys, and students were divided into break-out groups for law-related discussions and activities. The students were tested on what they learned in a game of "Judicial Jeopardy" and competed for prizes. ABTL sponsored the event by purchasing lunch for all of the participants. The Power Lunch allowed the students to visit the courthouse, learn about the legal system, and have an opportunity to meet judges and attorneys face-to-face, many for the first time. A Power Lunch was also held in Spring 2008.

Board members Stephanie Bowick (left) and Hon. John Shepard Wiley, Jr. confer with students.

These legal education programs truly serve as a learning experience for students and empower them to consider careers in law. The events also allow ABTL members to volunteer their time and make a difference through public service.

The Speakers Bureau was launched in November 2007 to expand the ABTL Los Angeles Chapter's public service involvement and provide a community service by sharing the knowledge and legal expertise of our members with the community at large. The Public Service Committee is currently recruiting new speakers to serve on the Speakers Bureau. All ABTL members are eligible to participate. To sign up as a speaker, please visit the ABTL website at www.abtl.org/ under the Los Angeles Chapter, Speakers Bureau, and submit a Speakers Bureau Application. Our continued efforts can, without a doubt, make a difference in our community.

— Stephanie Bowick

Settling the Business Case

Business litigation presents unique challenges and opportunities for settlement. The main differences from other litigation types are the nature of the client itself; the possibility of creating greater value for the litigants than mere money settlements can afford them; and the availability of specific negotiation tactics that work best in business cases.

Business people tend to be quantitative. Their job is to create value. They calculate the risk/reward ratio of their options and decide in the context of the broader business good instead of focusing simply on the dispute at hand. Not that business people aren't emotional and can't act irrationally. But even so, their instinct is to compare alternatives and choose the most promising, the most *valuable* to their business.

Robert A. Steinberg

Business clients expect their advocates to know and use statistically based evaluation methods, such as decision trees. Many have learned in business school that accurate decision-making requires formal analysis and use decision-tree software to help them consider the relative values of their choices. To speak the same language as your business client, you must familiarize yourself with decision tree analysis.

Business litigation allows the parties to trade multiple issues against one another to achieve an overall more valuable settlement for each side. So-called integrative bargaining gives the other party what you value less than the other party values, in exchange for something that you value more than the other party values.

Using 'Integrative Bargaining'

Any case can be turned into an opportunity for integrative bargaining. Even where compensation is the sole negotiating subject, issues such as deferred payments, the time period for such deferral, the interest rate on the deferred amount, and whether there should be any security for or guaranty of the deferred amount can transform any negotiation into a search for greater value for each side. But business cases generally raise more issues of value and risk allocation between the parties.

To employ integrative bargaining, first identify each party's needs (or interests); then prioritize them; and finally evaluate them. When you enter the settlement negotiation, you will know exactly what you want and what you are willing to give to get it.

To identify each party's needs, your most important question is "Why?" Why do you want to pay him so much for…? Why do you think it is necessary to…? Is there some other way we can…? What purpose do you hope to accomplish by…? Ask your client what it thinks the other party's answers to these questions might be.

Nor should you restrict yourself to the case at hand. The best advocates understand their client's business and industry and where this case fits into that context. If either party is a public company, read the company's publicly available information. Many private companies also have relevant product literature, market segment and product analyses, and financial analyses that can help you prepare for the litigation and settlement negotiation.

Once you have identified each party's needs, prioritize them. Many advocates consider needs prioritization the most important aspect of negotiation preparation. Needs prioritization likewise develops through your detailed conversations about each party's personal and business situation.

Finally, try to monetize or otherwise quantify the needs you have prioritized. This process does not necessarily require strict dollar equivalence, although that is possible in some cases. Even a rough understanding of the relative values of each party's needs is often adequate. This understanding will enable the advocate to trade some issues for others of equivalent value in the give-and-take of bargaining.

Trading Some Issues for Others

A common employment situation provides an example. An employee at a sports forum sued for wrongful termination. In the course of the settlement negotiation, the employee sought reinstatement or compensation; but he also wanted the continued right to attend games and to maintain his relationship with several athletes he had come to know and whom he frequently escorted from the airport to the games. The employer wanted to discourage other employees from suing it by limiting the amount of compensation, entering into a "one-way" confidentiality agreement (the employer could disclose the settlement amount, but the employee could not), and preventing the employee from interacting with other employees.

The negotiated settlement included the following terms. The employer paid the employee more money than it had originally intended in exchange for the employee's agreement to keep away from the sports forum for at least one season. The employer also obtained its "one-way" confidentiality agreement and required that some money be deferred until the employee had fulfilled his condition of nonattendance. The employee did retain the right to escort athletes to the sports forum; but he could not enter the forum with them as he had done before. In this way, he could fulfill his status need, which he valued more highly than the right to attend games.

Determining Value of Defective Products

Or consider the case of an Asian technology company that claimed its American supplier had provided defective products. The parties could not settle despite a common estimate of settlement value. The Asian company's chief negotiator was the director who had chosen and contracted with the American company. He wanted additional compensation for his embarrassment in choosing the defective product. The American company wanted to get its expensive products back, which could be refurbished, repaired and re-used. The parties reached agreement by exchanging additional compensation for the equipment.

Needs analysis can sometimes be tricky. In your negotiation preparation, consider using the same creative techniques you use to break impasse. These include (1) generating alternative solutions to the negotiation problem without prejudging their efficacy; (2) questioning your assumptions, which may lead to a

(Continued on Page 11)

Settling the Business Case

Continued from page 10

reframing of the negotiation problem; (3) breaking down and rebuilding the negotiation problem or rearranging the information that defines the problem, again to present new perspectives on the problem's solution; (4) analogizing your negotiation problem to other comparable situations you have confronted, a technique that parties often use in multiple defendant lawsuits; and (5) using random, overlooked information that may not itself be relevant to the dispute but may be helpful to its resolution.

Finding Apt Negotiation Tactics

Because business cases involve multiple issues, certain negotiation tactics are particularly apt. Two examples are the "straw man" and the "anything but that" tactics. The "straw man" tactic involves negotiating heavily over an issue that may in fact not be as important to you as another issue. At some point, you "reluctantly" give up this issue in exchange for obtaining concessions on the issue of greater importance to you. Partnership disputes over money often lead to dissolution and in-kind distributions of assets through this approach.

The flip side of the "straw man" tactic is the "anything but that" tactic. Here you object strenuously to your opponent's request, even though that request is otherwise acceptable to you. Your hope is to gain concessions on other issues as the price for acquiescing to your adversary's request.

Business litigation has its own peculiarities. To achieve the best settlement results, understand your client and how it views your case in the context of its overall business; employ the techniques of integrative bargaining; and use the appropriate negotiation tactics.

— Robert A. Steinberg

Contributors to this Issue

Stephanie Bowick, Chair of ABTL Public Service Committee, is Assistant General Counsel of the Los Angeles Unified School District.

The Hon. David C. Lee (ret.) is a retired judge of the Superior Court for the County of Alameda. He now serves as a mediator and arbitrator with ADR Services.

Jennifer W. Leland is an associate with Peitzman, Weg & Kempinsky LLP specializing in business litigation.

Tom McDermott, Founding Editor of *ABTL Report*, practices in the Law Offices of Thomas J. McDermott, Jr., in Indian Wells.

Peter S. Selvin, a member of the Board of Governors of ABTL, is a partner in the Los Angeles office of Loeb & Loeb LLP.

Robert A. Steinberg is a corporate, securities and tax lawyer and full time mediator of complex business cases.

Travers D. Wood, President of ABTL, is a partner with White & Case LLP in the Los Angeles office.

Letter from the President

June 30 marks the end of the ABTL fiscal and Board year (we rotate board members on July 1) and the end of my term as president of the Los Angeles Chapter. It has been an interesting year, with economic problems here and abroad, budget trauma in California (not enough room to discuss that issue here), and cost cutting and layoffs throughout the economy affecting not only law firms and lawyers, but also their clients. With all of that we have also seen a new administration come to power in Washington, a renewed emphasis on government regulation of industry and the securities markets, financial frauds of unprecedented proportions and, slowly, an increase in litigation of all kinds. Unique among past recessions, the dip in the economy has not yet produced the flood of litigation our profession expected. The recession has also impacted the way in which both the plaintiff and defense bars do business. Indeed, the ABTL lunch program on May 19, ably chaired by our Lunch Program Chair, John Nadolenco, addressed this very subject, also adding perspective from Los Angeles Superior Court Presiding Judge (and ABTL board member) Charles "Tim" McCoy, who commented on the impact the economic downturn and budget woes of the state have had, and will have, on the courts. Nonetheless, the "ABTL year" was a good one, as we were again treated to great programs and the continuing business and social interaction between the bench and the bar that is the hallmark of the ABTL throughout the state.

Travers Wood

Among the highlights were the dinner programs, organized by our Dinner Program Chair, Warren Rissier. Without mentioning all of them, the two most recent programs stand out: First, an evening with United States Supreme Court Associate Justice Antonin Scalia and Bryan Garner, the editor of Black's Law Dictionary and a noted appellate lawyer, doing a give-and-take about persuasive brief writing and oral advocacy, before a crowd of over 600 guests, including the editor of the Daily Journal and some of his staff. Second, a sort of after-dinner chat with California Supreme Court Chief Justice Ronald George, who was questioned by Tom Girardi and retired California Court of Appeals Justices Charles and Miriam Vogel — and board member California Appellate Justice Paul Turner. And then there was the annual seminar, tackling the topic "Businesses In The Courtroom: Getting Your Message Across", hosted in the fall of 2008 by the Los Angeles Chapter at the Hyatt Kauai Resort and Spa in Poipu Beach on Kauai, and organized by our Annual Seminar Committee Chair, Phil Cook, and his excellent, multi-chapter committee. California Supreme Court Associate Justice Joyce L. Kennard was our keynote speaker, the presenting panels were superb, the venue was terrific, and the attendance was, as usual, large. Our year ends in June with the annual Judicial Reception, at which the ABTL honors the federal and state judiciary in Los Angeles County at a cocktail reception attended by members of the bench and the bar.

(Continued on Page 12)

abtl REPORT

P.O. Box 351649
Los Angeles, California 90035

PRSRT STD
U.S. POSTAGE
PAID
LOS ANGELES, CA
PERMIT NO. 32623

Letter from the President

Continued from page 11

In many ways, the annual seminar exemplifies for me what belonging to the ABTL is all about. Hosted by a different chapter each year, but organized and planned by a committee with members from every chapter, the annual seminar is always topical, always has the best of our federal and state judiciary and fellow practitioners as presenters and panel members, and is designed to encourage both practical and social interaction among lawyers and judges throughout the state. At the local level, the same is true for the ABTL dinner and lunch programs, the events sponsored by our Public Service Committee, our Young Lawyers Division events, and by the close relationship of our Courts Committee with the local bench, this year chaired by Curtis Porterfield. In a large community like Los Angeles, not to mention the largest state, it is this sort of involvement that adds both society and fun to being a lawyer. In addition, the contacts one makes as a member of the ABTL will last a career — and help round it out. I have been a member of the ABTL since its inception over 30 years ago. I count among my friends and colleagues lawyers at multiple firms throughout the state, on both sides of the bar, and numerous judges at both the federal and state trial and appellate levels. If there is a "message" to send to the reader of the ABTL Report, it is to savor belonging to the ABTL, to join if you do not now belong, to encourage your colleagues to do the same, and to get involved with the organization in any way you can. You will never regret it. And you will never look back.

Many thanks for a great year to the board members with whom I served this year, and particularly to my fellow officers Scott Carr, Mike Maddigan, and Theresa Kristovich, to our Executive Director, Adrienne King, and to our committee chairs Phil Cook (2008 Annual Seminar), Seth Pierce (2009 Annual Seminar), Curtis Porterfield (Courts), Warren Rissier (Dinners), John Nadolenco (Lunches), Roland Tellis (Membership), Stephanie Bowick (Public Service), Mollie Burks-Thomas and Chris Chorba (Young Lawyers), and, last but certainly not least, Denise M. Parga, the editor of ABTL Report. The ABTL Report and Denise deserve special mention, as she has tirelessly, and often without thanks, made sure the ABTL continues to publish its report with articles of interest to us all (and copy is always welcome!). I could not have had a more rewarding year, economy notwithstanding.

— Travers Wood

abtl REPORT

P.O. Box 351649
Los Angeles, California 90035
(323) 988-3428 • FAX: (323) 375-0256
e-mail: abtl@abtl.org • www.abtl.org